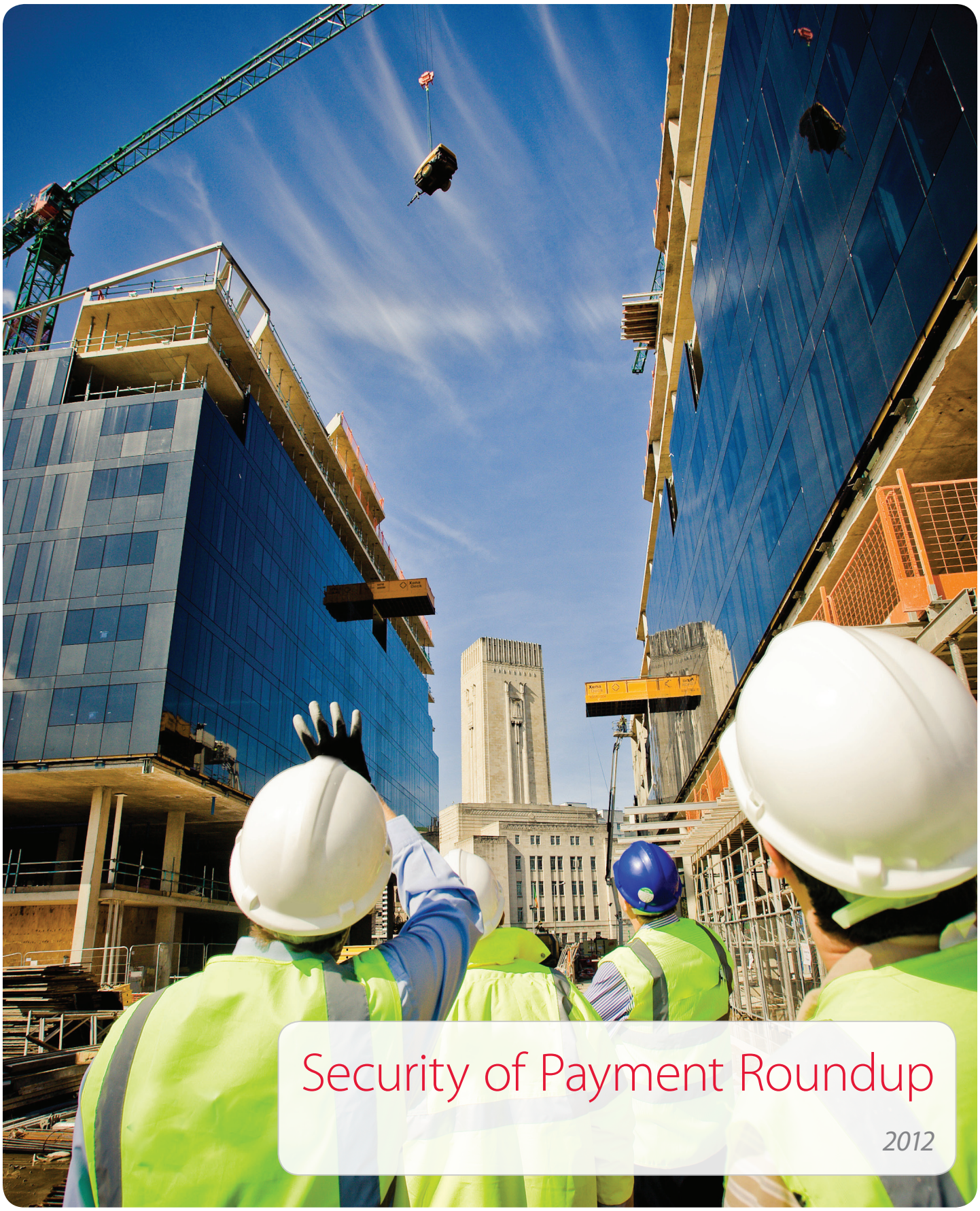

Security of Payment Roundup

2012

SYD13 0091v1

MinterEllison

LAWYERS

Security of Payment 2012

Introduction

2012 was another busy year for security of payment across Australia. Once again the number and value of claims in Western Australia increased significantly. Queensland registered an increase in the value of claims and a modest increase in the number of claims. New South Wales saw a higher number of cases although the nature of the discoveries did not create 'new' law but rather affirmed existing principles. Only Victoria experienced relative quiet on the SOP front.

A number of decisions generated debate during the year and notably, an interesting divergence emerged on the breadth of the 'mining exclusion' between Queensland and Western Australia.

In the *Thiess v Warren Brothers* decision, the Queensland Court of Appeal interpreted the mining exclusion to exclude work relating to drilling for, and the extraction of, certain minerals. In *Re Graham Anstee-Brook; Ex Parte Karara Mining Ltd*, the Supreme Court of Western Australia decided that a pipeline taking water to a mine site and a mine camp in that case fell outside the mining exclusion. In contrast, the State Administrative Tribunal in Western Australia interpreted the mining exclusion broadly in *Conneq Infrastructure Services (Australia) Pty Ltd and Sino Iron Pty Ltd* to extend to construction of facilities that were not directly used for mining purposes.

In Western Australia, the courts considered whether adjudicators have discretion to consider responses submitted out of time. While there were conflicting indications about this at the end of 2012 the Supreme Court ruled in March 2013 that responses must be served within the time limit. There is no obligation on adjudicators to consider late responses but they have the discretion to do so if they consider it necessary as part of the process of informing themselves about the case.

Finally, the year ended with the release of the report from the Independent Inquiry into Construction Industry Insolvency in New South Wales. The report sought submissions on wide ranging changes to the NSW SOP Act. Watch this space in 2013.

Richard Crawford
Partner – Construction Engineering & Infrastructure

Developments in 2012

New South Wales

While not a quiet year in terms of the number of decisions, 2012 brought little change to the state of the law with respect to the interpretation and operation of the *Building and Construction Industry Security of Payment Act 1999* (**NSW Act**).

The most significant development came from two decisions concerning the forms of agreement that can constitute a contract for construction work in order to be subject to the NSW Act, which the courts said could include oral agreements.

The term 'construction contract' can, apart from a contract, include 'some other arrangement' that would not ordinarily be regarded as a construction contract at law. In one decision an oral undertaking by a third party (a director of the principal) to pay the builder in the event of default by the principal was a contract for construction work and therefore subject to the NSW Act: *Machkevitch v Andrew Building Constructions* [2012] NSWSC 546.

In a further decision, an oral agreement made over the telephone was found to be a construction contract under the NSW Act, although the agreement was evidenced by the fact that the principal had made several payments to the claimant for architectural services: *IWD No 2 Pty Ltd v Level Orange Pty Ltd* [2012] NSWSC 1439.

Reform

In August 2012, the NSW Government commissioned an Independent Inquiry into Construction Industry Insolvency in response to a spate of contractor insolvencies. The inquiry sought to assess the causes and identify measures to better protect the industry from the consequences of contractor insolvency, particularly for subcontractors. The report was handed down in November 2012 and contained a raft of recommendations to which members of the industry have been invited to respond. Minter Ellison provided a submission in early 2013.

One payment claim for each reference date

Section 13(5) was the section of the NSW Act to receive the most judicial attention in 2012. However, the courts' strict interpretation of it was largely unwavering, which resulted in the quashing of a number of adjudication determinations on account of jurisdictional error. In particular, the courts:

- found that a claimant cannot overcome the time limit for making an adjudication application by issuing a second payment claim for the same work: *Grindley Constructions Pty Ltd v Painting Masters Pty Ltd* [2012] NSWSC 234;
- used section 8(2)(b) of the NSW Act to determine the reference date in circumstances where the contract did not specifically provide one with the result that the disputed payment claim was the second claim for that reference date and was accordingly invalid: *Grid Projects New South Wales Pty Ltd v Proyalbi Organic Set Plaster Pty Ltd* [2012] NSWSC 1571; and
- found in one particular case that there was no reference date between the month in which work was last carried out and the end of the defects liability period. The claimant's purported payment claim in between those dates was held to have the same reference date as the claim that was made at the end of the month when the work was last carried out and was therefore not a valid payment claim: *The Trustees of the Roman Catholic Church for the Diocese of Lismore v TF Woollam and Son* [2012] NSWSC 1559.

The courts also confirmed a substance over form approach will be entertained in determining what constitutes a single payment claim. Multiple invoices, each described as a payment claim and served concurrently, amounted to a single payment claim for the purposes of the NSW Act: *Ardnas (No 1) Pty Ltd v J Group (Aust) Pty Ltd* [2012] NSWSC 805.

Service

Service at the respondent's principal place of business as identified on the ASIC register will be effective service. The fact that a director of the respondent is not aware that the office where the payment claim is served is his/her company's principal place of business is not relevant for effective service: *DJ's Home and Property Maintenance v Dujkovic* [2012] NSWSC 870.

Application of the NSW Act to the contract

The residential building work exception at section 7(2)(b) of the NSW Act only applies to contracts that relate wholly to 'such part of any premises' that a party to the contract resides in or proposes to reside. The exception does not apply to situations where a party to the contract lives in one apartment in a building and the relevant contract was for work on the entire apartment building (even if it included the particular apartment): *Oppedisano v Micos Aluminium Systems Pty Ltd* [2012] NSWSC 53.

Project management services can constitute 'building advisory services' which are 'related services' under the NSW Act and therefore some project management services contracts are subject to the NSW Act: *Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd* [2012] NSWCA 31.

12 month time limit

The provision of standby labour throughout the defects liability period in case it is needed may constitute work under a contract for related goods or services but not a contract for construction work. This may affect the time limit on serving payment claims (within 12 months of work being carried out): *Bauen Constructions Pty Ltd v Sky General Services Pty Ltd and Anor* [2012] NSWSC 1123.

Overriding legislative purpose of the NSW Act

The courts continue to place a strong emphasis on the overriding legislative purpose of the NSW Act. In one instance, a respondent who failed to issue a payment schedule sought a stay of a summary judgment to enable its earlier in time proceedings commenced against the claimant under the contract to be determined. The court rejected the application as it considered it contrary to the overriding purpose of the NSW Act to provide quick release of funds to contractors: *Silver Star Construction Pty Limited t/as Genesis Construction Australia v Denham Constructions Pty Limited (unreported)* Court of NSW, Olsson SC DCJ, 25 November 2011).

Sufficiency of adjudicators' reasons

The courts showed a reluctance to impose too high of a threshold on adjudicators to give sufficient reasons in accordance with section 22(3) of the NSW Act.

An adjudicator's reasons should not be scrutinised with the same attention to detail as a trial judge's would be and need only be sufficient to show the process of his/her reasoning: *New South Wales Land and Housing Corporation v Clarendon Homes (NSW) Pty Ltd* [2012] NSWSC 333.

The reasons do not need to be lengthy, elaborate or detailed, just sufficient to show that the adjudicator had engaged actively with the dispute: *Avopiling (NSW) Pty Ltd v Menard Bachy Pty Ltd* [2012] NSWSC 1466.

However, an explanation as to why the claimant was entitled to the payment without any reasons for accepting its calculations as to the amount is insufficient: *Leighton v Arogen* [2012] NSWSC 1323.

A claimant cannot alter the basis of its payment claim in its adjudication application

A claimant is restricted from altering its position or introducing new issues in its adjudication application despite no prohibition on doing so in the NSW Act. This prohibition is implied as a consequence of the counterpart restriction provided for in the NSW Act that restricts a respondent from introducing new reasons for withholding payment in an adjudication response. To deny the respondent the opportunity to respond to a new issue put in an adjudication application, as it must maintain the position of its payment schedule which only deals with issues raised in the payment claim, would be a denial of natural justice: *Leighton v Arogen* [2012] NSWSC 1323.

The doctrine of issue estoppel also applies to prevent respondents from re-agitating issues already determined by the adjudicator: *Nigro v EVS Group Pty Ltd* [2012] NSWSC 1545.

> Read the detailed summaries of these cases in the NSW cases section of this report.

Queensland

Although there has not been a marked increase in the number of claims, there has been a marked increase in the amounts claimed. The *Building and Construction Industry Payments Act 2003* (Qld) (**Queensland Act**) is being used for very high value claims.

In financial year 2011/2012, 731 adjudication applications were lodged which is a modest increase over the previous financial year. The total value of adjudicated decisions was $242.6 million, almost quadruple the value of

decisions in the previous year. The average claim was over $500,000. The number of judgments from the Supreme Court has decreased.

Reform

On Christmas eve the Minister for Housing and Public Works issued a discussion paper *Payment Dispute Resolution in the Queensland Building and Construction Industry*. The Minister is seeking comments and suggestions for improving the operation of the Queensland Act for the benefit of the building industry and the general community.

Narrow construction of the mining exclusion

The most significant development of 2012 was consideration of the mining exclusion. The Queensland Court of Appeal has interpreted the exclusion of work relating to drilling for, and extraction of, certain minerals (section 10(3)) narrowly: *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Anor* [2012] QCA 276, *HM Hire Pty Ltd v National Plant and Equipment Pty Ltd & Anor* [2012] QSC 4.

No contracting out

The court continues to look unfavourably at attempts to impose contractual pre-conditions on entitlement to claim under the Queensland Act. It is not possible to contract out of the Queensland Act (section 99). The court has held a number of such attempts to be void:

- an attempt to provide preconditions regarding the occurrence of a reference date*: John Holland Pty Ltd v Coastal Dredging & Construction Pty Limited & Ors* [2012] QCA 150;
- the provision of a statutory declaration as a precondition: *BHW Solutions Pty Ltd v Altitude Constructions Pty Ltd* [2012] QSC 214, *State of Queensland through the Director-General, Dept of Housing and Public Works v T & M Buckley Pty Ltd (receivers and managers appointed)* [2012] QSC 265.

Technical issues

Judgments have been reinforced:

- the importance of endorsing the claim: *Peter Boyd Enterprises Pty Ltd v QR Concrete Pty Ltd* [2012] QDC 324;
- the need to clearly establish the source of entitlement to claim: *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2012] QSC 346;
- the need to ensure that a payment claim is supported by documents establishing the claim: *Richard Kirk Architect Pty Ltd v Australian Broadcasting Corporation & Ors* [2012] QSC 177;
- the need for a respondent to include all reasons for withholding payment in its payment schedule: *Ware Building Pty Ltd v Centre Projects Pty Ltd & Anor (No 1)* [2011] QSC 424; and
- the requirement to be licensed under the *Queensland Building Services Authority Act* 1991 (Qld) if the work the subject of the claim requires a licence, as a precondition to taking advantage of the Queensland Act, regardless of how small the component of work requiring a licence might be in respect of the entirety of the contract: *Dart Holdings Pty Ltd v Total Concept Group Pty Ltd & Ors* [2012] QSC 158, *Walton Construction (Qld) Pty Ltd v Plumber by Trade Pty Ltd & Ors (No 1)* [2012] QSC 264.

Work to which the Queensland Act does not apply

It has been held that the Queensland Act does not apply to supply of products that are part of a chain of supply where the purpose of the acquirer is to resupply in unchanged form: *Capricorn Quarries Pty Ltd v Inline Communication Construction Pty Ltd & Ors* [2012] QSC 388.

Valuation under contract, not quantum meruit

An adjudicator must carry out the task of valuation in accordance with the provisions of the Queensland Act, not on a quantum merit basis: *Unifor Australia Pty Ltd v Katrd Pty Ltd atf Morshan Unit Trust t/as Beyond Completion Projects* [2012] QSC 252.

Correcting mistakes

In *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd and Anor* [2012] QSC 373 the court considered the application of section 28 of the Queensland Act, taking into account the amount involved.

Jurisdictional error

In *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2012] QSC 346 Applegarth J neatly summarised the current position in respect of challenging an adjudicator's decision for jurisdictional error. He set out the following principles:

- Where matters are entrusted to an adjudicator for decision, a decision involving an error of law is not, for that reason alone, a decision beyond jurisdiction.
- An adjudicator who misconstrues or misapplies a relevant contractual provision and, as a result, does not correctly decide the amount of the progress payment, if any, to be paid to the claimant does not, for that reason alone, make a jurisdictional error.
- A jurisdictional error may be made by the adjudicator in proceedings to determine an adjudication for a number of reasons, for example the adjudicator may disregard something which the relevant statute requires to be considered as a condition of jurisdiction or otherwise fall into jurisdictional error by determining something which the adjudicator lacks authority to determine.
- Where matters are entrusted to an adjudicator to decide, an error of law made in the course of the decision making process is not, of itself, a jurisdictional error.
- An error in construing the terms of the contract under which an entitlement is claimed is not, of itself, a jurisdictional error.
- The position is otherwise where the error causes the adjudicator to make one or more of the jurisdictional errors identified in the leading authorities which consider the issue of jurisdictional error, such as the claimed amounts are not referrable to 'construction work' or related goods and services or where the claimant is an unlicensed builder.

Discretion to grant declaratory relief

The court has provided some guidance as to the circumstances in which the discretion to grant the declaration that an adjudicator's decision is void might, or might not, be exercised:

- The discretion should not be exercised where, even if relief was granted, the claimant would not recover payments: *Richard Kirk Architect Pty Ltd v Australian Broadcasting Corporation & Ors* [2012] QSC 177.
- Where even though there had been a denial of procedural fairness by the adjudicator the outcome would of been no different absent that denial of procedural fairness: *Transfield Services (Australia) Pty Limited v Nortask Pty Ltd & Anor [2012]* QSC 306.
- Conversely where an adjudicator decides contrary to a concession made by the claimant in respect of an item of the claim, the adjudicator's decision will be declared void in whole: *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd and Anor* [2012] QSC 373.

> Read the detailed summaries of these cases in the Queensland cases section of this report.

Victoria

2012 was a very quiet year in Victoria. One significant security of payment case was heard in the Victorian Supreme Court, being an appeal from an adjudicator's determination that a payment claim served pursuant to section 14 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Victorian Act**) was not required to be served by a claimant in good faith and/or with a bona fide belief in the entitlement to the moneys claimed.

Good faith and bona fide belief

Contractors are not under a duty of good faith, and need not have a bona fide belief as to the entitlements claimed, when submitting payment claims pursuant to section 14 of the Victorian Act. Implying such a duty of good faith is contrary to the purpose of the Victorian Act to achieve a speedy interim resolution of payment claims under a construction contract. The court considered that, following the service of a payment claim the Victorian Act itself provides mechanisms for the claim to be reviewed by the respondent and, if necessary, partly rejected or wholly rejected by the serving of a payment schedule. The Victorian Act also provided for the adjudication process, whereby the adjudicator was in the position to address and determine the merits of the parties' dispute as set out

in the payment claim and payment schedule: *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235.

Discretion to grant declaratory relief

Under the former section 25 and section 26 (which have since been repealed) of the Victorian Act, adjudicated amounts placed into trust because of ongoing litigation proceedings are to be directed, after the conclusion of the relevant proceedings, first to the claimant's entitlements (for progress payments) and then the left over funds to the respondent. If the claimant is unsuccessful at trial (and has no entitlement to payment) all the funds revert to the respondent: *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (Formerly SC Land Richmond Pty Ltd)* [2012] VSC 155.

> Read the detailed summaries of these cases in the Victoria cases section of this report.

Western Australia

Statistics

Each year the WA Building Commissioner issues a report pursuant to section 52 of the *Construction Contracts Act 2004* (WA) (**WA Act**) which contains statistics about the number of adjudications and their value. The draft report for the year to June 2012 is currently being reviewed by the Minister of Commerce. The Building Commission will not release any statistics until the WA Minister of Commerce has approved the report. There is no indication on the likely timing.

There was however a significant increase in the number of cases in 2012; up to 15 from four in 2011. In financial year 2010/2011, 197 adjudication applications were lodged, about 15% more than last financial year. The total value of adjudicated decisions was $308 million, up by a third from FY 2010/2011. The average claim was $1,566,262.25. The number of applications in Western Australia is still increasing, but at a slower rate, suggesting the frequency is starting to plateau.

Starting dates

The date by which claims must be issued was still a significant source of problems for parties during 2012 although more clarity has been provided by decisions during the year: *Michael Ebbott trading as South Coast Scaffolding and Rigging Services v Hire Access Pty Ltd* [2012] WADC 66. The issue that the courts have considered is the interaction between express terms in contracts which set out payment dates although not precisely in language used in the WA Act and the implied terms imposed by section 17 and section 18 of the WA Act. The courts have reached the sensible conclusion that the express terms prevail.

Late response submissions

Timing has also been an issue in terms of the service of the respondent's response documents.

The decision of Justice Le Miere in *Re Graham Anstee-Brook; Ex parte Karara Mining Ltd* [2012] WASC 129 has created uncertainty about whether adjudicators are required to consider responses that are filed and served outside the 14-day timeframe imposed by section 27(1) of the WA Act. In *Anstee-Brook*, at the order nisi stage of judicial review proceedings, His Honour held that it was arguable that an adjudicator had erred in deciding that he was obliged to ignore an adjudication response which had been filed outside the 14-day timeframe imposed by section 27(1) of the WA Act. In reaching that conclusion, His Honour took the view that the objectives of the WA Act in providing a rapid adjudication process would not be adversely affected by the consideration of a late response provided that the adjudicator had sufficient time to consider the response prior to making a determination.

The Court was not referred to an earlier, more robust decision by Commissioner Gething in *Witham v Raminea Pty Ltd* [2012] WADC 1. In *Witham*, the Commissioner held that section 27(1) does not grant an adjudicator the discretion to consider a late response. The Commissioner considered that the time limits imposed by the WA Act are mandatory and are imposed to give best effect to the object of the WA Act to provide a rapid adjudication process.

Anstee-Brook then proceeded to full argument on the question of late responses, again before Justice Le Miere. On this occasion, *Witham* was raised. In a decision handed down on 1 March 2013, His Honour held that the time limit for responses was mandatory and there was no obligation on an adjudicator to consider a late submission. However, this did not mean that the adjudicator had to ignore the response completely. The adjudicator could still

consider it, despite it being late, if he or she wished to do so as part of the process of informing themselves about the case.

On this basis, it is sensible for parties to submit responses even if they are late, in case the adjudicator will take them into account. It would also be sensible for adjudicators to explain how they have treated late responses in their determinations.

Barriers to enforcement

On the question of seeking leave to enforce a determination as a judgment, the courts now appear to have settled on a position in which the existence of an order nisi in judicial review proceedings challenging an adjudication determination is sufficient to prevent leave from being granted. The courts have taken the view that this indicates that there are issues to be considered in relation to the adjudication: *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd [No. 2]* [2012] WADC 60.

On the other hand, the mere existence of civil proceedings seeking to obtain a final decision on the matters decided in the adjudication is not a reason to prevent enforcement, absent any other factors as the WA Act clearly contemplates the existence of such proceedings: *Witham v Raminea Pty Ltd* [2012] WADC 1.

Technical issues

Our final comment on the year's cases is one of caution. Following on from the 2011 case of *Georgiou Building Pty Ltd v Perrinepod Pty Ltd*, in *Cape Range Electrical Constructions Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304, the Supreme Court of Western Australia has held that the list of grounds upon which an adjudicator must dismiss a case under section 31(2)(a) of the WA Act are jurisdictional facts which an adjudicator must consider and find to be absent before he or she can then determine the adjudication on its merits under section 31(2)(b) of the WA Act.

This is likely to lead to further challenges to decisions of the adjudicators where they do not clearly record that they have considered the section 32(2)(a) grounds and found them not to be present before moving on from the determination. A prudent adjudicator will make sure that any determination covers this issue.

> Read the detailed summaries of these cases in the Western Australia cases section of this report.

Northern Territory

Statistics

In financial year 2011/2012, three adjudication applications were lodged, down from 11 adjudication applications made the previous financial year. One court action resulted from the three determinations.

Jurisdictional error

The question of when a 'payment dispute' arises and whether the Supreme Court of the Northern Territory can declare a determination of an adjudicator void for jurisdictional error where the adjudicator wrongly construes the *Construction Contracts (Security of Payments) Act 2004* (NT) was discussed in *Northern Territory of Australia v Urban and Rural Contracting Pty Ltd and Anor* (2012) 21 NTLR 139. This matter was determined twice.

> Read the detailed summary of this case in the Northern Territory cases section of this report.

Australian Capital Territory

The *Building and Construction Industry (Security of Payment) Act 2009* (ACT) **(ACT Act)** has yet to be judicially considered in the ACT. The ACT Act was not amended in 2012.

Despite the absence of judicial consideration on the ACT Act, we can look forward to the report by the Minister for Environment and Sustainable Development on his review of the operation of the ACT Act. A report on the outcome of this review must be presented to the ACT Legislative Assembly by 1 July 2013 under section 45 of the ACT Act.

South Australia

The *Building and Construction Industry Security of Payment Act 2009* (SA) (**SA Act**) is yet to be considered or amended since it commenced on 10 December 2011. The local construction industry is adjusting to the application of the SA Act and its practical implications.

Tasmania

The *Building and Construction Industry Security of Payment Act 2009* (Tas) (**Tasmanian Act**) has yet to be considered since it commenced on 17 December 2009. The local industry is adjusting to the application of the Tasmanian Act and its practical implications.

New South Wales cases

In this section, the *Building and Construction Industry Security of Payment Act 1999* (NSW) is referred to as the 'NSW Act'.

Ardnas (No 1) Pty Ltd v J Group (Aust) Pty Ltd [2012] NSWSC 805

Significance

This decision confirms that, for the purposes of section 13 of the NSW Act, whether more than one payment claim has been issued in respect of a single reference date is a question of substance, not of form. A consequence of this principle is that multiple invoices or documents marked as payment claims, lodged at the same time and in respect of the same date, may be considered to comprise one payment claim.

Facts

J Group (Aust) Pty Ltd (**J Group**) the first defendant, issued two invoices to Ardnas (No 1) Pty Ltd (**Ardnas**), the plaintiff, under the cover of one facsimile dated 20 December 2011. The invoices claimed separate amounts for separate work but bore the same date for payment. J Group obtained an adjudication determination in relation to the invoices under the NSW Act, in its favour.

Ardnas claimed that:

- the two invoices amounted to more than one payment claim in respect of the same reference date, which is not permitted under section 13(5) of the NSW Act; and
- the adjudicator had no jurisdiction to make a determination in relation to two claims with the same reference date.

Section 13(5) of the NSW Act reads: '*A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract*'.

Ardnas also relied on the fact that the adjudicator made reference to 'claims' in the body of the adjudication determination.

Decision

Hammerschlag J in the Supreme Court of New South Wales cited *Tailored Projects Pty Ltd v Jedfire Pty Ltd* [2009] QSC 32 as authority for the principle that the delivery of multiple invoices at the one time, each being described as a payment claim under the NSW Act, does not necessarily lead to the conclusion that there was service of more than one payment claim.

His Honour found that the requirement of no more than one payment claim under section 13(5) of the NSW Act was a requirement of substance, not of form. Although multiple invoices were issued with the same reference date, His Honour considered that in substance only one payment claim had been issued, comprising two amounts each reflected in an invoice of the same date.

As the first submission failed, it was not necessary to consider the submission that the adjudicator did not have jurisdiction to determine two claims with the same reference date. Accordingly, the proceedings were dismissed.

Avopiling (NSW) Pty Ltd v Menard Bachy Pty Ltd [2012] NSWSC 1466

Significance

This decision clarifies the obligation adjudicators have to give reasons with their determinations.

Facts

Avopiling (NSW) Pty Limited (**Avopiling**), the plaintiff, and Menard Bachy Pty Limited (**Menard**), the defendant, were parties to a construction contract under which Menard agreed to design, supply and construct jet grout columns for a jet grout plug.

Menard issued a payment claim to Avopiling in July 2012 in relation to certain works. Menard subsequently applied for adjudication under section 17 of the NSW Act. The adjudicator found in favour of Menard, giving brief reasons.

Avopiling sought an order from the court to quash the adjudication determination or that, in the alternative, it be declared void. Avopiling relied on the basis that the adjudicator failed to perform its statutory functions and denied Avopiling natural justice by, what it regarded as, the adjudicator's manifestly inadequate reasons for its determination.

Decision

The court held that Avopiling was not entitled to the orders sought because the reasons given in the adjudication determination did not disclose any jurisdictional error on the part of the adjudicator. The adjudicator's obligation to give reasons under section 22(3)(a)(b) of the NSW Act is a statutory duty. An adjudicator must come a view as to what is properly payable on what the adjudicator considers to be the true construction of the contract and the true merits of the claim.

The court considered the duty of adjudicators under section 22 of the NSW Act and stated that:

- it is important to draw a distinction between a fact to be adjudicated in the ordinary course of enquiry which will be within jurisdiction and an essential preliminary to the decision-making process which will not be within the jurisdiction;
- the NSW Act discloses a legislative intention to require a particular measure of natural justice and a failure to afford that measure of natural justice will render the determination void;
- there is clearly no requirement for the reasons to be lengthy, elaborate or detailed. The reasons should be sufficient to show that the adjudicator has engaged actively with the dispute and dealt with it in a way that is reasoned, not perverse, arbitrary or capricious*: Bergemann v Power* [2011] NSWSC 1039);
- there is clearly no need to refer to all of the evidence in the reasons. It has to be clear enough that the relevant evidence or point has been considered. Any issue which is critical should be adverted to, but again the extent to which it needs to be dealt with will be a matter of degree and depends on what extent the issue is canvassed by the parties themselves; and
- a statement of reasons should be looked at as a whole: *Beale v Government Insurance Office* (NSW) [1997] 48 NSWLR 430).

In this case, Sackar J found that the adjudicator's reasons disclosed proper identification of the issues and real consideration of the factual material as presented to him by the parties.

Bauen Constructions Pty Ltd v Sky General Services Pty Ltd & Anor [2012] NSWSC 1123

Significance

A defects liability period does not extend of affect the 12-month time limit for serving a payment claim under a contract for construction work.

Facts

Bauen Constructions Pty Ltd (**Bauen**) entered into a contract with Sky General Services Pty Ltd (**Sky General**) for the latter to carry out painting work on two separate schools.

On 4 May 2012, Sky General served two payment claims, one in respect of each school.

Bauen alleged that the payment claims had been served out of time as more than 12 months had passed since work under the contracts had been carried out. Sky General had argued that the defects liability period was still on foot and this had included the 'provision of labour' which Sky General had maintained in case rectification works were required at any time.

The matter proceeded to adjudication where the adjudicator found that the payment claim had been served within the time limit provided by section 13(4)(b) of the NSW Act because they were served within 12 months of the expiration of the defects liability periods under the two contracts.

Section 13(4)(b) provides that:

'*a payment claim may be served only within the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied)*'

Bauen challenged the determination citing jurisdictional error and denial of natural justice as the adjudicator had not made the determination in accordance with the NSW Act and had failed to consider its adjudication response.

Decision

Sackar J held that the contract was for painting, which is explicitly defined as 'construction work' under section 5 of the NSW Act. The 'provision of labour' is also explicitly defined under section 6 of the NSW Act as 'related goods and services'. Accordingly, His Honour said the provision of labour amounts to work under a contract for related goods and services but not under a contract for construction work. Therefore the provision of labour during the defects liability period cannot be said to be work under the relevant contract and therefore the payment claims were out of time.

His Honour further found that the adjudicator's failure to properly apply section 13(4)(b) of the NSW Act amounted to jurisdictional error and a failure to bona fide address the requirements of section 22(2)(a) of the NSW Act, that is, to have regard to the NSW Act when making a determination.

Accordingly the adjudicator's determinations were quashed.

DJ's Home and Property Maintenance v Dujkovic [2012] NSWSC 870

Significance

This decision illustrates some of the principles of service in relation to payment claims and adjudication applications made pursuant to the NSW Act.

Facts

Zed Dujkovic, the first defendant, (**Dujkovic**) served a payment claim on DJ's Home and Property Maintenance Pty Limited, the plaintiff, (**DJ's Home**) at an address in Orange. DJ's Home never responded to the payment claim.

In July 2012, DJ's Home applied for and was granted an ex parte interlocutory injunction to restrain Dujkovic from prosecuting, and the adjudicator, the second defendant, from determining an adjudication in relation to the payment claim pursuant to the NSW Act.

McDougall J found that there was a serious question to be tried in relation to whether the payment claim, adjudication application and required notice under section 17(2) of the NSW Act had been properly served on DJ's Home, which was a necessary condition for the existence of a 'dispute'. Accordingly, Dujkovic and the adjudicator were restrained from proceeding with the adjudication.

The matter was brought back and Dujkovic filed evidence from the ASIC register showing that the address to which the payment claim, adjudication application and section 17(2) notice had been delivered was the principal place of business of DJ's Home at the relevant time.

Decision

Justice McDougall ordered that the injunction be discharged and the adjudicator be at liberty to make his determination. His Honour noted that section 31(1)(b) of the NSW Act permitted service of a document by lodging it during normal office hours at the ordinary place of business of the person to be served. Even though there was evidence that the director of DJ's Home had not been aware that the principal place of business of DJ's Home was the address in Orange, service had been regularly effected.

Edelbrand Pty Ltd v H M Australia Holdings Pty Ltd [2012] NSWCA 31

Significance

Project management service providers may be entitled to issue payment claims under the NSW Act.

Facts

HM Australia Holdings Pty Ltd (**HM**) engaged Domus Homes (**Domus**) (now trading as Edelbrand Pty Ltd) to provide project management services for a factory development.

The relevant provisions of the contract were that:

- if the project was completed under budget, the savings would be shared 50/50 between the parties;
- Domus was to coordinate the finalisation of the architectural brief and development approval;
- Domus were to be HM's representative in managing the consultants and contractor. All instructions to builders, subcontractors and consultants could only be carried out through Domus and all variations had to be signed off by HM.

A dispute arose when Domus purported to issue a payment claim for the bonus payment at the completion of the project. Domus was successful at adjudication. HM challenged the decision on the grounds that the contract between the parties was not subject to the NSW Act.

The Supreme Court accepted HM's argument noting that, while Domus had co-ordinated the finalisation of the architectural brief it could not be said to have provided architectural services (which are 'related goods and services' and therefore subject to the NSW Act). Domus appealed to the Court of Appeal and argued that they had provided 'building advisory services' which are covered by the NSW Act.

Decision

The court, agreeing with the primary judge, found that Domus had not provided architectural services for the purposes of the NSW Act. However it did find that Domus had provided 'building advisory services' with respect to managing the consultants and contractor and therefore the agreement was covered by the NSW Act. The court drew particular attention to the contractual requirement that all instructions to builders, subcontractors and consultants could only be carried out though Domus, and all variations had to be signed off by HM. This would have involved Domus 'advising' HM of whether the price and scope of a proposed variation was appropriate and this constituted 'building advisory services' under the NSW Act.

Additionally, HM argued that the contract was essentially a profit-sharing arrangement - similar to a joint venture - such that the contract was one where payment was to be calculated otherwise than by reference to the value of the services supplied and therefore excluded from the operation of the NSW Act by virtue of the section 7(2)(c) exclusion. The court dismissed this argument.

HM sought leave to appeal to the High Court, however the application was refused.

GMW Urban v Alexandria Landfill [2012] NSWSC 237

Significance

Courts will only overturn an adjudicator's determination in very limited circumstances, because the legislative purpose of the NSW Act is to enable a contractor to recover progress payments.

Facts

Alexandria Landfill Pty Ltd (**ALF**) contracted GMW Urban Pty Ltd (**GMW**) to design and construct a waste facility. GMW issued a payment claim on ALF, which it took to adjudication under the NSW Act. The adjudicator determined the money was payable by ALF to GMW.

GMW obtained judgment from the Supreme Court to enforce the adjudicator's determination and recover the debt due. At the same time, ALF sought to call on bank guarantees given by GMW on the basis that the superintendent had earlier determined that ALF was entitled to liquidated damages and despite the adjudicator overruling the superintendent in his adjudication.

In this proceeding GMW sought an injunction restraining ALF from calling on the bank guarantees and ALF sought an injunction restraining GMW from enforcing the earlier judgment of the court to enforce the adjudicator's determination.

Decision

As ALF did not ask the court to invalidate the adjudicator's determination, the court held that GMW was entitled to enforce the determination, on the basis that:

- the NSW Act has the underlying purpose of ensuring that a person who carries out construction work under a construction contract has an entitlement to receive, and the ability to recover, progress payments and except in very limited circumstances the court should not interfere with an adjudicator's determination to that effect; and
- it is of no relevance that GMW may be insolvent at such time as ALF may wish to pursue GMW for damages because the NSW Act transfers the risk of insolvency from contractors to principals, so that the risk of GMW's insolvency lay with ALF.

The court granted an injunction restraining ALF from calling on the bank guarantees on the basis that the adjudicator had determined the issue of delay costs and practical completion in favour of GMW. While section 32 of the NSW Act would permit ALF to challenge the adjudication in any final dispute, the adjudicator's determination was conclusive in relation to GMW's entitlement to interim payment.

Grid Projects NSW Pty Ltd v Proyalbi Organic Set Plaster Pty Ltd [2012] NSWSC 1571

Significance

This decision confirms that a claimant may not serve more than one payment claim in respect of a single reference date, even in circumstances where no adjudication application has been made in respect of the first payment claim.

Facts

Grid Project Pty Ltd (**Grid Projects**) engaged Proyalbi Organic Set Plaster Pty Ltd (**Proyalbi**) to perform rendering and plastering work. Proyalbi served on Grid Projects two payment claims for work completed between 9 March 2012 and 25 June 2012 which became the subject matter of an adjudication:

- a payment claim for $62,554.80 dated 2 July 2012 (**first claim**); and
- a payment claim 4 for $62,963.95 dated 14 August 2012 (**second claim**).

For the first claim, Grid served a payment schedule proposing to pay $17,952.40. Proyalbi did not make an adjudication application in respect of this payment claim.

For the second claim, Grid served a payment schedule proposing to pay $4,966.46. In response, Proyalbi made an adjudication application which was determined substantially in its favour.

Grid Projects sought to challenge the adjudicator's determination in respect of the second claim on the basis that Proyalbi was not entitled to:

- any progress payment after 30 June 2012 because no further work was carried out after the reference date of 30 June 2012; and
- make a progress claim for a later reference date.

Decision

Stevenson J found, in favour of Grid Projects, that Proyalbi's second claim was not a valid claim under the NSW Act and the adjudicator's determination in respect of that second claim had been made without jurisdiction and was void. The decision was based on the following reasoning:

- section 8(1) of the NSW Act states that a claimant is entitled to make a progress claim on and from each reference date;
- section 8(2)(b) of the NSW Act states that where the contract makes no express provision for a reference date (as is the case in this instance), the 'reference date' for the contract is the last date of the named month in which the work was first carried out under the contract and the last day of each subsequent named month;
- work under the contract was first carried out by Proyalbi in November 2011, therefore the first reference date under the contract was 30 November 2011;
- the last month in which work under the contract was carried out by Proyalbi was June 2012, therefore the last reference date to arise under the contract was 30 June 2012; and
- section 13(5) of the NSW Act states that a claimant cannot serve more than one payment claim in respect of each reference date under the contract, therefore Proyalbi was not entitled to make the second claim in respect of the reference date of 30 June 2012 and the adjudicator had no jurisdiction to make a determination in respect of that second claim.

Stevenson J noted in his decision that Proyalbi could have made an adjudication application in respect of the first claim (which was a valid claim under the NSW Act) but was prevented from doing so as the time for making an adjudication application under the NSW Act had clearly passed.

Grindley Constructions Pty Ltd v Painting Masters Pty Ltd [2012] NSWSC 234

Significance

A claimant cannot extend the time available to apply for an adjudication under the NSW Act by issuing a second payment claim for the same work which was the subject of an earlier payment claim, under which the time for adjudication has expired.

Facts

On 24 and 25 October 2011, Grindley Constructions Pty Ltd, the plaintiff, (**Grindley**) terminated subcontracts with Painting Masters Pty Ltd, the first defendant, (**Painting Masters**) for painting work on two building projects. Immediately following receipt of the notice of termination, Painting Masters issued payment claims to the plaintiff regarding the work it had performed.

On 9 November 2011, Grindley issued payment schedules for those payment claims, claiming a right of set-off for the cost of rectification work.

On 6 December 2011, and without having performed further work, Painting Masters issued two further payment claims covering the same time period and for the same work as the earlier two payment claims. On 20 December 2011, Grindley issued payment schedules as before.

On 9 January 2012, Painting Masters obtained a favourable adjudication determination under the NSW Act in respect of the second payment claims. Grindley applied to the Supreme Court of NSW for an injunction to restrain Painting Masters from registering the certificate of adjudication on the grounds that:

- the adjudicator did not have jurisdiction to determine the application because the time for applying for an adjudication regarding the first payment claims had expired and the second payment claims were invalid; and
- Grindley had been denied natural justice.

Decision

Ball J considered section 13(5) of the NSW Act, which provides that '*[a] claimant cannot serve more than one payment claim in respect of each reference date under the construction contract*'. Applying *Rail Corporation NSW v Nebax Constructions* [2012] NSWSC 6, His Honour found that it was not open to Painting Masters to issue a second payment claim for the same work. Accordingly, the adjudicator did not have jurisdiction to make a determination over the second payment claims.

The court also found that because the adjudicator had not considered Grindley's submissions on this issue, it had denied Grindley natural justice. An injunction was consequently granted. Ball J found that on the balance of convenience:

- there was potential damage to Grindley's reputation from a judgment against it; and
- Painting Masters' lack of assets meant that Grindley would be unlikely to recover money from Painting Masters if Grindley was successful at trial.

Ball J accordingly granted an injunction preventing the filing of an adjudication certificate.

Hanave Pty Ltd v Nahas Construction (NSW) Pty Limited [2012] NSWSC 888

Significance

This decision clarifies that a contravention of the payment withholding regime under Division 2A of the NSW Act requires a voluntary act or omission by the discharger after receipt of the payment withholding request, which act or omission is causative of the debt being discharged.

Facts

Hanave Pty Ltd, the plaintiff, (**Hanave**) engaged Nahas Construction (NSW) Pty Limited, the first defendant, (**Nahas**) to design and construct a building in Sydney.

In October 2011, Nahas served a payment claim on Hanave pursuant to the NSW Act, and later obtained an adjudication determination. Hanave commenced court proceedings to quash the adjudication determination and to restrain Nahas from enforcing it and was required to pay the disputed amount into court. The proceedings were determined in favour of Nahas, and the money held in court was paid to Nahas.

Waco Kwikform Ltd, the second defendant, (**Waco**) was a creditor of Nahas and obtained an adjudication determination against Nahas under the NSW Act. In November 2011, Waco served a payment withholding request on Hanave under Division 2A of the NSW Act which required Hanave to retain the amount owed to Waco out of money owed by Hanave to Nahas.

Division 2A of the NSW Act provides that if a principal contractor discharges its obligation to pay money to a contractor in contravention of a requirement under Division 2A of the NSW Act to retain money, the principal contractor becomes jointly and severally liable with the contractor in respect of the debt owed by the contractor to the subcontractor.

Waco claimed that Hanave became jointly and severally liable with Nahas for Nahas's debt to Waco because Hanave discharged its obligation to Nahas, in contravention of Division 2A of the NSW Act to retain the money.

Decision

Hammerschlag J concluded that a contravention of Division 2A of the NSW Act required a voluntary act or omission after receipt of the payment withholding request, which act or omission is causative of the discharge.

In this case, the money was paid into court before Hanave received the payment withholding request, and this was the act which brought about the discharge of Hanave's obligation to Nahas. The subsequent payment to Nahas was by order of the court and did not result from anything voluntarily done by Hanave after it received the payment withholding request. His Honour stated that Hanave could have (and perhaps should have) informed the court of the payment withholding request but its failure to do so did not contravene Division 2A of the NSW Act.

Accordingly, His Honour found that Hanave was not jointly and severally liable with Nahas for the debt to Waco.

IWD No 2 Pty Ltd v Level Orange Pty Ltd [2012] NSWSC 1439

Significance

In this decision the court found that an oral arrangement which was constituted by a telephone conversation is sufficient to constitute a 'construction contract' for the purposes of section 4 of the NSW Act.

Facts

IWD No 2 Pty Limited (**IWD**) engaged a builder, Link Constructions (NSW) Pty Limited (**Link**), under a design and construct contract in relation to a property in Randwick. IWD and Link together made a phone call to Level Orange Pty Limited (**Level Orange**). During this conversation the director of IWD:

- requested that Level Orange provide architectural services for the project; and
- stated that he would ensure that Level Orange was paid.

As a result of the director's statement, Level Orange agreed to provide architectural services.

Following this conversation Level Orange was paid a deposit and various lump sum payments by IWD.

IWD and Link then entered into dispute and Link went into external administration. The director of IWD again confirmed with Level Orange that IWD would continue to pay Level Orange for the architectural services.

The adjudicator found in favour of Level Orange against IWD and awarded the payment claim.

IWD appealed the decision of the adjudicator on the basis that the adjudicator did not have jurisdiction to make a determination because there was no 'construction contract' between IWD and Level Orange within the meaning of section 4 of the NSW Act.

Decision

The two issues raised by the court were:

1. Was there a construction contract within the meaning of section 4 of the NSW Act being,

   '*a construction contract means a contract* ***or other arrangement*** *under which one party undertakes to carry out construction work, or to supply related goods and services, for another party*' (emphasis added).

2. If so, did it guarantee payment of money owing to Level Orange within the meaning of section 7(3)(c) of the NSW Act, so that the NSW Act did not apply.

In relation to the first issue the court relied on *Machkevitch* and found that an oral arrangement at the very least involved one party 'undertaking to carry out construction work or to supply services related to construction work' and that the telephone conversation between IWD and Level Orange constituted an oral arrangement between the parties that was, for the purposes of section 4 of the NSW Act, a 'construction contract'.

In relation to the second issue the court held that the oral arrangement was not simply a guarantee (or a collateral contract) indemnifying Level Orange against losses caused by a breach of contract by Link. The court held that the oral arrangement was an independent 'construction contract' as evidenced by the telephone conversation of January 2011 and that IWD made undertakings to pay Level Orange's fees in return for architectural services irrespective of Link.

The court considered that the adjudicator had erred in determining the basis for the existence of a construction contract. However, the court also found that since there was a relevant 'construction contract' between the parties, the adjudicator did not fall into jurisdictional error.

Leighton v Arogen [2012] NSWSC 1323

Significance

A claimant cannot alter the basis of its payment claim in its adjudication application. To do so would be to deny natural justice to the respondent who cannot respond to new issues raised in the adjudication application.

Facts

Leighton Contractors Pty Ltd (**Leighton**) subcontracted Arogen Pty Ltd (**Arogen**) to supply horizontal directional drilling for a project involving the upgrade of an electrical supply system for Ausgrid.

Arogen submitted a $6.2 million payment claim mostly for variations/additional works described as 'delay and disruption due to Cooks River Heritage Issues for [a nominated month] Period (stop work issued by Ausgrid 1/12/2011.)'. Leighton responded with a payment schedule that was emailed to Arogen in two forms:

- a Microsoft excel document which contained the calculations as to its assessment of the value of each variation did in fact contain those calculations; and
- a PDF version which did not contain those calculations.

The payment schedule also asserted that Arogen had claimed variations relating to the stop work order by Ausgrid for periods well after work had been ordered to recommence on 10 February 2011.

Arogen proceeded to make an adjudication application which:

- attached the PDF version of Leighton's payment schedule and asserted that no calculations had been provided and therefore Leighton should be barred by section 20(2B) of the NSW Act from providing them in its adjudication response; and
- also accepted that the relevant cause of the delay did cease on 10 February 2011 but said that inclement weather during and after that period had further extensively delayed and disrupted the works.

Leighton's adjudication response dismissed the suggestion that the calculations had not been provided and annexed them again. Additionally, the response argued that it was not open to Arogen to put its claim on a new basis, being a claim for delay due to inclement weather after the stop work period had concluded.

The adjudicator determined that no calculations had been attached to the payment schedule and Leighton was therefore barred by section 20(2B) of the NSW Act from providing them in its adjudication response. There were no indication in the adjudicator's reasoning that he had considered the components of, or the rates underlying, Arogen's claims. The adjudicator simply stated that he was satisfied that Arogen was entitled to the amounts claims.

Decision

McDougall J found that section 20(2B) of the NSW Act did not bar Leighton from providing its calculations in its adjudication response. Section 20(2B) of the NSW Act prevents a respondent from including 'in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant'. However, His Honour said that the calculations demonstrating Leighton's valuation of the variations were not 'reasons for withholding payment', but rather constituted either a part of or an amplification of the reasons for non-payment that were outlined in the payment schedule.

Despite the fact that there is no equivalent provision in the NSW Act that prevents an applicant from including reasons for payment in its adjudication application not previously provided in its payment claim, MacDougall J found that there are multiple ways to arrive at the conclusion that that such a prevention does exist, as follows:

- Since the respondent in an adjudication is essentially held to what is argued in its payment schedule, it can essentially only answer the payment claim in its adjudication response. The respondent therefore has no ability to address new issues provided by the applicant in its adjudication application. This would amount to a denial of natural justice.
- Section 22(2) of the NSW Act limits the parameters of what the adjudicator can consider in making its determination. Subsection (b) relevantly includes: *'the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim.'* The adjudication application could be said to form the *'submissions'* in this context. In circumstances where the basis of the application is different to that provided in the payment claim, it could not be said that the application was *'duly made in support of the claim.'* By considering the application, the adjudicator considered matters outside the parameters provided by section 22(2) of the NSW Act.

Accordingly, the adjudicator had denied Leighton natural justice and had acted outside his jurisdiction under the NSW Act.

The court also found that the adjudicator had not provided any reasoning for accepting Arogen's calculations of the variations which would have been prudent given that Arogen's calculations did not appear to be in accordance with the rates attached to its letter of offer that formed the contract. MacDougall J, supporting the opinion of Brereton J in *Brodyn Pty Ltd v Davenport (2004)* 61 NSWLR 421, found that valid reasons were a basic and essential requirement of validity to a determination and the adjudicator's failure to provide them amounted to jurisdictional error.

The determination was declared void and quashed.

Machkevitch v Andrew Building Constructions [2012] NSWSC 546

Significance

An adjudication application may be brought under the NSW Act to enforce an arrangement, which in this case included an undertaking by a third party to pay an amount owed to a builder in the event of default by the proprietor, if it can be demonstrated that the undertaking evinced a concluded state of affairs under which construction work was to be carried out and thereby constituted an 'arrangement' under the NSW Act.

Doing so would not amount to an abuse of process under the NSW Act or give rise to an issue estoppel of any previous adjudication determination for the amount the subject of the undertaking (ie in respect of a payment claim made by the builder against the principal or owner), because the undertaking is part of a different arrangement capable of being separately pursued under the NSW Act.

Facts

Andrew Building Constructions (**Andrew**) entered into a written building contract and a 'bonus deed' (**Contract**) with 873 NSHR Investments Pty Ltd (**873 NSHR**) to carry out construction work in Rose Bay. Mr Machkevitch, a director and shareholder of the 873 NSHR, provided an oral undertaking that if 873 NSHR did not have sufficient resources to pay Andrew the amount that was due under the Contract, he would pay the amount owing.

Andrew applied for an adjudication of its payment claim under the NSW Act. The adjudicator made a determination in favour of Andrew. 873 NSHR then went into liquidation. Andrew thereafter issued a payment claim to Mr Machkevitch.

The court was left to determine:

- firstly, whether there was an 'arrangement' amounting to a construction contract for the purposes of the NSW Act, as was alleged by Andrew;
- secondly, whether Andrew was estopped, by reason of the determination of the original adjudication, from pressing its claim under the alleged construction contract against Mr Machkevitch; and
- thirdly, and in the alternative to issue estoppel, whether Andrew's attempts to press its payment claim against Mr Machkevitch was an abuse of process of the NSW Act.

Decision

The court accepted the evidence of Andrew concerning the oral undertaking made by Mr Machkevitch, and that Andrew had acted upon that undertaking in entering into the Contract. Applying the decision of *Okaroo Pty Limited v Vos Construction and Joinery Pty Limited & Anor* [2005] NSWSC 45, the court held that the term 'construction contract' could include both a 'contract' (as is known and understood at law) and some 'other arrangement' that would not ordinarily be regarded as a contract at law.

The court compared the reference to 'arrangement' in the NSW Act with the objective of section 10 of the *Home Building Act 1989* (NSW), under which a builder cannot enforce a contract unless that contract is in writing and that builder is licensed.

The court noted that the only limitation on the 'arrangement' referred to in the NSW Act was that it must be one under which a party undertakes to carry out construction work for another party. Further, the court noted that there must be something more than a mere undertaking, or something that can give rise to an arrangement, although not a legally enforceable agreement, between the parties. Alternatively, the court stated there must be a state of affairs under which one party undertakes to the other to do something such that there is a demonstrated 'concluded state of affairs'.

Regarding the other two issues, the court noted that it was reasonable for Andrew to have its claim against 873 NSHR adjudicated in order to determine whether or not it would be paid. The court said that once it became clear that Andrew would not be paid (as a result of 873 NSHR going into liquidation), it could not be unreasonable for Andrew to seek to enforce what it said was the secondary or alternative liability of Mr Machkevitch. On this basis, the court found that, by making the second adjudication application, Andrew was not seeking to re-agitate any matters that were decided by the first adjudicator because the first payment claim was one made under, and relying only on, the Contract. The court made it clear that if the second dispute went to adjudication, Andrew would rely on a different 'construction contract or arrangement'. On this basis, the court found there could not have been a finding of a repetitious and abusive re-agitation of the same claim.

Mr Machkevitch's claim was accordingly dismissed with costs.

New South Wales Land and Housing v Clarendon Homes [2012] NSWSC 333

Significance

In this decision, the validity of the adjudicator's determination was challenged on the basis that the adjudicator did not perform his statutory function by failing to give sufficient reasoning for his determination and in making his determination, did not afford such a measure of natural justice as is consistent with the NSW Act.

Facts

New South Wales Land and Housing Corporation (**the Corporation**) engaged Clarendon Homes (**Clarendon**) to perform construction work under a contract. A disputed payment claim was referred to an adjudicator under the NSW Act.

The Corporation sought judicial review of the adjudicator's determination and an order for certiorari in the NSW Supreme Court to quash the adjudicator's determination on the basis that the adjudicator did not:

- provide sufficiency of reasons for his determination;
- deal with the case put to him; and
- consider a concession made by Clarendon which reduced the amount claimed.

Decision

McDougall J found that the adjudicator did provide reasons for his determination which were sufficient to discharge his obligations under the NSW Act and that there was no denial of natural justice by the adjudicator in the making of his determination. The decision was based on the following reasoning:

- section 22(3)(b) of the NSW Act requires adjudicators to give reasons for their determination unless the parties have dispensed them from doing so. In this case, the parties did not dispense with the adjudicator's obligations under section 22(3)(b) of the NSW Act. As in Bauen Constructions v Westwood Interiors [2010] NSWSC 1359, McDougall J noted that:
  - adjudicators reasons should not be scrutinised with the same attention to detail with which the reasons of trial judges are subjected; and
  - the principal purpose of requiring adjudicators to give reasons is to enable the parties to understand the process of reasoning by which the dispute between them has been considered and resolved however it does not seem necessary to have the matters set out in full in the determination.

    The adjudicator did provide reasons for his determination and although sometimes scarce, such reasons indicated a process of reasoning which led to his determination.
- In this case, the Corporation and Clarendon each made submissions to the adjudicator regarding the quantum of the payment claim by Clarendon. In considering the competing submissions, the adjudicator found Clarendon's assessment of the payment claim to be 'more reasonable' than the Corporation's assessment of the payment claim because Clarendon's assessment was based on a detailed analysis of its payment claim including a summary of the amounts claimed and the times and prices for the work included in the payment claim whereas the Corporation's assessment was insufficient for the purposes of the work described in the payment claim. Where the adjudicator is required to consider two competing submissions, it is open to the adjudicator to apply his expertise to a decision on the competing submissions of the parties.

- The adjudicator's failure to apply a concession made by Clarendon in respect of its payment claim was not an error of a kind that should be taken to invalidate the whole determination. The adjudicator's failure to apply the concession is an error arising from an accidental slip or omission for which the Corporation may make an application under section 22(5) of the NSW Act to correct the error in the determination. In circumstances where a remedy is available to the Corporation, there is no relevant denial of procedural fairness.

Nigro v EVS Group Pty Limited [2012] NSWSC 1545

Significance

The doctrine of issue estoppel applies to adjudicators' determinations and so dissatisfied parties will not be able to re-agitate issues in court which have already been determined by an adjudicator.

Facts

Remolo Nigri (**Nigri**), the plaintiff, was a director of two companies, a developer and construction company, both of which were engaged in construction of home units. EVS Group Pty Limited (**EVS**), the defendant, was contracted to do security work at the site. The parties did not agree whether EVS contracted with Nigri in a personal capacity, with the development company or with the construction company.

EVS was not paid for its services and sought adjudication under the NSW Act against both Nigri and the construction company. The adjudicator determined that the counterparty to the contract was Nigri and that Nigri should pay EVS for its services.

Nigri commenced proceedings in the local court, seeking orders as to the correct counterparty to the contract for security services and whether Nigri was entitled to recover the moneys which EVS had obtained from Nigri to date.

The primary judge held that:

- Nigri was not able to dispute that he was the counterparty to the contract, because the issue had already been determined by the adjudicator, raising an issue estoppel;
- section 32 of the NSW Act does not allow parties to reagitate issues before the court where they were unsuccessful in an adjudication; and
- until such time as Nigri successfully applied to the New South Wales Supreme Court to have the determination set aside, he was not entitled to bring the proceedings.

Nigri appealed the decision to the New South Wales Supreme Court on the basis that the magistrate was mistaken at law on four grounds:

- the issue estoppel was not pleaded;
- section 22 of the NSW Act did not apply because the issues before the magistrate and adjudicator were not the same and the determination was not final;
- section 32 of the NSW Act did not allow EVS to bring a claim under the NSW Act as it was not a party to a construction contract; and
- section 32 of the NSW Act did not prevent revisiting the adjudicator's determination because of an entitlement to claim under other legislation.

Decision

The Supreme Court affirmed the decision of the primary judge, holding that:

- the only prejudice of not pleading the estoppel earlier is one of costs that could be dealt with in an appropriate costs order;
- the issues before the primary judge were relevantly the same issues as those before the adjudicator, and that the principles of issue estoppel will apply to any determinations made by an adjudicator under the NSW Act except to the extent that the NSW Act allows the determination to be revisited;
- on the plaintiff's pleaded case, it was not a party to the construction contract and so could not claim the benefits under section 32 of the NSW Act, to which it is a requirement that the claimant is a party to a construction contract; and

- it was not open to Nigri to recover funds under the Local Court Act:
  - contrary to the estoppel created;
  - in circumstances where it would amount to an appeal of the determination when no right of appeal exists;
  - if successful, the claim would result in a judgment inconsistent with an existing judgment; and
  - money paid under compulsion of law cannot generally be recovered.

Oppedisano v Micos Aluminium Systems Pty Ltd [2012] NSWSC 53

Significance

Confirmation that the section 7(2)(b) 'residential building work exception' to the NSW Act only applies to contracts that relate wholly to 'such part of any premises' that a party to the contract resides or proposes to reside.

Facts

Micos Aluminium Systems Pty Ltd (Micos) contracted with Mr Oppedisano to provide glazing work at Mr Oppedisano's premises.

The premises contained four single-occupancy units that separately housed Mr Oppedisano and his family members. Each of the units were fully self-contained, each contained sleeping accommodation; at least one bathroom; laundry facilities; a living area; a kitchen; individual letter boxes and no common facilities.

The parties fell into dispute and Micos submitted a payment claim. Mr Oppedisano responded with a payment schedule providing a number of reasons for non-payment, but did not assert that the NSW Act did not apply due to the section 7(2)(b) exclusion. Micos subsequently made an adjudication application which was determined wholly in its favour.

Mr Oppedisano appealed to the Supreme Court on the basis that the adjudicator did not have jurisdiction to determine the application as the contract between the parties was not subject to the NSW Act on the basis of the section 7(2)(b) exclusion.

Section 7(2)(b) excludes from the operation of the NSW Act, from a:

> *'construction contract for the carrying out of residential building work (within the meaning of the Home Building Act 1989) **on such part** of any premises as the part for whom the work is carried out resides in or proposes to reside in'.* (Emphasis added)

Decision

McDougall J affirmed the decision of *Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR (Shorten) which focused on the words 'such part of any premises' in section 7(2)(b) of the NSW Act. In that case the contract was for the construction of 10 residential units, one of which was to be the residence of the party to the contract.

Accordingly, where the contract included work beyond the individual residence of the party to the contract, the contract as a whole could not be taken outside the operation of the NSW Act as a result of the section 7(2)(b) exclusion. The exclusion only serves to exclude a contract for residential building work on "such part of any premises" that the party to the contract intended to reside.

His Honour held that the contract between Mr Oppedisano and Micos was not limited to Mr Oppedisano's individual unit and therefore the NSW Act applied to the contract.

McDougall J added that in the event that he found that section 7(2)(b) did apply, as a matter of discretion he would have been strongly inclined to withhold prerogative relief as Mr Oppedisano's knew the facts and failed to raise section 7(2)(b) in his payment schedule or adjudication response.

Rail Corporation of NSW v Nebax Constructions [2012] NSWSC 6

Significance

Where a party seeks adjudication in circumstances where payments are made under separable portions of a contract, then section 17(1) of the NSW Act does not allow more than one adjudication application to be made in respect of the payment claim. This decision also reiterates the importance of the adjudicator providing natural justice to the parties in the course of reaching their decision.

Facts

Rail Corporation of NSW, the plaintiff, (**RailCorp**) and Nebax Constructions, the defendant, (**Nebax**) were parties to a construction contract, under which the Nebax Constructions was to undertake platform resurfacing work at 25 different railway stations, with the work at each station being a separable portion of work under the contract.

Nebax submitted a monthly payment claim via one email, which attached five separate invoices for different separable portions of the work.

RailCorp submitted separate payment schedules in respect of each of the individual invoices. Nebax submitted five separate adjudication applications, one in respect of each of the separate payment schedules.

At the adjudication stage, RailCorp argued that there were five separable adjudication applications in respect of the one payment claim under the one contact, and that the adjudicator lacked jurisdiction to deal with the claims because:

- section 17(1) of the NSW Act did not permit multiple applications for the one payment claim; and/or
- section 13(5) of the NSW Act did not permit multiple payment claims under the one contract for the one reference date.

The adjudicator found, without either party having contended it, that each separable portion should be treated as a separate contract, therefore the adjudicator claimed he had the jurisdiction to deal with the application.

Decision

The court found in favour of the RailCorp, recognising that there was one single contract only and that the separable portions were in respect of the contract.

The court reaffirmed the position that (in accordance with section 17(1) of the NSW Act) there can only be one adjudication application for any particular payment claim for any particular contract – the group of invoices had been submitted as the one payment claim, the separate invoices merely particularised a number of separate portions of the works.

The court also found that the adjudicator had dealt with the objection as to jurisdiction on a basis for which neither party had contended. He did not give either party notice of his intention to do so, nor offer them the opportunity to be heard on that point. On this basis, the adjudicator deprived the parties and in particular the RailCorp of natural justice, by not allowing them the opportunity to put submissions that could have persuaded the adjudicator to a view different to that which was expressed.

In view of the above findings, the court said that it did not need to consider the plaintiff's arguments in relation to section 13(5) of the NSW Act.

Consequently, the court found that the RailCorp was entitled to the relief sought. However, it decided to reserve all other orders until resumption of the new law term. The application had been brought during the vacation period and it was not clear whether the adjudicator, the third defendant, and the nominating authority, Adjudicate Today Pty Ltd, the second defendant, were served and wished to be heard or, alternatively, intended to file submitting appearances so that the orders could be made on a final basis.

Silver Star Construction Pty Limited t/as Genesis Construction Australia v Denham Constructions Pty Limited (unreported)

Significance

The court will give effect to the policy of the NSW Act and will not grant a stay of execution, if it interferes with the object of the NSW Act, unless there is persuasive evidence that the object will be rendered nugatory.

Facts

Silver Star Construction Pty Ltd, the applicant, (**Silver Star**) submitted four payment claims to Denham Constructions Pty Ltd, the respondent, (**Denham**) in relation to works carried out at the Glenhaven project and Malabar project (**Projects**). Denham failed to issue payment schedules within the time frames required by the NSW Act and was consequently held liable for the entire amount of the payment claims totalling $285,811.69 (**Initial Proceedings**).

Denham commenced separate proceedings against Silver Star regarding the alleged breaches and defaults in the performance of the work on the Projects (**Denham Proceedings**). Denham sought a stay of judgment of the Initial Proceedings until the Denham Proceedings had been determined.

Decision

The court held that a stay of the nature sought by Denham will only be granted if there exists special or exceptional circumstances that warrant the exercise of the court's discretion. The court went on to say that the overriding factor in whether a stay is necessary is whether the order is necessary to prevent injustice. The court provided examples of previous decisions that warranted a stay to be granted. They included:

- the ability of the respondent to claw back the payment as a contractual claim;
- the claimant's insolvency and whether the claimant was insolvent at the time of the claim;
- whether there was more than a 'real risk that the respondent will suffer prejudice or damage' if the stay is not granted; and
- whether any irreparable prejudice would be caused to the respondent by the refusal of a stay.

The court concluded that no exceptional circumstances existed in this instance and said that the overriding consideration was the intention of the NSW Act, which provided that the applicant could obtain a prompt interim decision on a disputed payment. The court said that this would fulfil the intention of the NSW Act, which was to primarily shift the risk of the insolvency from a subcontractor to a contractor. The stay of execution was refused on these bases.

The Trustees of the Roman Catholic Church for the Diocese of Lismore v TF Woollam and Son [2012] NSWSC 1559

Significance

Contractors should be careful to submit only one payment claim in respect of each 'reference date' under the contract, because pursuant to section 13(5) of the NSW Act, any subsequent purported payment claim made in respect of the same 'reference date' will not be valid.

Facts

The Trustees of the Roman Catholic Church for the Diocese of Lismore (**Church**) and TF Woollam and Son (**TF Woollam**) entered into a construction contract.

TF Woollam included in its payment claims for September, October and November 2009 amounts for scaffolding, which the Church rejected. The work was completed in July 2011, and a payment claim was served in respect of July 2011 which again claimed the amounts for scaffolding which had earlier been rejected (**July payment claim**). The Church rejected the July payment claim insofar as it claimed scaffolding costs. Practical completion was certified, and a 12 month defects liability period commenced, on 15 October 2011.

In April 2012, TF Woollam submitted what purported to be a payment claim for the month of March 2012, which again included the amounts for scaffolding (**March payment claim**). The Church rejected the March payment claim, which was then determined by an adjudicator in favour of TF Woollam. The Church appealed to the Supreme Court.

The Church argued that the March payment claim was invalid because:

- section 13(5) of the NSW Act means that if more than one payment claim in served in respect of a particular reference date, only the first claim will be valid; and
- the March payment claim could only relate to one of the reference dates which the previous payment claims related to, and that after July 2011 there was no fresh reference date until the end of the defects liability period.

Decision

The court examined the effect of section 13(5) of the NSW Act, which provides that 'a claimant cannot serve more than one payment claim in respect of each reference date under the construction contract'.

The court found in favour of the Church and held that under the contract there was no reference date between July 2011 and the end of the defects liability period, because no work was undertaken in that period.

Therefore, because the March payment claim was submitted before the end of the defects liability period, the July payment claim and the March payment claim were in relation to the same 'reference date', which is prohibited by section 13(5) of the NSW Act.

Accordingly, the court held that the adjudicator did not have jurisdiction to determine the parties' rights on the basis that the March payment claim was not a valid payment claim and so did not enliven the adjudication procedure set out in the NSW Act.

Queensland cases

In this section, the *Building and Construction Industry Payments Act 2004* (Qld) is referred to as the 'Qld Act'.

BHW Solutions Pty Ltd v Altitude Constructions Pty Ltd [2012 QSC 214

Significance

A contractual provision that imposes pre-conditions (such as provision of a statutory declaration with a claim) on the statutory entitlement to progress payments will be void.

Facts

BHW Solutions Pty Ltd (**BHW**) entered into construction contracts with Altitude Constructions Pty Ltd (**Altitude**) to supply temporary accommodation units. Each contract contained a provision that required a progress claim to be accompanied by a statutory declaration as a pre-condition to payment under the Qld Act.

BHW served payment claims on Altitude, but did not provide statutory declarations. Altitude did not serve payment schedules in response. Altitude contended that it was not liable to pay the claimed amount because BHW had not provided statutory declarations and had not fulfilled the contractual pre-conditions to payment.

Decision

The court found in favour of BHW, awarding $1,3262,380.45 plus interest.

The court held that BHW's failure to provide the statutory declarations did not invalidate its payment claims.

BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors [2012] QSC 346

Significance

An adjudicator commits a jurisdictional error by ignoring the legislative requirement to find a source of a claimant's entitlement to be paid. An erroneous construction of the contract by the adjudicator would not have been a jurisdictional error.

Facts

BM Alliance Coal Operations Pty Ltd (**BM Alliance**) and BGC Contracting Pty Ltd (**BGC**) entered into a contract for BGC to construct a dam at the Goonyella riverside mine (**contract**). BM Alliance terminated the contract, effective 11 January 2012.

On 10 February 2012, BGC served a payment claim, claiming $36 million which included:

- a termination costs claim under clause 17 of the contract; and
- a latent conditions claim under clause 26 of the contract.

BM Alliance served a payment schedule. The adjudicator decided BM Alliance had to pay $28.16 million, assessing the latent conditions claim at $8.6 million and the termination costs claim at $4.3 million.

BM Alliance sought a declaration that the adjudicator's decision was void for jurisdictional errors, in that:

- as the adjudicator had (correctly) identified the relevant reference date as 1 January 2012, his decision that BGC was entitled to be paid termination costs was a jurisdictional error; and
- BGC was not entitled to be paid for latent conditions.

Decision

The court declared the adjudicator's decision void on the basis that it was affected by jurisdictional error in respect of the award of termination costs.

Jurisdictional error arose because the adjudicator failed to consider and find the source of the entitlement to be paid termination costs, and instead assumed the entitlement to be paid existed simply because BGC incurred costs before the reference date. BGC was not entitled to be paid for termination costs and had not shown an entitlement to be paid those costs, and the adjudicator's failure to identify a source of the entitlement meant that he exceeded his jurisdiction.

BM Alliance's latent conditions arguments turned on the proper construction of clause 26 of the contract. The court decided that the fact that the machinery for the assessment of entitlement for latent conditions was not followed did not alter BGC's entitlement to claim under the Qld Act. Even if the alternative had been found, the court noted that the error in construing the terms of the contract is not, of itself, a jurisdictional error.

Applegarth J noted that severance is not available with the consequence that BGC was not entitled to the $26.18 million found by the adjudicator despite the fact that the value of the part of the claim subject to jurisdictional error was only $4.345 million. He observed this was an area for potential legislative reform.

Capricorn Quarries Pty Ltd v Inline Communication Construction Pty Ltd & Ors [2012] QSC 388

Significance

The Qld Act does not apply to contracts for the supply of products that are part of a chain of supply such that the supply, as between the parties, is for the purpose of the acquirer re-supplying the goods in unchanged form.

Facts

Capricorn Quarries Pty Ltd (**Capricorn**) and Inline Communication Construction Pty Ltd (**Inline**) entered into a contract which required Inline to provide 'contract crushing', using its crusher and screens at the quarry owned and operated by Capricorn (**works**).

The material had to be appropriate for use as road making or drainage works. After processing, the product was moved by Capricorn to one of a number of stockpiles within the quarry. Capricorn supplied the finished products to customers who used them as they required.

Inline served a payment claim purportedly under the Act relating to 11 invoices. All but one of the invoices were for contract crushing; the exception being for the supply of an excavator.

Inline applied for adjudication of the payment claim. Capricorn did not serve a payment schedule. The adjudicator decided in favour of Inline.

Capricorn sought a declaration that the adjudicator's decision was void because:

- the contract was not a 'construction contract';
- the works were not 'construction work'; and
- the contract did not contain an undertaking to 'supply related goods and services',

within the meaning of the Qld Act.

Decision

The court accepted Capricorn's submissions and declared the adjudicator's decision void.

The court determined that the legislative requirements are not satisfied where, as between the contracting parties, the supply is for the purpose of the buyer re-supplying the goods in unchanged form in the course of the buyer's business of supply of such goods.

The judge arrived at that decision by a 'natural' construction of the relevant definitions of the Qld Act, which he preferred over the 'liberal interpretation' approach that extended the operation of the Qld Act.

Christie v Seventh Day Adventist Schools Ltd [2012] QDC 32

Significance

This case identified a new category of claim under the Qld Act. While it has long been the case that an unlicensed contractor cannot utilise the Qld Act, this case provided that an unlicensed contractor could claim under the Qld Act for work that does not require a licence, provided the claim for that work is clearly differentiated from work for which a licence is required.

The 'loophole' identified in this case was quickly closed in *Dart Holdings Pty Ltd v Total Concept Group Pty Ltd & Ors* [2012 QSC 158

Facts

Mr Christie (**Christie**) entered into a contract with Seventh Day Adventist Schools (**SDAS**) to remove asbestos, install functionally equivalent material and to make good, including painting. Christie was not licensed to perform building work under section 42 of the *Queensland Building Services Authority Act 1991* (**QBSA Act**).

SDAS terminated the contract.

Christie made a payment claim. SDAS did not deliver a payment schedule.

Christie commenced proceedings for judgment under the Qld Act alleging that he did not have to be licensed to perform the work as it was in accordance with the Asbestos Management Code (**Code**) which was expressly excluded from building work pursuant to section 5(za) of the QBSA Act.

Decision

The court found that work such as installing new sheeting, painting and fixing up the premises were classed as building work, and a licence was required to perform it. The court found that in undertaking to perform the work without a licence Christie had breached section 42 of the QBSA Act. As Christie was not entitled to payment under the contract, any progress claims under the Qld Act was also invalid.

The court found that although Christie was in breach of section 42 of the QBSA Act, the contract between the parties was not invalidated. Insofar as Christie had completed work which was not 'building work', he was still entitled to relief under the Qld Act. However, for a payment claim to be successful, the court stipulated that the contract must distinguish payment amounts for 'building work' and 'non-building work'. The contract between the parties provided no such distinction, however, there were invoices that specifically accounted for 'removal of asbestos'. As this effectively identified the works as 'non-building work', the Qld Act was activated.

Dart Holdings Pty Ltd v Total Concept Group Pty Ltd & Ors [2012] QSC 158

Significance

An unlicensed claimant cannot take advantage of the Qld Act, even if part of the work under the contract does not require a licence.

Facts

Dart Holdings Pty Ltd (**Dart**) engaged Total Concept Group Pty Ltd (**Total Concept**) to supply and install a number of items for a lump sum price (**contract**).

Total Concept served a payment claim. Dart's payment schedule disputed the whole claim. The adjudicator decided that Dart should pay Total Concept about half the sum claimed.

Total Concept obtained a judgment under section 31 of the Qld Act. Dart brought proceedings to set aside the adjudicator's decision as void. Dart challenged the adjudication on the basis that the contract was not enforceable because the contract required Total Concept to perform building work for which it was not duly licensed under the *Queensland Building Services Authority Act 1991* (**QBSA Act**).

Judgment

The court made the following declarations:

- when entering into the contract, Total Concept did not hold the appropriate class of contractor's licence under the QBSA Act in order to carry out the building work;
- at no time did Total Concept hold a licence under the QBSA Act entitling it to perform the works the subject of its payment claim;
- Total Concept entered into the contract in breach of section 42(1) of the QBSA Act;
- Total Concept had no contractual entitlement to be paid any consideration for any of the work the subject of the contract (as originally made or as varied); and
- Total Concept was not entitled to make a payment claim under the Qld Act for any of the work the subject of the contract (as originally made or as varied).

The contract's lump sum price meant that there was not a distinct agreement for the unlicensed portion of works. Section 42(1) of the QBSA Act consequently affected the entirety of the contract.

HM Hire Pty Ltd v National Plant and Equipment Pty Ltd & Anor [2012] QSC 4

Significance

The Qld Act applies to a contract for excavation and removal of timber and topsoil from designated overburden dumpsites at a mine.

Facts

HM Hire Pty Ltd (**HM Hire**) hired equipment from National Plant and Equipment Pty Ltd (**NPE**) to excavate and remove timber and topsoil from a coal mine site. This also involved the construction of a road to create a means of access to the mine site. NPE obtained an adjudication decision under the Qld Act in its favour.

HM Hire challenged the adjudicator's jurisdiction on the basis that:

- the work performed was not construction work; alternatively
- the work related to the extraction of minerals and consequently fell within the exemption in section 10(3) of the Qld Act.

Decision

The court found that the work fell within the definition of construction work and did not involve the extraction of a mineral. The work was therefore not excluded from the definition of construction work by section 10(3) of the Qld Act.

John Holland Pty Ltd v Coastal Dredging & Construction Pty Limited & Ors [2012] QCA 150

Significance

Contractual pre-conditions regarding the occurrence of a reference date are void.

Facts

John Holland Pty Ltd (**John Holland**) subcontracted dredging work in the Gladstone Harbour to Coastal Dredging & Construction Pty Limited (**CDC**). The subcontract provided:

- CDC was permitted to submit a payment claim to John Holland only on each reference date;
- a warranty by CDC that its payment claims would comply with a particular format; and
- if a payment claim did not comply with those conditions, then the payment claim would be void and the 'reference date' would occur on the same day on the following month.

CDC served a payment claim under the Qld Act. The claim went to adjudication, and the adjudicator decided that CDC was entitled to $3,571,790.20 (including GST).

The primary judge rejected John Holland's application for a declaration that the adjudicator's decision was void.

John Holland argued on appeal that the decision was void because the payment claim was not made from a valid 'reference date'.

Judgment

The court dismissed the appeal.

Fraser JA held that the contractual pre-condition that purported to defer what otherwise would have been CDC's statutory entitlement to a progress payment was void.

His Honour reasoned that the relevant contractual provisions for identifying the 'reference date' are those which state when a progress claim 'may be made'. The applicability of the Qld Act cannot be qualified by contractual restrictions regarding the form and content of payment claims.

Peter Boyd Enterprises Pty Ltd v QR Concrete Pty Ltd [2012] QDC 324

Significance

It must be clear on the face of a document which purports to be a payment claim that it is a payment claim for the purposes of the Qld Act.

Facts

Peter Boyd Enterprises Pty Ltd (**PBE**) entered into a contract with QR Concrete Pty Ltd (**QR Concrete**) for the manufacture and installation of pre-cast concrete panels for construction work at the Gold Coast University Hospital.

PBE contended it served a payment claim on QR Concrete by posting a bundle of documents to QR Concrete's principal office. The bundle contained a covering letter, a completed pro-forma that QR Concrete required it complete and copies of the original invoices for the work that were unpaid. Each of the invoices were endorsed in accordance with the Qld Act.

QR Concrete did not serve a payment schedule. It gave evidence that it did not receive PBE's bundle and was not aware that money was owing to PBE.

PBE claimed the amount in the payment claim as a debt owing under section 19 of the Qld Act.

Decision

The court dismissed the claim.

The court held the bundle was not effective as a payment claim for the purposes of the Qld Act. It was not clear on the face of the document that it was a payment claim for the purposes of the Qld Act. The invoices which formed part of the bundle had previously been sent to QR Concrete. Each invoice was endorsed as being made under the Qld Act. His Honour deemed that when each invoice was delivered, it was a payment claim for the purposes of the Qld Act. His Honour said it was significant there was nothing in the PBE's covering letter or the pro-forma form that referred to the Qld Act.

His Honour held that a reasonable person who had considered the bundle as a whole would be left in substantial doubt as to whether that bundle constituted a payment claim made under the Qld Act or whether PBE was asserting that each of the invoices when issued had constituted such a claim.

Richard Kirk Architect Pty Ltd v Australian Broadcasting Corporation & Ors [2012] QSC 177

Significance

Where an adjudicator decides that supporting documentation is not valid (and therefore does not impact on analysis of the application), this does not constitute jurisdictional error, even if the adjudicator was wrong in deciding that the supporting documentation was not valid.

Facts

Richard Kirk Architect Pty Ltd (**Richard Kirk**) entered into a contract with the Australian Broadcasting Corporation (**ABC**) for the provision of architectural services. Richard Kirk sent a letter to the ABC, purporting to serve a payment claim. The attached document, entitled 'Payment Claim', referred to an attachment that set out the particulars of the construction work or related goods and services and method of calculation of the total amount claimed (**payment claim letter**). There were no attachments to the payment claim. Richard Kirk also served a dispute notice.

The ABC's payment schedule stated the scheduled amount was $nil, because the payment claim was void or invalid for three reasons, being:

- it did not identify the related goods and services to which the progress payment related;
- it claimed an amount that was different to the amounts previously assessed and certified but provided no detail or break-up of the claimed amount; and
- more than one payment claim for the same reference date have been served.

Richard Kirk lodged an adjudication application. The ABC lodged and served its adjudication response, again stating the amount owed was $nil. The adjudicator determined that the adjudicated amount was nil. The adjudicator decided that the supporting documentation provided in the dispute notice letter did not form part of the payment claim letter and therefore was not a properly made submission for the purposes of the Qld Act.

Richard Kirk sought a declaration from the court that the adjudicator's decision was void for want of jurisdiction.

Decision

The court dismissed the application.

In rejecting Richard Kirk's arguments, it held that:

- the adjudicator's decision was made within jurisdiction because the decision was within the scope of a payment claim;
- the adjudicator's decision not to consider the supporting documentation was valid, as the documentation was not part of the payment claim in question; and
- even if the adjudicator was wrong in deciding that the supporting documentation was not a properly made submission, this would not have been a jurisdictional error.

In obiter, the court's discretion to grant declaratory relief should not be exercised where, even if relief was granted, Richard Kirk would not recover payments.

State of Queensland through the Director-General, Dept of Housing and Public Works v T & M Buckley Pty Ltd (receivers and managers appointed) [2012] QSC 265

Significance

A statutory reference date 'worked out under' a contract accrues regardless of contractual pre-conditions to claim.

Facts

The State of Queensland (**State**) and T & M Buckley Pty Ltd (**T&M Buckley**) entered into a contract for construction work. Clauses 42 and 43.2 of the contract required T&M Buckley to deliver a statutory declaration

prior to making a payment claim. The time for making a payment claim under the contract was 'monthly', i.e. the monthly anniversary of the date the works commenced.

T&M Buckley delivered a payment claim but did not deliver a statutory declaration with its payment claim. The State served a payment schedule in response to the payment claim.

T&M Buckley applied for adjudication. The adjudicator found T&M Buckley was entitled to a progress payment.

The State sought a declaration that the payment claim was invalid and the adjudication's decision was void by reason of jurisdictional error.

The State submitted that no reference date accrued pursuant to the Qld Act which entitled T&M Buckley to make the payment claim and accordingly the payment claim was invalid and the adjudication's decision was void.

Decision

The application was dismissed. The court found that the statutory reference date under the contract was the monthly anniversary of the commencement of the work, regardless of whether a statutory declaration was delivered.

The court held that 'worked out under' in paragraph (a) of the definition of 'reference date' under the Qld Act are words of wide ambit. Extrinsic evidence may be used to ascertain a reference date if the reference date is 'worked out under' rather than 'stated in' a construction contract. The accrual of the statutory reference date was not conditional on the prior delivery of a statutory declaration.

Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Anor [2012] QCA 276

Significance

The court construed the 'mining exclusion' very narrowly in the context of open cut mining.

The case confirmed that if some work under a contract is 'construction work' then all of the work under that contract may be caught.

Facts

Thiess Pty Ltd (**Thiess**) contracted with mine owners to conduct mining operations at two coal mines in Queensland. Thiess entered into three subcontracts with Warren Brothers Earthmoving Pty Ltd (**Warren**).

Warren made claims for progress payments under the Qld Act. The claims were determined by an adjudicator in Warren's favour. The adjudicator's decision was appealed on jurisdictional grounds.

The primary judge dismissed the application, deciding that the adjudicator had jurisdiction, because all of the work fell within the definition of 'construction work' under the Qld Act. Thiess appealed.

Decision

The Court of Appeal unanimously dismissed the appeal. The court held that the three subcontracts were 'construction contracts' in respect of which statutory payment claims could be made for the 'construction work' performed under those contracts.

The table summarises the views of the members of the Court of Appeal.

	Philippides J	Holmes JA	White JA
Constructing dams and drains	✓	✓	✓
Hire of excavators for various purposes, including constructing dams	✓	✓	✓
Clearing and grubbing land	No express conclusion	×	×
Stripping and hauling top-soil to stockpile	No express conclusion	×	×
Clearing overburden by trimming and scaling batters and walls, clearing excavated material and cleaning the interface between the overburden and coal seam	✓	×	×
Constructing an open cut coal mine (obiter)	✓	✓ Concurring	✓ Concurring

The court held that the mining exclusion did not apply because 'extraction' was to be read narrowly to exclude work done for the purpose of opening a mine or preparatory to that purpose.

Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd and Anor [2012] QSC 373

Significance

An adjudicator makes more than a mere accidental error or omission in the decision-making process if the adjudicator relies on a completely different method of calculating the quantum to that submitted by both parties. In considering whether an adjudicator's error is sufficient to constitute a jurisdictional error, the court will consider the nature, gravity and effect (if any) of the error on the adjudicator's decision.

Facts

Thiess Pty Ltd (**Thiess**) and Warren Brothers Earthmoving Pty Ltd (**Warren**) entered into a subcontract for Warren to perform works to clear and grub, strip topsoil and construct dams and drains.

Thiess terminated the contract. Warren lodged a payment claim on 31 December 2011. The total amount claimed included an amount of $101,032.51 for Item 1.

Thiess lodged its payment schedule, scheduling $nil and disputing the scraper load figures used to calculate Item 1. Warren, in its adjudication application, agreed with Thiess' calculations and reduced Item 1 by about $60,000.

The adjudicator decided that Warren must pay an amount that included the full claim for Item 1. Thiess sought a declaration that the adjudicator's failure to take into account the concessions made by Warren and the submissions made by Thiess, amongst other things, rendered the adjudication decision void. Although both parties agreed that the amount awarded was incorrect, Warren submitted that the adjudicator made an accidental clerical error and sought a fresh decision for a revised sum taking account of the clerical error.

Judgment

The court declared the adjudicator's decision void.

The judge said:

> *'... It would seem to me that if he had actually considered the Thiess submission and the Warren Brothers recalculation at the time he actually made his decision he would have seen that... Warren's claim which was subject to human error and that it... Warren had in fact not responded to some of the issues in dispute. To proceed on a factually flawed basis is in my mind a significant failure. I consider that the consequence of the failure of the Adjudicator to genuinely attempt to exercise his power in accordance with the BCIPA is that the Adjudication Decision is void.'*

Although the miscalculation involved a figure in excess of $60,000, the court noted that, by itself, a large monetary figure is not sufficient to constitute a significant failure, but it is one of the factors.

Transfield Services (Australia) Pty Limited v Nortask Pty Ltd & Anor [2012] QSC 306

Significance

This is a rare example of a case in which a denial of procedural fairness by an adjudicator did not result in the decision being declared void because absent the denial of procedural fairness the outcome would have been no different.

Facts

In 2011, Nortask Pty Ltd (**Nortask**) made a payment claim for $2,224,480.62 against Transfield Services (Australia) Pty Limited (**Transfield**). Transfield acknowledged that it owed $592,881.70, which it paid.

The adjudicator determined that Nortask was owed $2,060,095.

Transfield made an application to the court arguing:

- the adjudicator had breached the rules of procedural fairness by deciding on a basis on which characterisation Transfield was not heard; and
- the adjudicator's decision was deficient because it did not give reasons for his preference of one statement over another.

Nortask conceded that the adjudicator had breached the rules of procedural fairness but submitted that the breach could not have made any difference to the outcome.

Judgment

The court dismissed the application, finding that there was no material denial of procedural fairness. In particular:

- the adjudicator had made his decision on an interpretation of agreement relating to the variation made available by the parties;
- even though the adjudicator was wrong, there could not have been a different result had the adjudicator proceeded on the correct basis;
- the adjudicator's absence of reasons as to why particular evidence was preferred was immaterial; and
- in this case, it was immaterial only because the effect of giving reasons would not affect the adjudicator's construction of the agreement relating to the variation.

Unifor Australia Pty Ltd v Katrd Pty Ltd atf Morshan Unit Trust t/as Beyond Completion Projects [2012] QSC 252

Significance

An adjudicator's decision will be void if it assesses the value of work on a quantum meruit basis rather than pursuant to the provisions of the Qld Act.

Facts

Katrd Pty Ltd (**Katrd**) entered into negotiations with Unifor Australia Pty Ltd (**Unifor**) to install office systems at 111 Eagle Street in Brisbane. During the negotiations, the parties exchanged various proposals with different contractual terms. The negotiations concluded with Unifor providing Katrd with a purchase order.

Katrd served three tax invoices for variations endorsed under the Qld Act. Unifor's scheduled amount was $nil. Katrd made an adjudication application.

The adjudicator decided Unifor had to pay Katrd. The adjudicator reached his decision by first deciding that Katrd had an 'entitlement to be paid' and it would be 'unjust to deny' that entitlement because of one 'anomaly' in Katrd's supporting documents. The adjudicator then decided that, despite the anomaly, Katrd's claim represented a 'fair and reasonable value' of the additional costs that Katrd had incurred.

Unifor applied to the Supreme Court for a declaration that the adjudicator's decision was void due to jurisdictional error because the adjudicator took into consideration factors outside of those listed in section 26 of the Qld Act.

Judgment

The court declared the adjudicator's decision void, holding that the adjudicator fell into jurisdictional error by performing his valuation on a basis akin to quantum meruit, rather than having regard to the provisions of the Qld Act.

Ware Building Pty Ltd v Centre Projects Pty Ltd & Anor (No 1) [2011] QSC 424

Significance

The case demonstrates the importance of including all reasons for withholding payment in the payment schedule. It also highlights the importance of objecting to the introduction of new reasons for payment as soon as possible.

Facts

Centre Projects Pty Limited (**Centre Projects**) was contracted to do plastering work for Ware Building Pty Ltd (**Ware Building**).

Centre Projects made a payment claim under the Qld Act and obtained a favourable adjudication decision. Ware Building applied for an injunction restraining the enforcement of that decision.

Ware Building's grounds for challenging the decision were:

- the adjudicator had failed to consider the submission put before him by it;
- Centre Projects' submissions on the adjudication application raised new reasons for payment which Ware Building was unable to respond to due to the prohibition on fresh material in section 24(4) of the Qld Act; and
- once the adjudicator had decided that variations issued by Ware Building's manager should be allowed, the adjudicator should have allowed the contract processes for pricing variations to take place rather than determining the quantum himself.

Judgment

The court dismissed the application and ordered that the sum of money paid into court by Ware Building be paid out to Centre Projects on the basis that Ware Building had failed to demonstrate error on the part of the adjudicator.

The court held that:

- the adjudicator could not have considered arguments that had not been advanced in the payment schedule;
- there was no evidence that the adjudicator had relied upon the new reasons put forward in adjudication application in making the decision. Furthermore, Ware Building did not make any protest when Centre Projects' submissions, including the new reasons, were received by Ware Building; and
- Ware Building had not at any stage submitted that if the variation orders issued by its manager should be allowed, the adjudicator should allow the processes of the contract to take place.

Victoria cases

In this section, the *Building and Construction Industry Security of Payment Act 2002* (Vic) is referred to as the 'Vic Act'.

470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd [2012] VSC 235

Significance

There is no precondition to the making of a payment claim under the Vic Act that the claimant made the payment claim in good faith or had a bona fide belief in the payment claim's contents.

Facts

470 St Kilda Road Pty Ltd, the plaintiff owner (**470 St Kilda**) and Reed Constructions Pty Ltd, the defendant builder (**Reed**) entered into a design and construct contract for residential apartments and offices at 470 St Kilda Road in Melbourne. Reed submitted a payment claim under the Vic Act for $760,698 which was denied by 470 St Kilda on the grounds that the claim:

- was not made in good faith because Reed included a false statutory declaration that all employees and subcontractors had been paid amounts due to them; and
- was invalid because it contained a false statutory declaration.

Evidence that Reed had in fact failed to pay its employees and subcontractors was in dispute.

The matter proceeded to adjudication under the Vic Act. The adjudication determination required 470 St Kilda to pay Reed the full amount of the payment claim. 470 St Kilda challenged the adjudicator's determination.

Decision

Vickery J held that it was not a requirement that a payment claim be served by a claimant in good faith and/or with a bona fide belief in the entitlement to the moneys claimed. It was held that a lack of good faith is more appropriately dealt with by the payment schedule, and cannot operate to invalidate a payment claim form.

As a matter of statutory interpretation, His Honour refused to read into the Vic Act a precondition that the payment claim be made in good faith because a respondent is well-positioned to address spurious claims in its payment schedule, and the adjudicator is well-positioned to reject spurious claims in the adjudication. A contrary interpretation (requiring an examination as to the bona fides of every claim for payment) would undermine the primary objective of the Vic Act, being the expedition in the determination of the interim rights of the parties in relation to the recovery of progress claims under a construction contract.

Further, Vickery J accepted the adjudicator's finding that the statutory declaration was not false on the basis that there was some evidence for the adjudicator to have found the statutory declaration was true and that Reed had complied with the construction contract by providing the statutory declaration. His Honour noted that the approach of the adjudicator to such issues is to do the best they can to arrive at a level of positive satisfaction one way or the other based on the documentary material before them.

His Honour further noted that, while it was well established at law that the failure to provide adequate reasons in an arbitral award will constitute error of law on the face of the record, this was not the case in these circumstances. It was held that, although the reasons given by the adjudicator were relatively brief, they were adequate to satisfy the requirements of section 23(3) of the Vic Act. The fact that the adjudicator made a bona fide attempt to provide the required reasons, and provided adequate reasons which dealt with all substantive issues in dispute, was sufficient in the circumstances.

Dura (Aust) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (formerly SC Land Richmond Pty Ltd) (No. 4) [2012] VSC 155

Significance

Under the former sections 25 and 26 of the Vic Act, adjudication amounts placed into trust because of ongoing litigation proceedings are to be directed, after the conclusion of those proceedings, first to the claimant's entitlements (for progress payments) and then the left over funds to the respondent. If the claimant is unsuccessful at trial (and has no entitlement to payment) all the funds revert to the respondent.

Note that this case concerns sections 25 and 26 of the Vic Act. Sections 25 to 27 of the Vic Act have since been repealed. A new Division 2A was inserted providing for review of an adjudication.

Facts

Hue Boutique Living Pty Ltd (**Hue**) engaged Dura (Australia) Constructions Pty Ltd (**Dura**) to construct 29 residential apartments. Dura and Hue had been involved in several construction disputes that were the subject of three separate adjudications. The result of the adjudications was that Hue was required to pay Dura a total of $1,107,694.49 (**adjudicated amount**).

Following the adjudications, Hue initiated litigation proceedings (**litigation proceedings**) and the adjudicated amount was placed in trust pending the resolution of the litigation proceedings.

In the litigation proceedings, it was determined that the superintendent's clause 44.6 certificate certified that the costs incurred by Hue exceeded the amount which would have been paid to Dura by $4,457,308.

The current proceedings concerned the adjudicated amount. Section 26(2) (now repealed) of the Vic Act provided that funds are held on trust first to satisfy the claimant's entitlements (either at trial or in respect of other progress claims), and any residual funds are to be then paid to the respondent.

Dura argued that the amounts in trust should be used to partially satisfy the debt due upon the clause 44.6 certificate, which is now reflected in the court's judgment in Hue's favour. Dura argued that the moneys held in the designated trust account represented Dura's entitlement which should be paid to it in diminution of its judgment on the clause 44.6 certificate.

Hue argued that pursuant to the process in the Vic Act, the funds should revert to it.

Decision

Dixon J held that Dura had no entitlement to the funds and that the funds were to revert to Hue pursuant to the process set out in section 26(2) (now repealed) of the Vic Act.

The court noted that all of the disputes between Dura and Hue in connection with the construction contract had been finally determined under the litigation proceedings. The final certification under the construction contract is of a debt due from Dura to Hue, and there could be no entitlements now arising in favour of Dura to the moneys held in the designated trust account.

The court held that Dura was effectively raising a new challenge to the finality of the superintendent's clause 44.6 certificate and contending that the sum certified by the superintendent under clause 44.6(b) of the construction contract is in error.

As Dura did not:

- establish any entitlement generally to payment in its favour in the litigation proceedings;
- raise any issue in the litigation proceedings concerning its entitlement to funds in the trust account; and
- challenge the superintendent's clause 44.6 certificate as reviewable for error on this ground in the litigation proceedings,

Dura could not now mount a collateral challenge against the superintendent's certificate on this basis. Dura could have, and should have, challenged the superintendent's clause 44.6 certificate in the litigation proceedings.

Western Australia cases

In this section, the *Construction Contracts Act 2004* (WA) is referred to as the 'WA Act'.

All Roofs Pty Ltd and Southgate Corporation Pty Ltd [2012] WASAT 178

Significance

There can be an effective variation of a construction contract notwithstanding an express provision in the original contract prohibiting variations or that the variation does not comply with an express term requiring it to be in a particular form.

Claims that arise by operation of law, such as estoppel or unjust enrichment, or under statute do not fall within the WA Act adjudication regime. They are not 'payment claims' (as defined in section 3 of the WA Act) because they are not made 'under a construction contract'.

The SAT does not have jurisdiction to review an adjudicator's decision to order a party to pay costs to its opponent under section 34(2) of the WA Act.

Facts

All Roofs Pty Ltd (**All Roofs**) applied for an adjudication against Southgate Corporation Pty Ltd (**Southgate**) seeking payments for costs incurred as a result of delays to the construction contract. The contract had a fixed price which had been paid in full. All Roofs claimed that it was entitled to the payment of reasonable costs arising from the delay pursuant to the construction contract between the parties; or of 'fair and reasonable costs' pursuant to a variation to the contract.

The contract of variation was alleged to be in writing, comprised of several emails between the parties or was to be implied from the conduct of the parties.

If there was no effective variation of the contract, All Roofs asserted that the communications between the parties were such that Southgate was prevented from denying that the delay payment was due.

The adjudicator dismissed All Roofs' claim and made a costs order against it under section 34(2) of the WA Act.

All Roofs applied to the State Administrative Tribunal (**SAT**) for a review of that dismissal and the decision on costs.

Decision

The SAT dismissed the application, affirming the adjudicator's decision.

It held that an agreement to vary a contract can still be binding even if it does not comply with express provisions in the original contract stating that the contract cannot be varied or that any variation must be in a particular form. On the facts, however, there was no such variation.

The claim based on estoppel failed on the facts. Moreover, it was not a payment claim within the meaning of section 3 of the WA Act. A payment claim by a contractor needed to be made under a construction contract for '*an amount in relation to the performance or non-performance by the contractor of its obligations under the contract*'. It therefore did not give rise to a payment dispute for the purposes of section 6 of the WA Act.

The SAT concluded that it had no jurisdiction to review the adjudicator's decision on costs.

Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd [2012] WASC 304

Significance

The Supreme Court has jurisdiction to hear an application for a declaration that a determination should be set aside.

When considering an adjudication, an adjudicator should treat the grounds upon which the adjudication can be dismissed under section 31(2)(a) of the WA Act as threshold issues to be considered in order to establish his or her jurisdiction to decide the case on the merits under section 31(2)(b) of the WA Act. They were broad jurisdictional facts which the adjudicator had to decide. They could be reviewed by the Supreme Court but only overturned if the adjudicator's determination of them was irrational or illogical.

This is a high threshold to reach. Accordingly, the better strategy for a losing party may be not to dispute the determination but instead issue court proceedings to seek final resolution of the issues in question.

Facts

Cape Range Electrical Contractors Pty Ltd (**Cape Range**) had succeeded against Austral Construction Pty Ltd (**Austral**) in an adjudication. Cape Range applied to the District Court for leave to enforce the determination pursuant to section 43 of the WA Act.

In response, Austral commenced proceedings in the Supreme Court seeking declaratory relief challenging the validity of the adjudicator's determination. Cape Range argued that section 46(3) of the WA Act precluded any challenge to the adjudicator's decision by way of declaratory relief; any such challenge needed to be made by writ of certiorari. Austral also argued that the adjudicator's determination was invalid on the basis that:

- section 26 of the WA Act was not complied with; and
- the adjudicator had failed to make a determination contemplated by the WA Act, and/or breached a requirement for procedural fairness contained in section 32(1) of the WA Act by failing to decide a set-off argument that Austral had raised.

Decision

The court found that whilst section 46(3) of the WA Act precluded an application other than by way of writ of certiorari to the State Administrative Tribunal (**SAT**), it did not prohibit an application for a declaration in the Supreme Court.

The court then considered whether the adjudicator's determination was invalid. This led to detailed consideration of the grounds upon which an adjudication can be dismissed under section 31(2)(a) of the WA Act. The issues was whether those grounds were jurisdictional facts which had to be present before the adjudicator could decide the case on the merits under section 31(2)(b) of the WA Act.

The court found that the grounds were jurisdictional facts and then went on to consider whether they were jurisdictional facts in the 'narrow' or 'broad' sense. The distinction between the narrow and broad facts is whether or not those matters must in fact exist or whether they are matters whose existence is to be decided by the adjudicator. If a jurisdictional fact is 'narrow' then the question of its existence is capable of being reviewed by a superior court. If, on the other hand, the jurisdictional fact is broad, the superior court can only review the method by which the adjudicator decided whether that fact existed. The adjudicator's decision could only been overturned if it was:

> '*was so unreasonable that no decision-maker would have reached that conclusion, was reached by misconstruing the [WA Act], took into account irrelevant considerations, or manifested serious irrationality or illogicality*'.

The court concluded that Parliament intended the criteria in section 32(1)(a) of the WA Act to be jurisdictional facts in the broad sense. It then found that the adjudicator had not acted in any way that would give rise to any jurisdiction to overturn the decision.

On the failure of the adjudicator to take into account a set-off claim, the judge stated the alleged claim was poorly articulated and not readily apparent from the adjudication response.

The court therefore gave leave to enforce the determination.

Classic Stone (Qld) Pty Ltd and Julie Mauretta Pitcher [2012] WASAT 80

Significance

It is important to identify the parties to the contract that is to be enforced. This is particularly so with small businesses where there can often be a confusion about whether the contract is with the principal or his or her business. In this case, the State Administrative Tribunal (**SAT**) upheld the dismissal of an adjudication which had been commenced against the wrong party.

Facts

Classic Stone (QLD) Pty Ltd (**Classic**) specialised in the installation and supply of tiles. Julie Mauretta Pitcher (**Pitcher**) was an employee of Vue Developments Pty Ltd, which traded as Vue Developments. She was not a director or shareholder of that business but Classic asserted that she had held herself out as the owner of it.

Classic commenced an adjudication over a contract to supply tiles which it claimed to have made with Pitcher. Pitcher argued that the contract was with Vue Developments Pty Ltd and not herself.

The adjudicator had found that there was no contractual relationship between Classic and Pitcher and dismissed the adjudication. However, he did not identify the specific ground within section 31(2)(a) of the WA Act upon which he based the dismissal.

Classic sought a review of the dismissal.

Under section 46 of the WA Act, the SAT can only review cases that an adjudicator has dismissed under section 31(2)(a) of the WA Act.

Pitcher argued that the SAT was unable to review the adjudicator's dismissal of the case because it was either a determination on the merits and therefore not a dismissal at all or that it was not a dismissal on one of the grounds set out in section 31(2)(a) of the WA Act.

Decision

The SAT took a common sense approach to the issue.

It found that the decision of the adjudicator was amenable to review. The adjudicator's dismissal was properly characterised as a decision to dismiss under section 31(2)(a)(ii) of the WA Act on the basis that the adjudication application had not been prepared and served on a party to the contract as required by section 26 of the WA Act.

After analysing the evidence, the SAT found that, on a balance of probability, it was not established that there was any contractual relationship between Classic and Pitcher. It therefore upheld the dismissal.

The SAT also held that even if it was wrong in finding that there was no contractual relationship between the parties, the application would fall to be dismissed under section 31(2)(a)(iv) of the WA Act on the basis that it was not possible to fairly make a determination because of the complexity of the matter.

Conneq Infrastructure Services (Australia) Pty Ltd and Sino Iron Pty Ltd [2012] WASAT 13

Significance

An application for an adjudication under the WA Act may only be made if the contract in dispute is a 'construction contract' and is for 'construction work'. The WA Act requires an appointed adjudicator to dismiss an application for adjudication without making a determination on its merits if, amongst other things, the contract concerned was not a construction contract.

This decision provides some clarity that, when assessing what constitutes 'construction work', the 'mining exclusion' at section 4(3)(c) of the WA Act applies broadly. It is not only applied to mining operations, but also extends to the construction of facilities that are not directly used for mining purposes.

Section 4(3)(c) excludes any of the following on a site in WA:

> '*constructing any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance.*'

The Tribunal held that the focus needed to be on the purpose of the plant being constructed. Here, its purpose was to extract salt, which was a mineral. It was therefore fall within the 'mining exclusion' in section 4(3)(c) of the WA Act.

The approach of focussing on the purpose of the plant being constructed was followed by the Supreme Court of Western Australia in *Re Graham Anstee-Brook; Ex Parte Karara Mining Ltd* [2012] WASC 129.

Facts

Conneq Infrastructure Services (Australia) Pty Ltd (**Conneq**) and Sino Iron Ltd (**Sino**) entered a contract in July 2010 by which Conneq agreed to undertake work and provide services in connection with a desalination plant that was to form part of the Sino Iron ore project. Sino terminated the contract in October 2010.

The contract contained provisions relating to the payment of Conneq's costs in the event of termination. Conneq made a claim for the payment of those costs in February 2011. Sino rejected the claim.

Conneq subsequently applied for an adjudication of its claim under the WA Act. The adjudicator dismissed the application under section 31(2)(a)(i) of the WA Act (the contract was not a construction contract) and section 31(2)(a)(ii) of the WA Act (the application did not comply with the requirements of section 26 of the WA Act). The adjudicator held that the contract was not a construction contract as the water produced by the desalination plant was used for the purpose of processing iron ore, and consequently the work to be performed under the contract was not construction work by reason of the 'mining exclusion' in the WA Act.

Conneq contended that the contract was a construction contract having regard to the definition of 'construction work' and that the 'mining exclusion' did not apply as:

- the contract was not a contract for 'constructing any plant' within the meaning of section 4(3)(c) of the WA Act; and
- the purpose of the desalination plant was to produce desalinated water and was not to undertake a mining activity. The production of desalinated water was an activity that was only incidental to mining and processing iron ore.

Sino contended that the contract for the construction of a plant that processed a substance (seawater), and therefore the work performed under the contract was not construction work by reason of the 'mining exclusion' of the WA Act. Alternatively, the purpose of the plant was to extract water from a mineral bearing substance.

Sino further contended that the contract was a contract for constructing a plant as referred to in the 'mining exclusion' in the WA Act as:

- the desalination plant was critical plant for the purposes of processing or extracting a mineral bearing substance because it is a plant used in a larger process, the purpose of which is the processing and extraction of iron ore; and
- over 99% of the water produced by the desalination plant was to be used in extracting and processing iron ore.

Decision

The Tribunal held that the contract was not a construction contract but for a different reason to the adjudicator. It held that the adjudicator was wrong to focus on the use of the water that the desalination plant was to produce. The focus had to be on the purpose of the desalination plant itself. As its purpose was to extract salt which is a mineral, the plant fell within the 'mining exclusion' and the contract was deemed not be a 'construction contract' under the WA Act.

DPD Pty Ltd v McHenry [2012] WASC 140

Significance

This decision re-affirms the position in Western Australia that a payment claim expires if the adjudication is not commenced within the 28 days from when the payment dispute starts. It confirms a marked departure from the jurisprudence on repeated payment claims in New South Wales and Queensland. Those two jurisdictions allow claims to be repeated provided they have not been adjudicated, and that in Western Australia, which prohibits adjudication of previous claims regardless of whether they have yet to go to adjudication.

Facts

DPD Pty Ltd (**DPD**) carried out construction work for Zafiro Pty Ltd and McHenry (**McHenry**) under a partly oral and partly written contract with express payment provisions (meaning the implied payment provisions under the WA Act took effect).

A dispute over defects and delays arose which led to payment over two payment claims issued on 17 February 2011 and a revised claim of 17 June 2011 being delayed or made only in part. As defects continued to subsist, payment of the later claim was delayed further until two new fresh payment claims for the same work were issued on 3 November and 8 November 2011. It is these claims to which the adjudication application related.

DPD submitted that the earlier payment claims of 17 February and 17 June 2011 were not payment claims within the meaning of the WA Act and that no right to adjudication under the WA Act arose, and that therefore, no right to adjudication could have been lost by not following up those claims with an application under the WA Act.

Alternatively, DPD argued, that even if a right to adjudication of those earlier claims under the WA Act did arise, the decision of Southwood J in *Georgiou Group Pty Ltd and MCC Mining (Western Australia) Pty Ltd* [2011] WASAT 120 to the effect of prohibiting the recycling of payment claims was wrong and the question of recycled claims should be reconsidered to allow such claims to go to adjudication.

Decision

The court found that the earlier payment claims complied with the implied requirements of the WA Act for payment claims and that they were therefore, truly payment claims within the meaning of the WA Act to which a right of adjudication applied.

The court approved of the *Georgiou v MCC Mining* decision in that the recycling of payment claims is prohibited by the WA Act, mostly on policy grounds. This confirmed that all rights to adjudication of the earlier claims was lost when the 28-day time limit from the date of the payment dispute expired, at the latest on 17 July 2011, for the 17 June 2011 claim.

His Honour, McKechnie J, was however, more equivocal on the position in the context of a contract which expressly allows claims to be repeated, such as in a final payment claim, and referred to the comments of Kelly J and Olsson J in *K&J Burns Electrical Pty Ltd v GRD Croup (NT) Pty Ltd* [2011] NTCA 1. In commenting, His Honour said:

> '*… It was the interpretation of that contract which gave rise to the differing views expressed by the court as to whether it was a payment claim that gave rise to a dispute within the period.*'

Georgiou Building Pty Ltd v Perrinepod Pty Ltd [2012] WASC 72

Significance

Where an applicant has entered judgment against a respondent pursuant to a determination of an adjudicator under the WA Act and the judgment has not been discharged, this decision confirms that the applicant is a creditor and can apply to wind up the respondent.

Facts

Georgiou Building Pty Ltd (**Georgiou**) had succeeded in an adjudication against Perrinepod Pty Ltd (**Perrinepod**). Perrinepod applied unsuccessfully to the State Administrative Tribunal to review the adjudicator's decision. Perrinepod then appealed to the Court of Appeal but this too was dismissed. Its response was to issue Supreme Court proceedings against Georgiou challenging the contractual basis upon which the adjudication had proceeded.

Georgiou obtained leave to enforce the determination as a judgment. It then applied under the *Corporations Act 2001* (Cth) for Perrinepod be wound up on the ground that it was insolvent.

Perrinepod argued that Georgiou was not a creditor and therefore could not apply to wind up Perrinepod. This was because the Supreme Court proceedings might reverse the adjudication determination. Perrinepod also argued that the winding up application was an abuse of process as there was a dispute about the underlying debt.

Decision

The court referred to previous case law where creditors had issued statutory demands to enforce adjudication determinations. On the basis of those authorities, the court had no doubt that Georgiou had standing as a creditor to pursue the winding up. This followed from the structure of the WA Act and, in particular, the limited right of

review of an adjudicator's determination, and the ability to enforce the determination as a judgment of the court even though it was, in a sense, provisional.

The court held that the application was not an abuse of process as the determination currently stood as a judgment. That judgment was unpaid so that Perrinepod was presumed to be insolvent. In addition, Georgiou had exhausted its other avenues for recovery of the sum due.

Accordingly, the court ordered that Perrinepod be wound up.

Hire Access Pty Ltd v Michael Ebbott t/as South Coast Scaffolding And Rigging [2012] WASC 108

Significance

This decision gives guidance to an unsuccessful respondent who wishes to delay the enforcement of a determination. The court held that the correct course is for the unsuccessful respondent to oppose an application for leave to enforce. In this case, the respondent attempted to seek a stay of the determination from the Supreme Court and failed.

Facts

This decision followed on from the decision in *South Coast Scaffolding and Rigging and Hire Access Pty Ltd* [2012] WASAT 5. After the State Administrative Tribunal (**SAT)** reversed the dismissal, the matter was remitted to the adjudicator. He determined that Hire Access Pty Ltd (**Hire Access**), the respondent, was liable to pay the sums claimed by Michael Ebbott t/as South Coast Scaffolding And Rigging (**South Coast**).

Hire Access issued proceedings in the Supreme Court appealing against the decision of the SAT. At the same time, Hire Access applied for an interim stay of the SAT's decision to overturn the dismissal and remit the matter back to the adjudicator and of the adjudicator's subsequent determination.

This decision concerns the application for the interim stay.

Decision

The Supreme Court dismissed the application.

The SAT decision and orders had been completely implemented. The original decision of the adjudicator had been set aside and the matter had been remitted to the adjudicator for a second determination. Therefore, there was no SAT decision in effect to stay. The payment was ordered by the adjudicator and not the SAT. As the judge noted, 'the horse had bolted'.

The power to stay proceedings under Order 65 rule 1 applied to proceedings taking place in 'the primary court'. In this case, that was the SAT, not the adjudicator. There was therefore no power to stay the adjudicator's second determination.

The correct course for Hire Access would be to seek to delay enforcement by opposing any application for leave to enforce the determination. South Coast had already applied to enforce the determination: *Michael Ebbott trading as South Coast Scaffolding and Rigging Services v Hire Access Pty Ltd* [2012] WADC 66. That application had been adjourned pending the determination of the stay application in this case.

In any event, it would not be appropriate to order a stay under the principles set out in *Eastland Technology Australia Pty Ltd v Whisson* [2003] WASCA 307. There were no special circumstances that would justify departure from the ordinary rule that the successful party at first instance is entitled to enforce the judgment pending determination of the appeal. There was nothing to suggest that Hire Access would be unable to recover any money paid in the event it was successful on the appeal.

Howard and Farrell [2012] WASAT 169

Significance

This decision confirms that a 'payment dispute', which is the trigger for adjudication under the WA Act Western Australia, arises only once when payment has not been paid by the due date. The due date cannot be extended or renewed as a result of subsequent part payments or demands. If no application is made within 28 days from that

date, any opportunity to adjudicate is lost, even if subsequent payments or further letters of demand are issued for the outstanding balance.

Facts

Mr Howard (**Howard**) carried out painting work as a subcontractor to Mr Farrell (**Farrell**) for the 'Our Lady Star of the Sea Primary School' in Esperance. There was no formal contract in place nor were there any specific payment terms, only a simple form quote for $25,793.77.

The work was carried out between February and June 2011 and, it seems, completed soon after. Howard then issued, on 21 June 2011, a statement and tax invoice (21 June 2011 statement) which claimed the outstanding amounts due. The statement did not have or set out any terms as to payment such as '14 day payment terms' or '30 days net' or the like, or have any underlying contract with payment terms which applied.

In the absence of a contracted payment regime, in Western Australia, the WA Act will imply payment terms into the agreement, similar to those under the security of payment legislation in other jurisdictions. Those terms require a claim to set out certain particulars, a response to be provided within 14 days and payment of the amount accepted or, if no response is given, the full amount, within a further 14 days.

As the quote for the work had no payment terms in it and none were otherwise agreed, the WA Act implied terms for payment applied meaning that payment for the 21 June 2011 statement would have had to have been made within 28 days, or by 18 July 2011. No payment was made by that date thus triggering a 'payment dispute' under the WA Act and giving rise to a right to adjudicate on that day.

Subsequent to the due date for payment, the solicitor for Howard sent a letter of demand for amounts outstanding to Farrell. Following that, a part payment of the amount outstanding was made on 29 August 2011 and a further part payment was made on 20 September 2011, possibly in an attempt to avoid service of the application (served on 23 September 2011).

Howard argued that while a the 'payment dispute' arose on 18 July 2011, that was superseded by the later letter of demand or the part payments that were made, giving rise to a new 'payment dispute' over the balance outstanding, and a later date by which to apply for adjudication, meaning the application on 23 September 2011 was within time.

Decision

The State Administrative Tribunal (**SAT**) disagreed and decided that the earlier non-payment in breach of the implied terms was the first and only time when a 'payment dispute' for the claim in question arose.

The SAT also decided that the mere repetition of a claim, by issuing a demand, cannot give rise to a new 'payment dispute' nor does any part payment of the unpaid balance. The SAT therefore affirmed the determination of the adjudicator, and the application for review was dismissed.

Michael Ebbott t/as South Coast Scaffolding And Rigging Services v Hire Access Pty Ltd [2012] WADC 66

Significance

The 28-day time limit for payment of a payment claim implied into contracts by section 17 and section 18 of the WA Act does not apply when the contract in question makes express provision for the time within which invoices must be paid. This upholds the decision of State Administrative Tribunal in *Blackadder Scaffolding Services (Aust) Pty Ltd and Mirvac Homes (WA) Pty Ltd* [2009] WASAT 133.

Facts

This case followed on from the decision of the State Administrative Tribunal (**SAT**) in *South Coast Scaffolding and Rigging and Hire Access Pty Ltd* [2012] WASAT 5 to remit the matter back to the adjudicator for determination. The adjudicator determined that Hire Access Pty Ltd (**Hire Access**), the respondent, was liable to pay the sums claimed by Michael Ebbott t/as South Coast Scaffolding And Rigging (**South Coast**).

South Coast applied to the District Court for leave to enforce the adjudication determination under section 43 of the WA Act.

Hire Access appealed to the Supreme Court against the SAT's decision to overturn the dismissal of the adjudication and, on that basis, opposed South Coast's application.

These proceedings were adjourned pending the determination of Hire Access's application to the Supreme Court which was the subject of the decision in *Hire Access Pty Ltd v Michael Ebbott trading as South Coast Scaffolding and Rigging* [2012] WASC 108.

In this case, the key issue for the District Court was whether it should stay enforcement because of the appeal. This required the court to consider whether the determination was based on an error of law. This primarily involved determining whether the *Blackadder* decision was correct. The court would then exercise its discretion under section 43 of the WA Act.

Decision

Commissioner Gething affirmed the position in the *Blackadder* decision, namely that section 17 and section 18 of the WA Act did not apply to the contracts between South Coast and Hire Access because the agreements provided for the time by when a payment must be made. Commissioner Gething came to the above conclusion on the bases that:

- if the WA Parliament had intended section 17 and section 18 of the WA Act to override the contract it would have made this clear as it has done in other sections of the WA Act;
- by using the language of implied provisions, the WA Parliament has drawn on established common law concepts. For a term to be implied it must be necessary and not contradict any express term of the contract; and
- the overall approach of the WA Act is to preserve the freedom of parties to contract on the terms they consider appropriate.

Commissioner Gething found that the decision in the *Blackadder* decision is correct and granted leave to South Coast to enforce the determination pursuant to section 43 of the WA Act.

Re Graham Anstee-Brook; Ex Parte Karara Mining Ltd [2012] WASC 129

Significance

This case considered whether an adjudicator must consider a late response if it was submitted within sufficient time for the adjudicator to make a determination within the 14-day time limit under the WA Act.

The case also considered the 'mining exclusion' at section 4(3)(c) of the WA Act. It held that a pipeline that took water to a mine site and a mine camp was not plant for the extraction and processing of a mineral bearing substance.

The contract therefore fell outside the 'mining exclusion' of the WA Act and could be subject of an adjudication. The focus on the purpose of the plant under construction is consistent with the approach taken by the State Administrative Tribunal in *Conneq Infrastructure Services (Australia) Pty Ltd and Sino Iron Pty Ltd* [2012] WASAT 13. There is also a second decision in the same case where application for costs orders for the judicial review application were heard.

Facts

By contract dated 6 July 2010, Karara Mining Ltd (**Karara**) engaged DM Drainage Constructions (**DMC**) to construct a water pipeline to Karara's mine site, northeast of Perth.

DMC submitted a claim for $4,975,650.70, which Karara refused to pay. DMC applied for an adjudicator to be appointed to determine the dispute under the WA Act. Mr Graham Anstee-Brook was appointed (**adjudicator**).

DMC served its adjudication application on 24 January 2012. Pursuant to the WA Act, Karara was required to serve its written response within 14 days of service of DMC's application. On 10 February 2012 (three days overdue), Karara served its adjudication response. On 28 February 2012, the adjudicator delivered his determination; that the applicant must pay DMC $4,981,285.50 (**determination**). In his reasons for decision, the adjudicator decided that because Karara's response had not been served within the requisite 14-day time limit, he was obliged to ignore Karara's adjudication response and to only consider DMC's application.

Karara then sought a judicial review to quash the adjudicator's determination on three grounds:

- the adjudicator committed jurisdictional error by concluding that the WA Act required him to ignore Karara's adjudication response because it had been served outside the 14-day time limit;
- Karara had been denied procedural fairness because the adjudicator did not consider Karara's adjudication response; and
- the adjudicator committed jurisdictional error in that the works were for the construction of a plant for the purposes of processing a mineral bearing substance within the 'mining exclusion' in section 4(3)(c) of the WA Act and was not a 'construction contract' for the purposes of the WA Act.

Decision

At the order nisi stage of the judicial review application, the court considered that the first two grounds were arguable bases upon which the determination could be challenged and should proceed to a full hearing of them. However, it dismissed the application for stay of the determination. The court considered that it was arguable that the adjudicator erred in deciding he was obliged to ignore the adjudication response. This was because:

- section 27(1) of the WA Act did not state the consequences for a respondent not serving its response within the prescribed time;
- the object of the provision is to ensure a rapid adjudication process; and
- that object would not be frustrated by a response served at a time when the adjudicator still had sufficient time to consider it and make the determination within the prescribed time.

It is notable that *Witham v Raminea* was not cited at the order nisi hearing.

In relation to argument that the case fell within the 'mining exclusion', the court decided that it did not disclose an arguable case, or in any case, had no reasonable prospect of success. Whilst the court agreed that:

- the pipeline would transport water from the bore field to the campsite and the mine site;
- the water, or most of it, would then used for the purposes of extracting and processing iron ore,

the pipeline itself was not part of any plant for the purposes of extracting or processing any mineral bearing substance.

At the subsequent full hearing of the judicial review application, the court considered the question of how an adjudicator should deal with a late response. *Witham v Raminea* was cited. Despite have recognised at the order nisi hearing that it was arguable that an adjudicator should consider such a response if he or she could do so within the timescale for the determination, the Court concluded that:

- responses must be served within the 14 day time limit;
- an adjudicator does not have the discretion to extend this time limit;
- an adjudicator nonetheless has a discretion to consider the late response as section 32(1)(b) of the CCA provides that an adjudicator may inform him or herself about the case as he or she thinks fit.

South Coast Scaffolding And Rigging and Hire Access Pty Ltd [2012] WASAT 5

Significance

This decision confirms that the implied time limits of the WA Act do not apply where a construction contract contains a provision which stipulates a due date for the payment of a payment claim (known as a 'time for payment' provision).

Facts

This case was the start of a series of proceedings which was subsequently upheld by the District Court in *Michael Ebbott trading as South Coast Scaffolding and Rigging Services v Hire Access Pty Ltd* [2012] WADC 66. The third case in the series, the decision in *Hire Access Pty Ltd v Michael Ebbott t/as South Coast Scaffolding And Rigging* [2012] WASC 108 concerned an application for an interim stay of the State Administrative Tribunal's (**SAT**) decision in this case.

South Coast Scaffolding And Rigging (**South Coast**) applied to the SAT for a review of an adjudicator's decision to dismiss its application for adjudication for being out of time. South Coast's claim related to unpaid sums arising under a contract for it to erect scaffolding supplied by Hire Access Pty Ltd (**Hire Access**), the respondent, for the construction of the Perth Arena.

The payment claims were made by South Coast on 14 April 2011 for work performed under the construction contract between 14 March 2011 and 8 April 2011.

The contract between the parties provided that South Coast was to invoice its services 30 working days prior to the due date for payment, with the payment date being the thirtieth day of each month. South Coast therefore submitted that payment claims dated 14 April 2011 were due for payment by 30 May 2011. Consequently, the payment dispute arose between the parties on 31 May 2011, and the application for adjudication was filed and served within time on 20 June 2011.

The adjudicator disagreed and dismissed South Coast's application as being out of time. This was because in his view, the construction contract did not specify how and when Hire Access was to respond to claims for payment, other than by way of payment. The implied payment terms in the WA Act therefore applied. Under these terms, the payment date for South Coast's claims was 12 May 2011 (being 28 days after 14 April 2011). Once Hire Access failed to pay the claims, South Coast then had 28 days in which to serve an application for adjudication. This time limit expired on 9 June 2011 and South Coast's claim, lodged on 20 June 2011, was therefore out of time.

South Coast applied to SAT to review the dismissal of its application.

Decision

The SAT disagreed with the adjudicator's finding. The SAT found that the contract contained a time for payment provision, namely the provision which provided that the payment date was the thirtieth day of each month. The terms that the WA Act implied into the contract therefore would not include the term requiring payment to be made within 28 days of a payment claim being received by Hire Access. Rather, the parties must refer to the contractual time for payment provision in determining when a payment is due.

The due date for payment of South Coast's payment claims was therefore 30 May 2011 and the application for adjudication was made within the WA Act's time limits.

SAT therefore set aside the adjudicator's decision dismissing South Coast's application and remitted the matter back to the adjudicator for determination.

State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd [2012] WADC 27

Significance

This decision confirms that while a party with the benefit of an adjudication determination in its favour is entitled to enforce the benefit of that determination, a court will not grant leave to enforce if the party opposing the application can establish a valid reason as to why the determination should not be enforced. Examples of reasons include that the determination may be vitiated by appealable error, or by other circumstances making the determination susceptible to being set aside.

Facts

State Side Electrical Services Pty Ltd (**SSES**) obtained a determination on 14 November 2011 in its favour in an adjudication proceeding to enforce an adjudication determination under the WA Act made in its favour against the defendant, WA Commercial Constructions Pty Ltd (**WACC**).

Between 14 November 2011 and before 1 March 2012, WACC commenced judicial review proceedings in the Supreme Court seeking orders to quash the adjudication determination on the basis of a denial of natural justice, and sought a stay in that court of execution of the determination.

SSES subsequently brought an application in the District Court seeking leave to have the determination enforced as a judgment.

WACC opposed the application for leave on the basis that it had:

- applied to the Supreme Court for a judicial review of the adjudicator's determination on a number of grounds; and
- identified a number of issues arising in the original adjudication which WACC considered gave it high prospects that the adjudication would be set aside. In particular, WACC identified the fact that the relevant invoices did not comply with the requirements of the WA Act, the fact that SSES had failed to provide the adjudicator with the relevant construction contract and also that one of the amounts claimed by SSES was out of time,

and submitted that SSES should not be granted leave to enforce the determination as a judgment.

Decision

On 1 March 2012, the District Court found that the issues identified by WACC gave rise to legitimate concerns as to the validity of the adjudication which SSES sought to enforce. For that reason, the court was not prepared to grant SSES leave to have the adjudication determination enforced as a judgment.

The registrar adjourned SSES's application indefinitely with leave to relist upon determination of WACC's judicial review application in the Supreme Court.

State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd [No.2] [2012] WADC 60

Significance

This decision considers the tension between competing applications to enforce an adjudication determination and to seek judicial review of a jurisdictional error of law made by the adjudicator in making that determination. This decision provides guidance on whether leave to enforce a determination under the WA Act should be granted (as is necessary in Western Australia) before an application to stay the determination on the grounds of judicial review. Once an order nisi has been made in the judicial review proceedings, this decision confirms that it is appropriate to stay enforcement of the adjudication determination.

Facts

This case followed on after registrar's decision to adjourn an application to enforce an adjudication determination as a judgment in *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd* [2012] WADC 27).

On 8 March 2012, State Side Electrical Services Pty Ltd (**SSES**) appealed against that District Court registrar's decision. That appeal is the subject of this case.

On 2 April 2012, the WA Supreme Court granted an order nisi in the judicial review proceedings started by WACC which confirmed, in effect, that there was a genuine basis for the review.

Decision

On 27 April 2012, the District Court upheld the registrar's decision.

An adjudicator's determination under the WA Act is open to review for an error of law going to jurisdiction (as it is in most jurisdictions). In considering the separate question of whether leave to enforce should be granted (as required in Western Australia), the court considered whether any such review has merit.

In this case, the two issues arose contemporaneously and the court recognised that there was a possibility of a judgment on leave which addresses the merits of judicial review in the District Court, conflicting with the question of judicial review before the Supreme Court in the context of a stay.

As the registrar, in granting the adjournment, was of the view that there were prospects of the judicial review proceedings being successful, and as an order nisi had already been made, the District Court decided that the appeal of the adjournment should be refused.

Synergon Constructions Pty Ltd v Cusack Group Pty Ltd [2012] WASC 474

Significance

The court awarded indemnity costs against a respondent who opposed an application to register a determination as a judgment in order to create delay.

Facts

Synergon Constructions Pty Ltd (**Synergon**) applied to the Supreme Court for leave to enforce an adjudication determination. The respondents (**Cusack**) opposed the application but failed to comply with orders requiring them to file responsive affidavits and submissions and ultimately did not oppose the application at its the final hearing. Cusack did not provide any explanation as to why the matter had not proceeded and why they had not taken steps to meet the orders.

Synergon sought an order for indemnity costs to be paid by Cusack.

Decision

The court awarded indemnity costs. The court took the view that it was difficult to see how Cusack could reasonably have resisted the application to register the determination as a judgment. The court noted that Cusack's actions seemed to be designed to delay enforcement.

Tormaz Pty Ltd and High Rise Painting Contractors Pty Ltd [2012] WASAT 166

Significance

An application by a respondent under section 46 of the WA Act for a review of a decision by an adjudicator to dismiss part of a claim under section 31(2)(a)(ii) of the WA Act, is, in reality, an application for a review of the decision not to dismiss all of the claim. Such a decision is therefore incapable of being reviewed under the WA Act.

Facts

High Rise Painting Contractors Pty Ltd (**High Rise**) applied for an adjudication against Tormaz Pty Ltd (**Tormaz**). The adjudicator had dismissed part of the application because High Rise had not been prepared and served in accordance with section 26 of the WA Act, as it was made more than 28 days after the payment dispute had arisen. However, the adjudicator held High Rise liable to pay the sums claimed in the remaining parts of the application.

Tormaz applied for a review of the adjudicator's decision to dismiss part, rather than all, of the application for adjudication. Tormaz also asserted that the whole application should have been dismissed, principally on the basis that the remaining claims refreshed or repeated earlier claims.

Decision

The State Administrative Tribunal (**SAT**) held that it did not have the power to review the dismissal.

Under section 46 of the WA Act, a person who is aggrieved by a decision to dismiss made under section 31(2)(a) of the WA Act can apply to the SAT for a review of that decision. However, Tormaz was not aggrieved by the dismissal of part of the claim. It was aggrieved by the decision not to dismiss the whole claim. This therefore meant that Tormaz was seeking a review of a refusal to dismiss an adjudication. The SAT did not have the jurisdiction under section 46 of the WA Act to conduct such a review.

Witham v Raminea Pty Ltd [2012] WADC 1

Significance

Leave to enforce a determination might be refused where the determination is susceptible to judicial review over a jurisdictional error of law. However, a non-jurisdictional error of law, such as a lack of procedural fairness, is not sufficient ground to refuse leave as it is not amenable to judicial review. Similarly, the fact that the party opposing the application for leave may have commenced proceedings to challenge the adjudication is not a ground for a court to refuse leave to enforce as the WA Act contemplates such proceedings.

Facts

Witham had obtained a determination in his favour. In so finding, the adjudicator disregarded the Raminea Pty Ltd's (**Raminea**) submissions as they were served outside the 14-day time limit imposed by the WA Act.

Witham applied to the district court for leave to enforce the determination. Raminea opposed the application on the basis of lack of procedural fairness and jurisdictional error. In particular, Raminea submitted that:

- there was a jurisdictional error because the adjudicator found that there was no discretion to extend the time limit for the filing of the response submissions; and
- there was a denial of procedural fairness as the adjudicator had not considered Raminea's submissions.

Raminea also opposed the application on the basis that it had commenced an action in the district court concerning the merits of the case.

Witham argued that a denial of procedural fairness is a non-jurisdictional error of law that is not amenable to judicial review. Moreover, even if judicial review was available for a denial of procedural fairness, there was no such denial in this case as the time limit for the filing of a response under the WA Act is mandatory and had expired. In any event, the court should enforce the determination in order to give effect to the object and purpose of the WA Act.

Witham also argued that the existence of parallel civil proceedings between the parties to a dispute is contemplated under the WA Act and is not a sufficient reason to decline an application to enforce.

Decision

The district court agreed with Witham and gave leave to enforce. It held that, in considering an application for leave to enforce a determination, the court should take into account whether the adjudicator's determination would be open to successful judicial review. Applying that approach, the court found that:

- While an adjudicator's decision is amenable to judicial review for jurisdictional error, in this case there was no such error. The time limit imposed by the WA Act for filing response submissions is mandatory. The adjudicator has no discretion to extend it.
- A denial of procedural fairness is a non-jurisdictional error of law which is not amenable to review. As such, the court was unable to consider that issue.

The court also found that the WA Act clearly contemplates that civil proceedings may proceed in parallel to the making of a determination by an adjudicator. The existence of the district court proceedings is therefore not a sufficient basis for declining Witham's application for leave to enforce.

Northern Territory cases

In this section, the *Construction Contracts (Security of Payments) Act (NT) 2004* is referred to as the 'NT Act'.

Northern Territory of Australia v Urban and Rural Contracting Pty Ltd and Anor (2012) 21 NTLR 139

Significance

This decision confirms that a 'payment dispute' does not arise until after the due date for payment. The existence of a payment dispute is the foundation of the adjudicator's jurisdiction. Section 48(3) of the NT Act does not prevent the Supreme Court from declaring a determination of an adjudicator void for jurisdictional error where the adjudicator wrongly construes the NT Act.

Facts

Urban and Rural Contracting Pty Ltd, the first defendant, (**URC**) applied for adjudication under the NT Act after the plaintiff principal, the Department of Construction and Infrastructure (**Department**), rejected a payment claim but before the time for payment had arisen under the construction contract. An adjudicator, the second defendant (**adjudicator**) made a determination in favour of URC. The Department sought a declaration from the Supreme Court that the determination was void on the basis that the adjudicator lacked jurisdiction.

On the strict interpretation of section 8(a) of the NT Act, the Department asserted that the existence of a payment dispute could only be adjudicated at the time when the amount claimed in the payment claim was due to be paid under the contract.

URC relied on section 6(a) of the *Construction Contracts Act 2004* (WA) and decisions in the Western Australian State Administrative Tribunal to assist in the interpretation of section 8(a) of the NT Act. In doing so, URC argued that a payment dispute could arise on:

- the due date for payment under the contract, if payment had not been made by that date; or
- the earlier date on which the claim has been rejected or disputed (if it has).

URC also asserted that the adjudicator's decision to proceed to a determination of the merits, whether correct or otherwise as a matter of law, was not reviewable by the court.

Decision

The Supreme Court held and made an order declaring the adjudication void for jurisdictional error. The court held:

- A payment dispute does not arise, pursuant to section 8(a) of the NT Act, until the payment claim is due to be paid under the contract.
- The existence of a payment dispute at the date of applying for adjudication is both a jurisdictional fact and an essential pre-condition for the existence of the power to adjudicate.
- Such interpretation of the NT Act provides parties greater clarity and certainty and outweighs any delay imposed on a party wishing to apply for adjudication.
- In applying *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14, section 48(3) of the NT Act does not prevent the Supreme Court from declaring a determination of an adjudicator void for jurisdictional error where the adjudicator wrongly construes the NT Act.

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