Security of Payment Roundup

A comprehensive review of cases in 2013

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NATIONAL OVERVIEW

Developments across Australia

For the second time in its history the NSW Act has been the subject of major amendments with the passing of the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW) (NSW Amendment Act). While these changes are not yet in operation, the changes are far reaching. The major change is the removal of the requirement for a payment claim to state that it is being made under the NSW Act. This will mean virtually every progress payment will be a progress claim made under the NSW Act and will need to be responded to with a payment schedule. The other major changes include the prescription of maximum periods for payment.

Elsewhere, 2013 was a year of 'firsts'. The courts considered security of payment legislation in ACT, SA and Tas for the first time.

Otherwise there has been a consistent flow of cases in NSW and Qld addressing the main issues such as the continued breach of the rules of natural justice by adjudicators and the subsequent voiding of their determinations as well as reinforcement of the position that only one claim can be made per reference date and for each construction contract.

While none of the 10 adjudication determinations made in 2013 resulted in court action under the NT Act, the NT Act which came into force in 2005 continues to have an impact on the building and construction industry in the Northern Territory.

In circumstances where there were allegations of misleading conduct or fraud, the courts in Victoria have reviewed an administrator's findings of fact that go towards establishing the validity of payment claims.

In WA, a number of cases in 2013 demonstrate that the rights of parties under the WA Act are intricately linked to careful drafting and counting of days in determining time periods.

Emerging trends

The courts in NSW and Qld courts have refused to sever the untainted portion of an adjudicator's determination. It maybe that the various security of payment legislation will be amended to deal specifically with this question as has occurred in Victoria.

The Supreme Court of South Australia observed that the security of payment acts in NSW and in SA are largely identical and, accordingly, looked to NSW authorities in one case for guidance in interpreting the SA Act.

The Vic courts continue a purposive interpretation of conflicting drafting in the Vic Act.

Future

We predict that when the NSW Amendment Act commences in 2014 that there will be increase in the number of contractors and subcontractors proceeding to the NSW courts in circumstances where the principals and head contractors have not put on payment schedules or adjudication where the principal or the head contractor's payment schedule was inadequate because they did not understand that a claim under the NSW Act was being made.

Until the pending appeal on this point is heard by the High Court, the question as to whether construction companies carrying on work on sites subject to a mining lease may rely on the Qld Act is unsettled.

While the Qld government has not announced any amendments to the Qld Act, after the detailed review carried out during 2013 perhaps that is just around the corner?

It will also be interesting to see the extent to which SA courts use NSW authorities as guidance to determine disputes under the SA Act.

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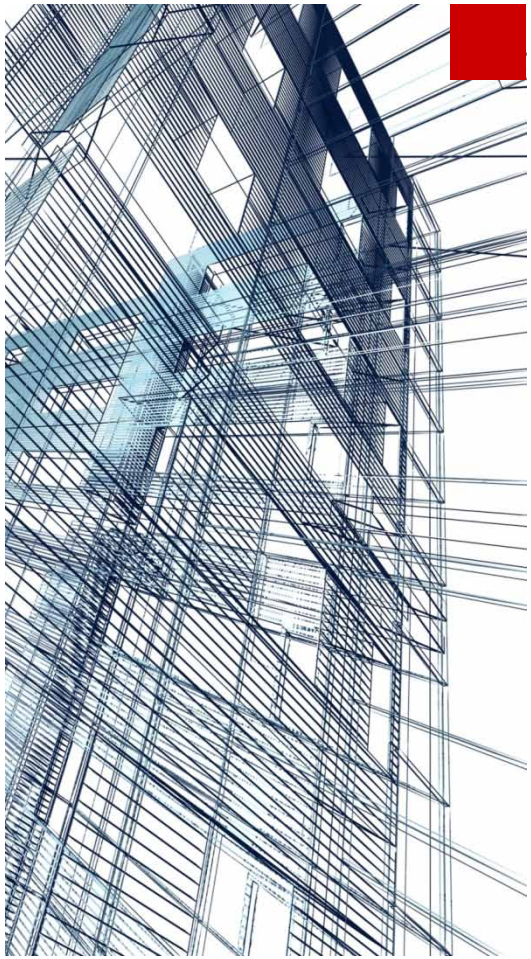
NEW SOUTH WALES



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

NSW OVERVIEW

Developments

The final report of Bruce Collins QC on Subcontractor Insolvency in NSW was released in late January 2013. The report dealt with wide ranging issues and made numerous recommendations about the construction industry as a whole. It also made several specific recommendations about the NSW Act. As a consequence the NSW Amendment Act was enacted but is yet to commence.

The following are the main changes to the NSW Act:

- **Maximum time limits**: the maximum time limits where a progress payment is to be made:
  - by a principal to a head contractor, is 15 business days from the date of the making of a payment claim; and
  - to a subcontractor, is 30 business days from the date of the making of a payment claim.
- **Removal of requirement to identify payment claim to the NSW Act**: the removal of the requirement that a payment claim identify that it is a 'Payment claim pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW)', except for subcontractor claims for payment in respect of residential construction.
- **New head contractor supporting statement**: a new requirement that a head contractor provides a 'supporting statement' in a form prescribed by the regulations which includes a declaration that all subcontractors have been paid all amounts that have become due and payable in relation to the construction work concerned.
- **Regulations for the creation of trust accounts for security**: the regulations to the NSW Act (which have not been proposed) can make mandatory provision for the creation of trust accounts for the holding of retention moneys as between head contractors and subcontractors.

On the case law front the major development was the continued support by the courts for the proposition that the NSW Act only offers interim justice and therefore if a claimant is insolvent the courts will be reluctant to let it enforce its entitlements under the NSW Act. Along this line, in *Prime City Investments Pty Limited v Paul Jones & Associates Pty Limited & anor* [2013] NSWSC 2, the court refused to allow a debt certificate to found a winding up order where the respondent had a set off claim.

Future

The NSW Amendment Act did not deal with all the suggested amendments made by the Collins Report. These included:

- increasing the time limits for response under the NSW Act , acknowledging the practice of ambush;
- inserting requirements for training and education of adjudicators to increase confidence in the adjudication process;
- removing the unilateral right of claimants to select the authorised nominating authority; and
- extending the jurisdiction of the NSW Act to deal with cashing bank guarantees and cash retentions and large scale home building disputes.

It remains to be seen whether further amendments to the NSW Act will be implemented during 2014 to address these and other recommendations.

Additionally the effect on the industry of the changes in the NSW Amendment Act when it commences will be interesting to observe. We consider that until the participants in the industry get their procedures in place there will be an increase in adjudications and applications to the courts.

Ampcontrol SWG Pty Limited v Gujarat NRE Wonga Pty Limited (formerly Gujarat NRE FCGL Pty Limited) [2013] NSWSC 707

Significance

The court will not look to the contractual basis of a payment claim when determining whether a claimant is entitled to payment of an unpaid portion of its claim. Rather, the court will be satisfied that the operation of the NSW Act is enlivened when a claimant asserts that it is entitled to any portion of an unpaid progress payment.

Facts

Ampcontrol SWG Pty Limited (Ampcontrol) as contractor entered into a construction contract with Gujarat NRE Wonga Pty Limited (Gujarat) to design, supply and commission high voltage infrastructure at a mine site. Schedule 2 of the contract described equipment that was to be supplied by Ampcontrol to Gujarat and the corresponding cost of the equipment. The contract also provided that Ampcontrol was entitled to deliver an invoice to Gujarat once the equipment was delivered and that Gujarat must approve or reject the invoice within 14 days of receipt.

Subsequently, Ampcontrol delivered an invoice to Gujarat. Gujarat failed to provide a payment schedule within the specified time as required by section 14(4) of the NSW Act and to pay Ampcontrol in full.

Ampcontrol filed a motion seeking recovery of the unpaid portion of the claim as a debt due to it under section 15(2)(a) of the NSW Act.

Counsel for Gujarat made two primary submissions.

First, that the court could not and should not be satisfied that Ampcontrol had made a payment claim under the NSW Act. They argued that the purported payment claim did not demonstrate a nexus between the payment sought and the specified events or dates in Schedule 2 of the contract.

They thought this was crucial because they interpreted the interplay between section 13 and the definition of 'progress payment' in section 4 to operate such that a payment claim had to be for a progress payment, 'the entitlement to which arose only, on and from those contractually specified events'.

The second submission was if the court could not be satisfied of the existence of the circumstances referenced in section 15(1), that finding would preclude the availability of the option to recovery under section 15(2)(a)(i).

Decision

Both submissions were rejected and the court entered judgement in favour of Ampcontrol for the outstanding amount.

The court rejected the first submission by taking a strict construction of section 13, which 'makes it clear that the assertion of entitlement is sufficient to enliven the operation of the NSW Act'. Even though the payment claim did not demonstrate a connection between the payment sought and any particular contractual provision, it was sufficient that the payment claim identified provision of items of equipment described in Schedule 2 of the contract as the event giving rise to the payment obligation.

As to the second rejected submission, the court held that Gujarat's failure to respond was enough for the court to find that the circumstances referred to in section 15(1) had arisen.

The court also held that section 15(4)(b)(ii) prevented Gujarat from raising a contractual issue. In any case, the court would betray the express language of section 13 and the rationale of the NSW Act if it were to attempt to determine the 'contractual efficacy' of Ampcontrol's claim.

In obiter, the court reiterated that one of the underlying rationales of the NSW Act is to provide a swift remedy to a claimant who seeks it.

Anderson Street Banksmeadow Pty Ltd v Helcon Contracting Australia Pty Ltd [2013] NSWSC 491

Significance

An adjudication determination may be quashed if the basis of the adjudicator's determination was not the subject of submissions by either party, and the adjudicator failed to first notify the parties (especially the party against whom the determination is made) of his intention to decide the application on that basis and also failed to allow each party to make submissions in response to that basis.

Facts

A dispute arose between Anderson Street Banksmeadow Pty Ltd (Anderson) and Helcon Contracting Australia Pty Ltd (Helcon) and an adjudication application was made, in relation to:

- a payment claim from Helcon in relation to certain variations Helcon purported to have completed (Variation Claim); and
- the payment schedule provided by Anderson in response in which Anderson denied that Helcon had completed the works in relation to the Variation Claim, and claimed that it was entitled to deduct an amount from amounts claimed by Helcon as the result of damage caused by Helcon to a Sydney Water sewer pipe (Deduction Claim).

The adjudicator determined both claims in favour of Helcon and awarded a single amount.

Anderson applied to have the determination declared void, claiming that the adjudicator had resolved the Deduction Claim on a basis that had not been put forward by Helcon which had denied Anderson the opportunity to respond to that claim.

In assessing the Variation Claim, the adjudicator accepted that Helcon had completed the relevant variation works, and placed the onus onto Anderson to establish that the variation work had not been commenced or completed. Anderson argued that this approach was incorrect – rather, the onus was on Helcon to provide evidence in support of its assertion that it had completed 100% of, and was entitled to 100% of the value of, the variation. Therefore, Anderson argued that the adjudicator had not turned his mind to the question of the extent to which the work was complete and had failed to come to a view as to what was properly payable for the Variation Claim.

Decision

The court declared the adjudicator's determination void for jurisdictional error.

The court concluded that the adjudicator had indeed resolved the Deduction Claim on an argument that had not been advanced by Helcon, and had failed to notify the parties of his intention to resolve the dispute on that basis. The parties (especially Anderson) had been denied the opportunity to put forward submissions on that topic which breached the requirement of natural justice that a party to a dispute has 'a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it'. The court concluded that the resulting breach of natural justice was material, in that it significantly affected the result of the determination.

The court considered that its conclusion in relation to the Deduction Claim was sufficient to deal with the parties' dispute.

However, the court proceeded to address the Variation Claim. The court held that although the adjudicator might have been erroneous in shifting the onus to Anderson, the adjudicator did have jurisdiction to determine the application as he had, and that the reasons given evinced a considered deliberation of the merits of the matter.

Anderson Street Banksmeadow Pty Ltd v Helcon Contracting Australia Pty Ltd [2013] NSWSC 657

Significance

The court will issue certiorari relief and void an adjudication determination when there is a breach of natural justice, even if only one discrete aspect of the determination is referrable to the breach. However, the court retains the discretion to withhold certiorari relief in cases of jurisdictional error where there is no breach of natural justice, especially where the aspect of the determination referrable to the jurisdictional error is a small proportion of the total amount of the determination and there are relatively large sums of money involved.

Facts

This dispute relates to the court's decision in *Anderson Street Banksmeadow Pty Ltd v Helcon Contracting Australia Pty Ltd* [2013] NSWSC 491 (Initial Decision), and the same parties and other circumstances apply to this decision. In this case, Helcon disputed the orders made to give effect to the court's reasons given in the Initial Decision, arguing that they remained entitled to the part of the determination that was not affected by the reviewable error.

Helcon relied on the Queensland decision in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd (No 2) & Ors* [2013] QSC 67 (the *BM Alliance* decision), in which the Queensland Supreme Court withheld relief of certiorari on the condition that the party in the position of Helcon make an undertaking to repay to the party in the position of Anderson the sum of money that was directly referrable to the aspect of the determination that was made in jurisdictional error.

Decision

Despite being initially attracted to Helcon's submission, the court ultimately was compelled by precedent to declare the entire adjudication determination void, not merely voidable.

The court went on to distinguish between this case and that of the *BM Alliance* decision by contrasting both the nature of jurisdictional error and the practical financial effects of the decisions - Helcon's argument related to approximately $50,000, whereas the *BM Alliance* decision affected approximately $24m.

Note: In *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2013] QCA 394, the Queensland court of appeal subsequently reversed the *BM Alliance* decision.

Class Electrical Services v Go Electrical [2013] NSWSC 363

Significance

Under an overarching credit agreement that was further particularised by individual purchase orders for the supply of goods, it is each individual purchase order, and not the credit agreement, that is construed as a single construction contract for the purposes of the NSW Act.

Facts

Go Electrical (GoE) and Class Electrical (ClassE) entered into an agreement which served as an overarching credit agreement between the parties in respect of the supply of electrical goods on credit by GoE to ClassE.

Although terms and conditions were annexed to the credit agreement, the usual particulars in a supply contract were not specified. From time to time, ClassE would, by submitting purchase orders, request GoE to supply goods and GoE would agree to those requests by way of delivering the goods as requested.

GoE claimed that it was owed $1.8m by ClassE under a number of the purchase orders and utilised the provisions of the NSW Act to recover this sum. An adjudicator found in favour of GoE.

ClassE claimed the adjudicator's determination should be declared invalid because of a number of errors affecting the adjudicator's decision. One of the errors was that the payment claim, the adjudication application and the adjudicator's determination related not to one construction contract but to multiple construction contracts. That is, each purchase order was a separate construction contract and should support separate payment claims, payment schedules and adjudications if necessary.

Decision

The Supreme Court upheld ClassE's claim and declared the adjudication determination invalid on the basis that the relationship between the parties was based a multiplicity of contracts and therefore the NSW Act did not apply.

There was no dispute between the parties that the electrical goods supplied were related goods which had been supplied by GoE to ClassE. The question was whether they were supplied pursuant to a contract or 'other arrangement' caught by the NSW Act.

Counsel submitted that the credit agreement was not a construction contract for the purpose of the NSW Act as GoE did not undertake to supply goods under it; rather, it was the individual purchase orders (constituting separate construction contracts) that provided such undertakings for the supply of goods.

The court was unable to find anything in the credit agreement to suggest that GoE had undertaken to supply the goods under that agreement.

In addition, the court did not find in the credit agreement the usual relevant particulars that would be expected in a contract for the supply of goods including the description of the goods, the price, the date and place of delivery. On that basis, McDougall J concluded that each purchase order was a separate construction contract and a multiplicity of construction contracts was on foot which, following His Honour's reasoning in *Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6, would bring the matter outside of the adjudicator's jurisdiction.

Cranbrook School v JA Bradshaw Civil Contracting [2013] NSWSC 430

Significance

A subcontractor, whose contractor seeks to novate its rights and obligations in relation to the subcontract to the principal, cannot expect to rely on the NSW Act to compel the principal to make good the defunct contractor's obligations when that subcontractor represents through its conduct or statements that it is undertaking the construction work for the contractor, and not the principal. In obiter, McDougall J noted that a determination will not be declared void just because an adjudicator issues its determination after expiration of the statutory time limit.

Facts

Cranbrook School (Cranbrook) entered into a contract with St Hilliers Construction Pty Ltd (St Hilliers) for the execution of works on Cranbrook's junior school. St Hilliers subcontracted JA Bradshaw Civil Contracting (Bradshaw) to carry out civil engineering works for the junior school. Cranbrook and St Hillers' business relationship subsequently deteriorated. They entered into a 'termination and disengagement agreement' under which St Hilliers agreed to use its best endeavours to procure novation agreements from subcontractors to enable Cranbrook to have contractual relationships with them.

Bradshaw did not enter into a novation agreement because it felt that the agreement did not sufficiently deal with the delay and disruption costs claim it had against St Hillers. Bradshaw continued to perform work and submit progress claims and payment claims under the NSW Act to St Hilliers despite being directed otherwise. Bradshaw also continued to insist after meeting with Cranbrook that it was performing construction work for St Hilliers. When St Hilliers was placed under external administration, Bradshaw submitted a payment claim to Cranbrook which included the delay and disruption costs.

St Hilliers, acting through its agent Cranbrook, provided a payment schedule that provided for a negative scheduled amount.

An adjudication application was made. The adjudicator determined that Cranbrook was obligated to pay Bradshaw. This determination was made outside of the 10 business days prescribed under section 21 of the NSW Act and just within the time extended by the parties.

Cranbrook applied to the Supreme Court for a declaration that the determination was void and for an order quashing the determination.

Decision

The court held that the determination was void and issued relief in the nature of certiorari.

The court found that there was no relevant construction contract under the NSW Act, either between Bradshaw and Cranbrook or between those two parties and St Hilliers. McDougall J reasoned that section 4 of the NSW Act, which defines 'construction contract', makes it plain that in the absence of a formal contract, like in this case, there must be an arrangement where a party undertakes to perform construction work for another party to the arrangement. His Honour concluded that there was no such undertaking by Bradshaw to carry out construction work for Cranbrook as Bradshaw's acts manifested an intention to carry out works for St Hilliers under its subcontract, not for Cranbrook.

McDougall J also indicated that, had it been necessary to decide the issue, it would be perverse to interpret the requirements of section 21(3) as being jurisdictional. To do so would violate the legislative intent of the NSW Act that a builder or subcontractor who had successfully navigated the various obstacles of the legislation in the path of getting a favourable determination would still be disqualified from the benefit of that determination just because the adjudicator had breached its statutory time limit in making the determination.

Draybi One Pty Ltd v Norms Carpentry & Joinery Pty Ltd [2013] NSWSC 1676

Significance

A claimant cannot serve more than one payment claim in respect of the same reference date, pursuant to section 13(5) of the NSW Act. In addition, where a construction contract does not specify a reference date, section 8(2)(b) will operate to provide a reference date. Section 13(4) limits the time during which a payment claim may be served and does not in itself operate to create a reference date.

Facts

Draybi One Pty Ltd (Draybi) engaged Norms Carpentry & Joinery Pty Ltd (Norms) to supply and install kitchens in a residential development at Castle Hill.

After Draybi terminated the contract having alleged that the work performed was defective, Norms served a payment claim on Draybi (first payment claim). An adjudicator made a determination in respect of the first payment claim (first determination). Draybi successfully commenced proceedings to set aside the first determination and the court declared the first determination void.

Norms served on Draybi another payment claim (second payment claim), in respect of which an adjudicator determined in favour of Norms (second determination). The second payment claim was identical to the first payment claim. Draybi sought a declaration that the second determination was void because it was made without jurisdiction.

Norms argued that once the first determination was declared void, it had 'no other option' than to serve a fresh payment claim. Norms interpreted section 13(4) of the NSW Act to mean that a second reference date would then arise.

Decision

The court declared the second determination void.

The contract did not provide a specific reference date. Therefore the court looked to section 8(2)(b) of the NSW Act which provides that if the contract makes no express provision as to a specific reference date, it will be the last day of the named month in which the construction work was first carried out under the contact and the last day of each subsequent named month.

The court rejected Norms' interpretation of section 13(4).

The court confirmed that a payment claim may be served only within the period determined by the contract or the within the period of 12 months after the construction work to which the claim relates was last carried out. The court found that s213(4) does no more than limit the time during which a payment claim may be served. It does not of itself operate to create a reference date, let alone a second reference date for work specified in an earlier payment claim.

Norms was therefore precluded under section 13(5) of the NSW Act from serving a second payment claim.

GMW Urban v Alexandria Landfill [2013] NSWSC 660

Significance

The court will be reluctant to interfere with a party's ability to enforce its rights once those rights have been vindicated by an adjudicator's determination under the NSW Act. Additionally, the court reiterates that the legislative scheme is such that it will be very difficult for a party to persuade the court to prevent the enforcement of an adjudicated amount pending final determination just because there is a risk that the other party could become insolvent.

Facts

GMW Urban (GMW) and Alexandria Landfill (ALF) entered into a design and construct contract of a waste facility. GMW gave ALF security comprising two unconditional bank guarantees in favour of ALF. GMW made a progress claim and ALF responded by proposing a negative scheduled amount. The adjudicator determined in favour of GMW.. GMW recovered judgment in the Supreme Court for a debt to be enforced by garnishee.

ALF called upon by one of the bank guarantees s by invoking the superintendent's determination under the contract that GMW was indebted to ALF for liquidated damages.

GMW sought ex parte interlocutory relief. The court ordered ALF to forebear calling on the bank guarantees and restrained the bank from paying them out on condition of GMW not seeking to enforce its garnishee notice. This regime maintained the 'status quo' while the court was ascertaining the chain of events.

This case relates to the challenge of the interlocutory regime. GMW sought to enforce the garnishee notice and to restrain ALF from claiming on the bank guarantees until the hearing of the matter. ALF sought to exercise its rights under the bank guarantees and to restrain GMW from enforcing the garnishee notice. ALF contented that it would be unable to recover the adjudicated amount should GMW encounter major financial problems.

Decision

The court found in favour of GMW on both issues.

The court noted that ALF had not initiated any of its own proceedings or filed a cross-claim asserting invalidity of the determination. In the six weeks that had elapsed since GMW initiated its proceedings, ALF did not take any steps in court to vindicate the position it had taken in the interlocutory hearing. The court noted that it was reasonable to infer from the circumstances that ALF had called on the bank guarantees to thwart the determination in favour of GMW, and not for a proper purpose.

McDougall J emphasised that one underlying rationale of the NSW Act was to shift the risk of insolvency pending a determination of final rights from parties in the position of GMW to those in the position of ALF.

The court also held that ALF should not be freed from the interlocutory relief that was granted in favour of GMW in the prior hearing. The court reasoned that the principle of 'issue estoppel' applied to adjudicator determinations in respect of interim payments. Although an adjudicator's determination on issues necessarily raised in deciding the entitlement to a payment claim is not final as to merits, it will be with respect to entitlement to interim payments. Since the adjudicator determined in favour of GMW on the liquidated damages issue, the court would not here assist ALF to thwart that determination by allowing ALF to call on the bank guarantees.

The court also held that GMW should be free to enforce its rights. The court invoked the underlying policy of the NSW Act in reasoning that it is not for the court, especially in light of ALF's failure to formally challenge the validity of the determination, to interfere with the rights that the legislature intended for GMW to have after it has had those rights vindicated by an adjudicator's determination.

Hill as Trustee for the Ashmore Superannuation Benefit Fund v Halo Architectural Design Services Pty Ltd [2013] NSWSC 865

Significance

It is not possible for claimants to 'bank' reference dates and serve multiple payment claims following one reference date for work done in previous months under the NSW Act.

Facts

Robert and Christine Hill were trustees of the Ashmore Superannuation Benefit Fund (Hill). Hill entered into a project management agreement with Halo Architectural Design Services Pty Ltd (Halo) to project manage a development on Hill's behalf.

Hill received 10 different claims for payment under the NSW Act for different dates from Halo within a one month period (from 9 November 2012 to 7 December 2012). Each payment claim related to work undertaken in 10 separate months (from February 2012 to November 2012). Hill paid six out of the 10 payment claims. Halo then proceeded to adjudication on the outstanding four payment claims, where the adjudicator found in favour of Halo.

Hill sought judicial review of the adjudicator's determination on the basis that the four payment claims were invalid because each adjudication application under the NSW Act can only be made with respect to one payment claim and, in this case, there were four payment claims.

Halo argued that the 10 payment claims served in the one month period should be seen as one payment claim, made progressively and by ten instalments over that period.

Decision

The court declared the adjudication determination void.

Stevenson J held that the 10 payment claims were made on different dates in that one month period, each for a different month and therefore required payment on different dates.

Hill submitted, and His Honour agreed, that McDougall J's reference in *Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6 provides that an adjudication application can only be made with respect to one payment claim per reference date. Therefore, His Honour found that Halo was only entitled to serve one payment claim in respect of the reference date of 7 November 2012. As Hill had paid the first payment claim served on 9 November 2012, Halo could not serve any further payment claims in respect of that same reference date (7 November 2012).

Ultimately, the court found that the purported payment claims were not payment claims as prescribed in the NSW Act and thus the adjudicator did not have jurisdiction in making that determination.

Lahey Constructions Pty Limited v Newbold Bulk Haulage Pty Limited [2013] NSWSC 215

Significance

An adjudicator must make their determination on the basis of the arguments put forward by the parties. If the adjudicator makes their decision based on new arguments they must ask the parties to make further submissions in relation to those new arguments, otherwise there will be a denial of natural justice.

Facts

Lahey Constructions Pty Limited (Lahey) subcontracted Newbold Bulk Haulage Pty Limited (Newbold) to perform works.

The contract provided that Newbold bear the full risk of any materially adverse site conditions. An adverse site condition was encountered and Newbold put in a claim for a variation. Lahey agreed to the variation but then did not pay the variation amount claimed in Newbold's payment claim, as Lahey claimed that the site condition was still Newbold's risk.

Newbold made an adjudication application. Both parties clearly stated the legal basis upon which it was relying in their respective adjudication application and response.

The adjudicator made her determination in favour of Newbold by considering an approach that had not been raised by either party. She took the view that the real, albeit unstated, issue was not whether a variation was agreed for the purpose of a particular clause in the subcontract, but whether the extra works were within or outside the scope of works defined in the contract.

Lahey made an application for the adjudicator's determination to be set aside.

Decision

The court held that the adjudication determination was void and that the adjudicator:

- failed to comply with her statutory obligations under section 22 of the NSW Act to consider the payment claim, payment schedule and all submissions and relevant documentation;
- denied the parties natural justice by making her decision based on new arguments which had not been put forward by either party and then failing to seek further submissions from the parties regarding those new arguments; and
- did not give adequate reasons for her decision - the amounts and rates put forward by the defendant were in dispute and the adjudicator did not give reasoning to justify her acceptance of those rates or demonstrate that she had dealt with the dispute in a reasoned way.

Lahey Constructions Pty Ltd v Trident Civil Contracting Pty Ltd [2013] NSWSC 176

Significance

When making a determination, an adjudicator must consider the terms of the contract from which the application arose; failure to do so can result in jurisdictional error. Parties to a dispute must have notice of what is alleged against them in order to be able to put forward their case in answer. There is a breach of the fundamental requirement of natural justice where an adjudicator fails to give notice of an intention to make a determination on a basis that has not been the subject of any notice, or contention, of any party.

Facts

Lahey Constructions Pty Ltd (Lahey) engaged Trident Civil Contracting Pty Ltd (Trident), by a subcontract agreement (Subcontract) to carry out earthworks.

The Subcontract stated that a direction by Lahey to vary the work is not a 'variation' and if Trident considered a variation applies, it must claim a variation within two days of the direction or is barred.

Lahey gave a direction to Trident which Trident carried out the work and for which Trident submitted a payment claim (Excavation Claim). Lahey served a payment schedule that referred only to the 'variation & notice clauses' in the Subcontract.

In its adjudication response, Lahey submitted that the Excavation Claim was barred as Trident had 'failed to comply with the variation and notice requirements under the Subcontract' (Bar to Variation Point).

The adjudicator made a determination that Lahey pay Trident a progress payment which included the Excavation Claim. The adjudicator also dealt with the Bar to Variation Point by concluding that Trident, having carried out the works, was entitled to recover progress payments for that work under section 3 of the NSW Act and the terms of the Subcontract did not prevent the right to be paid for that work.

Decision

Stevenson J held that the determination is void.

The adjudicator rejected the Bar to Variation Point only by reference to section 3 of the NSW Act, but section 3 provides no basis upon which the adjudicator could ignore the terms of the Subcontract. The adjudicator's misapprehension of the role played by section 3 and his consequent failure to have regard to the terms of the Subcontract result in a finding of jurisdictional error.

A fundamental requirement of natural justice was breached as the parties were not given notice of the adjudicator's intention to decide the Bar to Variation Point on the basis of section 3.

His Honour endorsed an established line of authority on the degree of particularity required in a payment schedule. They must be reasonably sufficient to inform the parties of the issues in dispute unless the issues have been 'expansively agitated' in previous dealings that the briefest reference in the payment schedule will suffice to identify it clearly.

Maxstra NSW Pty Ltd v Blacklabel Services Pty Ltd [2013] NSWSC 406

Significance

A party may not in its adjudication response include reasons for rejecting payment that have not already been included in its payment schedule. And, where a payment claim is contested but the contesting party has not challenged the requirement to perform the work, nor the completion of the work, and has not submitted an alternative valuation of the work or contradicted the other party's valuation of the work, the adjudicator is not required to independently assess the value of the work.

Facts

Blacklabel Services Pty Ltd (Blacklabel) was the electrical subcontractor to Maxstra NSW Pty Ltd (Maxstra). Blacklabel claimed payment for electrical design work completed. Maxstra's payment schedule claimed that the 'amount claimed exceeds value of works performed' and asserted the amount payable as nil, without giving any reasons in support.

However, in its adjudication response, Maxstra put forward the ground that the design work was work contained within the contract and could not be charged for over and above the contract sum (new assertion). The adjudicator determined that, as Maxstra was precluded by section 20(2B) of the NSW Act from relying on new reasons that were not already in its payment schedule, he could not consider the new assertion.

Maxstra sought a declaration that the adjudicator's determination was void due to jurisdictional error, denial of procedural fairness or failure to comply with the NSW Act on the grounds that the adjudicator failed to:

- consider the new assertion; and
- value the work claimed and Blacklabel had not supported its payment claim by any basis for the adjudicator's use in a valuation.

Decision

The court found in favour of Blacklabel.

Adjudicator need not consider assertions in adjudication response that were not already in the payment schedule

The court held that the adjudicator was correct in not considering Maxstra's new assertion and confirmed no inconsistency exists between sections 20(2B) and 22 of the NSW Act.

There was no error of law or error of jurisdiction or denial of procedural fairness in the adjudicator's findings, nor did the adjudicator misconstrue the NSW Act or the nature of its functions and powers. Section 20(2B) prevents a respondent from including in its adjudication response any reason that is not already included in its payment schedule. The adjudicator is, therefore, confined, under section 22(2)(c) and (d) of the NSW Act, to consider only the payment claim and the payment schedule and submissions made in support of them respectively.

Adjudicator is not required to independently to assess the value of the work done

The court held that, for the purposes of ensuring natural justice or procedural fairness, the adjudicator was not required to independently value the work that had been done and was entitled to rely on the payment claim in the absence of any counter-assessment.

Maxstra, having acknowledged that work had been done and asserted that the work undertaken was of less value than the claim submitted, had the burden of submitting a reason for withholding payment under section 14(3) of the NSW Act which it failed to give.

The adjudicator concluded that no support for Maxstra's assertion that the value of the work was nil had been tendered, and, if it were tendered, it would be excluded from consideration. That is, he excluded from consideration material that was never tendered by Maxstra. Therefore, even if there was a denial of procedural fairness, it was not substantive and had little or no effect on the outcome of the proceedings.

Modcol v National Buildplan Group [2013] NSWSC 380

Significance

The NSW Act is subordinate to the proper functioning of the administration process delineated in the *Corporations Act 2001* (Cth). The court intimated its reluctance to undermine the proper functioning of the administration process even if it results in betraying the purposes of the NSW Act.

Facts

Modcol Pty Ltd (Modcol) had been subcontracted by National Buildplan Group Pty Limited (Buildplan) in redevelopment works of the Dubbo Base Hospital.

Modcol served a payment claim on Buildplan in the amount of $1.37m (claimed amount). Buildplan failed to serve a payment schedule within the 10 business days specified in the NSW Act. As a result, Modcol was entitled to the full amount claimed in its payment claim. It chose to vindicate that right under section 15(2)(a)(i) of the NSW Act by seeking to recover the amount as a debt in court and commenced proceedings by filing summons. However, before the summons was filed, Buildplan went into administration.

In response, Modcol sought leave pursuant to section 440D of the *Corporations Act 2001* (Cth) to have the proceedings heard so that it could use the judgment against Buildplan for the claimed amount as a vehicle for seeking an order under section 7 of the *Contractors Debt Act 1997* (NSW) to get a debt certificate of the recovered amount. This certificate could then be used to force the principal to pay Modcol the claimed amount out of money owing by the principal to Buildplan for Buildplan's works to which the subcontract relates.

Decision

The court held that to permit Modcol leave would be to undermine the purposes of Part 5.3A of the *Corporations Act 2001* (Cth), which are, for the purposes of administration, to maximise the chances that Buildplan will continue to trade or, in the event of winding up, to maximise the returns to creditors.

The court reasoned that exercising its discretion under section 440D of the *Corporations Act 2001* (Cth) in favour of Modcol would deprive Buildplan or, alternatively, the administrators of money essential to either continue trading or to fairly devolve assets to creditors.

The court highlighted how the administration had only just begun and that the first meeting of creditors under the administration procedure had not yet occurred. In such circumstances, the court suggested the court should have even greater trepidation in exercising the discretion to grant leave due to the potential for distracting the administrators from their overriding responsibilities.

NC Refractories Pty Ltd v Consultant Bricklaying Pty Ltd [2013] NSWSC 842

Significance

A claimant can make a payment claim in respect of works carried out under a construction contract that has been varied after the works have already been completed. Conversely, a respondent cannot escape the operation of the NSW Act by arguing that the payment claim whose value is referrable to a newly bargained payment amount is no longer connected to the works that were carried out under the original construction contract; variation is not tantamount to discharge. The newly bargained payment claim in effect replaces, and implies the withdrawal of, the initial payment claim and does not breach section 13(5) of the NSW Act (which prohibits having more than one payment claim in respect of the same reference date).

Facts

NC Refractories Pty Ltd (NC) entered into a verbal contract with Consultant Bricklaying Pty Ltd (Consultant) to carry out brickwork on a furnace. Problems brought about delays that ultimately prompted the principal to direct NC to engage another bricklayer.

Consultant served a payment claim on NC. In response to NC's email in which it criticised the sum of the payment claim, Consultant emailed a revised invoice which claimed a reduced amount (reduced payment claim).

NC then served payment schedules to both the original and reduced payment claims.

The dispute over the reduced payment claim was heard by an adjudicator who determined in favour of Consultant for the total amount claimed in the reduced payment claim.

NC sought to have the adjudication determination declared void because it was:

- not based on a construction contract as required by section 8(1) of the NSW Act because the reduced payment claim was based on some other arrangement embodied in the exchange of emails; and
- based on a payment claim which was tainted by breach of section 13(5) because the reduced payment claim had the same reference date under the contract (if it was the verbal contract) as the earlier claim.

NC also sought to have the determination quashed for jurisdictional error on the basis that the adjudicator did not afford NC natural justice by failing to properly consider its submission (in the adjudication response and the payment schedule) that no money was due because the works were defective and of 'nil value'.

Decision

The court dismissed the proceedings on all three grounds.

Hammerschlag J held that the verbal construction contract was varied, and not discharged, by the exchange of emails. The obligation to pay related to works already carried out under the original contract, albeit at a reduced rate of payment.

The court reasoned that the necessary implication of Consultant taking NC up on its offer to pay a different rate by issuing a second invoice was that the first invoice was effectively withdrawn. In obiter, the court noted that even if that were not the case, it would have withheld its prerogative relief from NC because it had not pressed this point in its adjudication response or payment schedule.

The court noted the adjudication determination made explicit mention of NC's submission that no money should be paid because of defective works and contained the adjudicator's finding that he did not have sufficient material before him to find that the work was of 'nil value' and valued the work in accordance with the hourly rates that were undisputed.

NSW Land and Housing Corporation v DJ's Home and Property Maintenance Pty Ltd (in liquidation) [2013] NSWSC 1167

Significance

In cases of liquidation, a payment withholding request under section 26A of the NSW Act will not create a charge over the monies the principal contractor is obliged to retain. Therefore, a claimant under the NSW Act remains an unsecured creditor subject to the discretionary allocation of the liquidator.

Facts

This proceeding was in relation to a contest between four parties seeking to claim $217,481.72 (retention sum) held in a retention fund by the New South Wales Land and Housing Corporation (Housing).

As of 1 July 2012, Housing owed DJ's Home and Property Maintenance (DJ) the retention sum for works done under the contracts between them.

Zed, a subcontractor to DJ, had served on DJ payment claims under the NSW Act. In July 2012, Zed served a payment withholding request under Div 2A of the NSW Act on Housing requiring it to retain money payable by Housing to DJ. In August 2012, Zed obtained an adjudication determination in his favour against DJ $796,297.56. He obtained a copy of the determination, only after paying the adjudicator's costs on 12 June 2013, which he then purported to have emailed it to Housing.

On 24 June 2013, DJ was placed under a creditors' voluntary winding up and the sum of money in the retention fund was the only potential asset available for distribution to its creditors. Later that same day, Zed obtained an adjudication certificate under the NSW Act for the amount of $891,006.70 (determination sum). Judgment in the Supreme Court was also entered that day in Zed's favour against DJ for the determination sum.

On 26 July 2013, a Deputy Registrar of the Supreme Court issued a debt certificate under the *Contractors Debt Act 1997* (NSW) (Debt Act) certifying that, on 24 June 2013, the determination sum was due and payable by DJ to Zed.

Zed laid claim to the retention sum. He claimed that under either of the NSW Act or the Debt Act, the payment withholding request under the NSW Act had the effect of creating a charge over Housing's retention fund that secured the debt owed to Zed by DJ. Zed did not cite any authority to support his assertion.

Decision

The court rejected Zed's claim. Zed's claim was unsecured and therefore he had no entitlement to the fund.

A payment withholding request served under the NSW Act does not create a charge because the consequences of serving it lack essential features of a charge.

The court briefly elaborated on the key features of a charge; namely, that a charge entails a transfer by assignment of proprietary rights in the subject matter of a charge to the chargee. This implies the dual-sided nature of a charge conferring a right in the claimant to the property over which the charge exists, and an obligation on the part of the holder of the property to transfer it to the person who obtains the charge.

The court reasoned that a payment withholding request under Div 2A of the NSW Act does not confer any such right nor does it create that obligation. A payment withholding request lacks these essential features because it only required Housing to retain the sum of money that it owed to DJ. It did not require Housing to transfer the money over to Zed.

Also, the court found that, as Zed served his notice of claim under the Debt Act after DJ was wound up, the notice of claim was void section 471B of the *Corporations Act 2001* (Cth).

Prime City Investments Pty Limited v Paul Jones & Associates Pty Limited & anor [2013] NSWSC 2

Significance

An adjudication determination and its attendant remedies are not final in the sense that the NSW Act does not affect the rights of the parties to a construction contract at general law or under the contract. It also illustrates the interplay between the creditor's statutory demand flowing from the registration of an adjudication certificate and an order to offset a claim under section 459G of the *Corporations Act 2001* (Cth). In short, that interplay shows that an adjudication certificate which is being used to support a statutory demand for the winding up of a company can be defeated 'in action at law' when there is a 'plausible contention requiring investigation' that undermines the correctness of the adjudication.

Facts

Prime City investments (Prime) applied for an order setting aside a creditor's statutory demand served on it by Paul Jones & Associates (Paul Jones), which had claimed a judgment debt arising upon registration of an adjudication certificate under the NSW Act.

Prime argued that it was not the party liable to Paul Jones under the construction contract, and that the adjudication determination was tainted by jurisdictional error and should therefore be quashed.

There was also dispute as to whether Prime had failed to comply with the strict requirement of section 459G of the *Corporations Act 2001* (Cth), namely that it had not served the originating process to Paul Jones's nominated address within the 21-day limit.

Decision

The court set aside Paul Jones's statutory demand after finding that Prime had a genuine offsetting claim in an amount equal to the creditor's statutory demand. The court also held that Prime had complied with the time limit.

The court ruled that, on the evidence, there was a 'plausible contention requiring investigation that [Prime] was not a party to, or liable under, the construction contract'. This satisfied the court's reading of sections 459H(1) and (2) of the *Corporations Act 2001* (Cth), which states that an offsetting claim 'means a claim on a cause of action advanced in good faith, for an amount claimed in good faith', with good faith meaning 'arguable on the basis of facts asserted with sufficient particularity to enable the court to determine that the claim is not fanciful.

The court contemplated that section 32 of the NSW Act implies that an adjudication determination under the NSW Act is not a final determination as to the rights of the parties, and that any party may recover in an action at law any amount that it is required to pay pursuant to an adjudication determination.

As to Prime's claim that the adjudicator fell into jurisdictional error, the court quickly rejected the claim because, even though it had found 'a plausible contention requiring investigation', it deemed that Prime had failed to provide sufficient evidence to establish that the adjudicator had wrongly identified Prime as the party liable under the construction contract; Prime did not supply any of the adjudication materials in its application.

Proactive Building Solutions v Mackenzie Keck [2013] NSWSC 1500

Significance

An exclusive jurisdiction clause in a contract for 'construction work' in New South Wales which confers jurisdiction on a foreign court will be found void under the NSW Act.

Facts

MK had not furnished any payment schedule in response to the payment claims under 19 construction contracts.

In an interlocutory application, MK sought a permanent stay of proceedings on the basis that the contract incorporated MK's subcontract purchase orders which included clause 27.2. It stated: *'This contract is governed by and is to be determined in accordance with the law [sic] of England. The courts of England shall have the exclusive jurisdiction to determine any disputes between the parties, enforcement of which determination may be through the courts of any appropriate jurisdiction.*'

Proactive Building Solutions (Proactive) argued that not all of the contracts had been formed by reference to a purchase order and sought recovery in three ways:

- judgment because, in the absence of any payment schedule, it had elected to pursue its rights under section 15(2)(a)(i) of the NSW Act (summary procedure);
- judgment for work done and materials supplied, pursuant to each of the contracts, regardless of the effect of the NSW Act; and
- the issue of a debt certificate under the *Contractors Debts Act 1997* (NSW) (Debt Act) by the court who gave judgment, once a judgment was given, which it could then serve upon MK's principal to enforce against amounts that the principal owed to MK.

MK asserted that it was up to Proactive to prove how the English courts would deal with the dispute which Proactive had failed to do.

Decision

The court held that, to the extent that it formed part of any contract, clause 27.2 was void.

As it was an interlocutory application, the court did not consider whether or not the relevant terms and conditions of the purchase orders were incorporated into each and every contract. Rather the court stated that since there was a factual basis for concluding that at least some of the contracts were governed by the terms and conditions, it was proper to deal with the validity of clause 27.2.

In acknowledging the general rule that the parties' choice in an agreement as to the system or law to be applied or the choice of courts to resolve disputes will be respected, McDougall J held that the choice of law clause itself does not deprive the court of its jurisdiction. The clause instead raises question whether the court should refuse to exercise that jurisdiction and instead enforce the choice of law clause.

As English law does not include either the NSW Act or the Debt Act, His Honour ruled that the operation of clause 27.2 would shut out Proactive of its rights under the NSW Act and prevent an English court from issuing a debt certificate under the Debt Act.

His Honour held that clause 27.2 is void because it breached section 34 of the NSW Act (headed 'No contracting out'). Section 34 provides that a provision of any agreement that excludes, modifies or restricts the operation of the NSW Act (or purports to, or has any such effect) or that reasonably may be construed as attempting to deter a person from taking action under the NSW Act is void. Therefore, enforcing clause 27.2 would deprive Proactive from recovering pursuant to section 15(2)(a)(i) the claimed amount from a 'court of competent jurisdiction'.

Even if Proactive chose to proceed to adjudication, His Honour doubted whether sections 24 and 25 of the NSW Act could empower the English courts to issue an adjudication certificate.

Relative Mirait Services Pty Ltd v Midcoast Under Road Boring Pty Ltd [2013] NSWSC 107

Significance

This case concerned an application for leave to appeal from the decision of a magistrate in respect of the payment relating to implied terms under a construction contract.

While it did not directly address the rights under the NSW Act as there was no adjudication, there were some interesting obiter remarks made by the judge concerning the NSW Act.

Comments in decision

Those comments concerned the relationship between sections 8 and 13 of the NSW Act.

The court commented that a failure by a claimant to comply strictly with section 13 does not remove it of:

- the entitlement under section 8 to receive a progress payment; or
- the right to enforce the progress payment claim other than through adjudication.

Sky General Services Pty Ltd v Bauen Constructions Pty Ltd [2013] NSWCA 191

Significance

The case illustrates the Court of Appeal's very strong reluctance to review and correct discrete steps in the underlying reasoning of a decision of the court of first instance when the party does not dispute the ultimate decision, but only the costs order resulting from it. An appeal solely regarding costs is not an appropriate occasion for exploring a legal question of principle concerning the correct interpretation of the NSW Act. Interestingly this decision illustrates a predicament that claimants often find themselves in. That is the adjudicator has erred in its adjudication decision and so the respondent challenges it and wins. The claimant through no fault of itself suddenly finds itself on the receiving end of a costs order.

Facts

Bauen Constructions Pty Ltd (Bauen) sought to quash an adjudicator's determination that had been made in favour of Sky General Services (Sky). The Supreme Court found that the adjudicator fell into jurisdictional error and quashed the determination.

Sky then applied for leave to the Court of Appeal in order to challenge the costs order made by the Supreme Court against it. Of the three grounds of review, Sky submitted that the Supreme Court erred in respect of two of those grounds and that, though the court's ultimate decision should not be disturbed, the costs order should be varied accordingly.

Sky further contended that the two disputed bases for the Supreme Court's finding should be re-examined because there were important questions of law involved regarding the correct interpretation of relevant sections of the NSW Act.

Decision

The Court of Appeal dismissed Sky's application for leave to appeal.

The court held that Sky's request for the court to re-examine the Supreme Court's substantive findings with respect to two of the three bases for its finding that the adjudicator fell into jurisdictional error was no more than a vehicle for creating a basis for a different costs order. This approach was rejected for two primary reasons.

First, Sky had failed to articulate how a different costs order would necessarily follow from the court adopting its view in relation to the two disputed substantive issues. Sky did not provide any analysis with respect to the time spent on each issue or even how time or any other factor would be a proper basis on which to apportion the costs. What is more, each of the three issues was determinative in its own right.

Secondly, as a principle of civil procedure, the court stated that it would be a misapplication of scarce court resources to re-examine substantive issues on their merits in a way that would leave the ultimate orders undisturbed, merely for the sake of costs.

State Asphalt Services Pty Ltd v Leighton Contractors Pty Ltd [2013] NSWSC 528

Significance

The right to summary judgment under the NSW Act was upheld in circumstances where no payment schedule has been served in response to a payment claim, even though a payment schedule was provided to a subsequent, identical payment claim. This case highlights the importance of issuing a payment schedule in a timely manner.

Facts

State Asphalt Services Pty Ltd (SAS), entered into a contract with Leighton Contractors Pty Ltd (Leighton) to perform pavement resurfacing works. SAS served a payment claim on Leighton (First Payment Claim). Leighton did not serve any payment schedule.

Subsequently, SAS served a further payment claim (Second Payment Claim) with identical terms to the First Payment Claim. Leighton responded with a payment schedule which valued the Second Payment Claim at nil, based on a valuation of back charges claimed against SAS.

SAS did not serve an adjudication application under section 17 of the NSW Act in response to this payment schedule. Instead it commenced proceedings to enforce the amount of the First Payment Claim as a judgment debt, pursuant to section 15(2)(a)(i).

Leighton argued that:

- where a claimant includes in a subsequent payment claim an amount that has been the subject of a previous claim, then a respondent has another opportunity to reply to the claim; and
- any liability owed by a respondent in respect of a failure to pay a previous payment claim expires or becomes unenforceable.

Decision

Stevenson J said that it is clear from section 13(6) of the NSW Act that a claimant may include in a payment claim an amount that has been the subject of a previous payment claim. Following from this, a claimant may include in a payment claim all of the amounts that had been the subject of an earlier payment claim.

As Leighton did not serve a payment schedule in response to the First Payment Claim, by reason of section 14(4) of the NSW Act, it became liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

The court held that SAS was entitled to enforce the First Payment Claim as a judgment debt, and that:

- the failure to pay the money by the due date conferred on SAS an accrued right to enforce the payment claim; and
- there was nothing in the NSW Act to compel the conclusion that SAS's accrued right ceased to exist once it served the Second Payment Claim.

His Honour rejected the argument that the repetition of SAS's claim afforded Leighton a 'further opportunity' to answer the repeated claim, as the 'opportunity' to answer a claim was distinct to that particular payment claim.

His Honour dismissed submissions by Leighton that SAS engaged in misleading and deceptive conduct and that the proceedings were an abuse of process.

The Owners - Strata Plan 74635 v Buildcorp Group Pty Limited [2013] NSWCA 40

Significance

The court will look at the intention of the parties to the construction contract when assessing whether or not service of notices under section 31 of the NSW Act has been effected. Also, in order to amend an admission in a defence, the parties must provide quality evidence that adequately explains why it is necessary to withdraw the admission.

Facts

This case was an application for leave to appeal from orders made by a District Court Judge refusing an application by a defendant to amend its defence.

The Owners of Strata Plan No 74635 (Owners) and Buildcorp Group Pty Limited (Buildcorp) disputed the entitlements to payments claimed by Buildcorp. Buildcorp had delivered to the engineer of the works, Mr Kokolis, a payment claim under the NSW Act. The Owners did not serve a payment schedule in response.

Buildcorp applied to the primary judge to amend its defence to include a denial that the document referred to in the defence was served on the Owners in accordance with section 31 of the NSW Act. The primary judge refused to permit this amendment to be made on the basis that the quality of evidence necessary for the withdrawal of the admission was not sufficient. The only real evidence was a paragraph in an affidavit which did not explain the circumstances of Buildcorp's clear admission of the service of the payment claim in the defence. The primary judge said that it seemed clear that Buildcorp had effected service in accordance with section 31 of the NSW Act and no proper reason had been advanced for withdrawal of the admission.

Decision

The court dismissed the application for leave to appeal with costs.

The court found that it was not clear on the evidence whether or not service had been effected under section 31 of the NSW Act.

Section 31(1)(e) of the NSW Act provides that '*any notice that by or under this Act is authorised or required to be served on a person ... may be served on the person in such other manner as may be provided under the construction contract*'.

The contract between Buildcorp and the Owners provided in its terms for an Owners' representative, Ms Walshaw, and an engineer, Mr Kokolis. Under the contract, Mr Kokolis was entitled to be served progress payments. The payment claim was delivered to Mr Kokolis. The Owners argued that the document was not a progress claim but a payment claim and that the payment claim should have been served on the Owners representative, Ms Walshaw, and not upon the engineer, Mr Kokolis.

The court stated that the document here was not a progress claim, but was a payment claim for progress claims. The court also stated that it was unnecessary to resolve the relationship between certain provisions in the contract.

Ultimately the court found that, in reading the contract against the background of the NSW Act, service had been effected.

Williams v Concreting Services [2013] NSWSC 85

Significance

Where a party seeks interlocutory relief restraining another party from enforcing a determination made by an adjudicator under the NSW Act, it is the usual practice of the court to require the party seeking interlocutory relief to make payment into court of the adjudication amount, together with the amount of the costs of the adjudication, as a condition of the grant of interlocutory relief.

Facts

Mr Lloyd Williams (Williams) sought an interlocutory injunction preventing Concreting Services (Concreting Services) from enforcing an adjudicator's determination made in the favour of Concreting Services.

Williams asserted that the determination is void because there was no construction contract between Concreting Services and Williams. Williams contended that the construction contract was in fact between Concreting Services and Williams' company, not Williams in his capacity as a private individual.

After recognising that there was a serious question to be tried, the court had to determine whether Williams ought to be required to make payment into court as a condition of the grant of interlocutory relief.

Decision

The court granted the injunction conditional upon Williams paying into court the adjudication amount plus the amount of the costs of the adjudication.

McDougall J acknowledged that there is a long string of first instance decisions which establish that it is the usual practice of the court to require payment as a condition of the grant of interlocutory relief.

Furthermore, His Honour noted that the process of payment into court facilitates achievement of the legislative purpose of the NSW Act – being to ensure that those who perform work under a construction contract get paid quickly. Concreting Services should not be prevented from exercising its rights under the NSW Act unless given a substantial degree of satisfaction in return.

Williams v Concreting Services Pty Ltd [2013] NSWSC 366

Significance

The Supreme Court has clarified how the identification of a counterparty to a building contract is to be undertaken. The identity of parties to a contract is to be determined objectively from all the circumstances. Further, any adjudication made pursuant to the NSW Act where a party is wrongly identified as a counterparty is void for lack of jurisdiction.

Facts

Mr Lloyd Williams (Williams), sole director of Childcare Specialists Australia (CSA), entered into a contract on behalf of CSA with Concreting Services Pty Ltd (Concreting Services) for the provision of contracting works at a site at Ropes Crossing in Western Sydney (site). The overall works were divided into five separate contracts to be performed at different times on different areas of the site.

In respect of the fifth contract, Williams and Concreting Services disagreed on the quotation price for the works to be performed under that contract. Williams paid Concreting Services the amount that he believed to be owing pursuant to the quotation and Concreting Services disputed this.

The dispute was taken before an adjudicator who made a determination that Williams (rather than CSA) was obliged to pay Concreting Services the full sum under the quotation, as such work was held to be pursuant to a 'construction contract' (for the purposes of section 3 of the NSW Act) between Williams personally and Concreting Services.

Williams challenged the determination of the adjudicator on the grounds that it was in fact CSA who was the counterparty, not Williams, and that as a result the adjudicator had no jurisdiction under the NSW Act and the determination is void.

Decision

The court found that the counterparty to the contract was CSA, not Williams. Accordingly, the adjudicator had no jurisdiction under the NSW Act to make the determination against Williams, and that determination is void.

Although each of the invoices issued by Concreting Services to Williams for the works performed under the five contracts were addressed to Williams personally, not CSA, the court held that all other evidence pointed 'overwhelmingly' to the conclusion that CSA was the counterparty to the contract. This evidence included:

- Williams' details on a business card that he handed to Concreting Services, outlining that it was CSA, not Williams personally, responsible for building the works;
- those same details printed on a large sign outside the site;
- the embroidery of CSA's full company name on Williams' shirt, worn at all meetings between Williams and Concreting Services;
- the nomination of other parties to this project (such as the engineer and surveyor) of CSA as their 'client'; and
- the payment of the invoices by CSA referred to on the bank statement as 'CSA inv'

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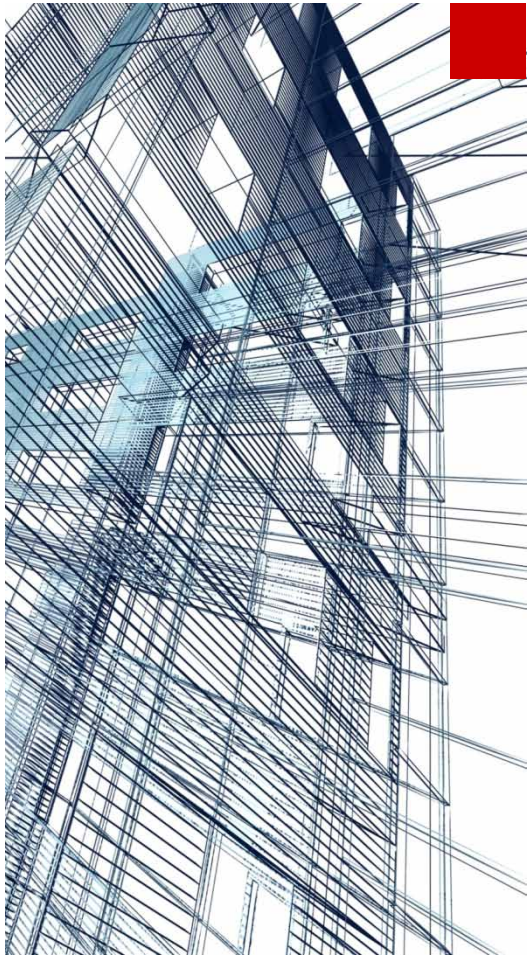
QUEENSLAND



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

QLD OVERVIEW

Developments

Timing is vital because a claim cannot be made after a contract has been terminated (*Kellett Street Partners Pty Ltd v Pacific Rim Trading Co Pty Ltd and Ors* [2013] QSC 298), unless specifically permitted by the contract (*McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd* [2013] QSC 269). The mere fact that the contract's dispute resolution procedure is already in process is not a specific provision allowing a claim (*McNab NQ Pty Ltd v Walkrete Pty Ltd & Ors* [2013] QSC 128).

Adjudicators can make significant errors in contract interpretation, misinterpret submissions and reverse the onus of proof (*McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd & Ors* [2013] QSC 293; *Watpac Construction (Qld) Pty Ltd v KLM Group Ltd & Ors* [2013] QSC 236), but cannot make jurisdictional errors such as deciding a claim on a basis contended by neither party (*Matrix Projects (Qld) Pty Ltd v Luscombe* [2013] QSC 4), ignoring a payment schedule made within time (*Heavy Plant Leasing Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd & Ors* [2013] QCA 386) or failing to consider obvious non-compliance with section 17(4) of the Qld Act simply because a party has not raised it (*South East Civil & Drainage Contractors P/L v AMGW P/L & Ors* [2013] QSC 45).

If part of an adjudicator's decision is infected with jurisdictional error the decision cannot give rise to legal consequences. There is no prospect of severing the part which is not infected (*BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2013] QCA 394).

An unlicensed civil contractor that performs civil work for which a licence is required, ie roadwork on private property and water reticulation and sewerage or stormwater drainage works inside the boundaries of private property, cannot take advantage of the Qld Act (*Ooralea Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd & Anor* [2013] QSC 254).

A single payment claim cannot be made in respect of a number of contracts or arrangements as the term 'arrangement' in the definition of 'construction contract' does not permit one claim to be made in respect of a number of arrangements (*Matrix Projects (Qld) Pty Ltd v Luscombe* [2013] QSC 4).

A claimant seeking summary judgment is entitled to claim interest pursuant to section 15 of the Qld Act, provided its summary judgment application is drafted broadly enough to cover a claim for interest (*McCarthy v State of Queensland* [2013] QCA 313).

The Queensland Civil and Administrative Tribunal (QCAT) is not the place to challenge a decision of an adjudicator or a judgment based on such a decision (*Blackwhite Pty Ltd v Ryall Smyth Architects Pty Ltd* [2013] QCAT 142).

A statutory demand can be set aside if there is a genuine dispute or offsetting claim in respect of the underlying judgment based on an adjudicated amount (*Spinks & Co Pty Ltd v Tomkins Commercial and Industrial Builders Pty Ltd* [2013] FCA 107).

The Court of Appeal has overturned the primary judge's conclusion that 'land' in section 10 of the Qld Act does not include a mining lease (*J & D Rigging Pty Ltd v Agripower Australia Ltd* [2013] QCA 406). An application for special leave to appeal this decision has been filed in the High Court and construction companies carrying out work on sites subject to a mining lease may again rely on the Qld Act pending the outcome of the appeal.

Emerging trends

There is doubt as to whether it is legally possible to remit matters to an adjudicator (*BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2013] QCA 394). Until there has been comprehensive argument on remitting matters to an adjudicator who acted outside jurisdiction the court will base such a decision on discretionary grounds (*Heavy Plant Leasing Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd & Ors* [2013] QCA 386) with the likely result that remission will not occur.

Future

It remains to be seen whether the Court of Appeal's decision in *J & D Rigging Pty Ltd v Agripower Australia Ltd & Ors* [2013] QCA 406) to overturn the primary judge's conclusion (that 'land' in section 10 of the Qld Act does not include a mining lease) will be upheld by the High Court.

Unlicensed civil contractors may again have access to the Qld Act if the Court of Appeal overturns the judgment in *Ooralea Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd & Anor* [2013] QSC 254. They may also benefit from amendments to the *Queensland Building and Construction Commission Regulation 2003* at Schedule 1AA made on 1 December 2013.

There have been no amendments to the Qld Act despite the extensive consultation early in 2014 regarding desirable reform.

The Queensland Government is in the course of implementing a 10 point plan for reform in the construction industry. It has replaced the Building Services Authority with the Queensland Building and Construction Commission. There have been significant amendments to the licensing regime in section 42 of the *Queensland Building and Construction Commission Act 1991* (Qld). The amended licensing regime commenced on 16 November 2013 so in 2014 we expect to see cases that test the scope of the amended licensing requirements.

Blackwhite Pty Ltd v Ryall Smyth Architects Pty Ltd [2013] QCAT 142

Significance

The Queensland Civil and Administrative Tribunal (QCAT) does not have jurisdiction to review a decision of an adjudicator, or a judgment based on such a decision.

Facts

Ryall Smyth Architects Pty Ltd (Ryall) was retained by Blackwhite Pty Ltd (Blackwhite), to perform architectural services.

Ryall made an adjudication application. The adjudicator decided Blackwhite should pay Ryall $13,981.

Ryall registered the adjudication as a judgment in the Magistrates Court pursuant to section 31 of the Qld Act. Blackwhite paid the judgment amount.

Blackwhite then applied to QCAT seeking monies due and owing because:

- the decision of the adjudicator was 'erroneous' as the contract on which the decision was based was not between Blackwhite and Ryall;
- the judgment registered in the Magistrates Court, based upon this decision, was also made in error; and
- as a result, Blackwhite paid money to Ryall that it did not owe.

Decision

Member Williams found that QCAT did not have jurisdiction over the Qld Act dispute; therefore it did not have power to grant the declaratory relief sought by Blackwhite.

Member Williams observed that:

- section 43 of the *Magistrates Court Act 1921* (Qld) states all judgments and orders made in the Magistrates Courts are 'final and conclusive'; and
- the Qld Act is not an 'enabling Act' which confers jurisdiction on QCAT under section 6 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

It was clear that the QCAT did not have the jurisdiction over an appeal against the decision made by the adjudicator or by the magistrate. The powers of the QCAT to grant declaratory relief could only be exercised within its jurisdiction and not at large.

BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors [2013] QCA 394

Significance

If part of an adjudicator's decision is affected by jurisdictional error that part cannot be severed from the balance of the decision. An adjudicator's decision that is affected by jurisdictional error cannot give rise to legal consequences. Consequently if a respondent pays money when it had no obligation to pay it (because the decision was affected by jurisdictional error), the respondent is entitled to recover the payment.

Facts

BM Alliance Coal Operations Pty Ltd (BMA) paid BGC Contracting Pty Ltd (BGC) an adjudicated amount of $28.1m.

On 13 November 2012, the primary judge concluded that the adjudicator had exceeded his jurisdiction by including a component for termination costs of $4.3m in the adjudicated amount.

The primary judge dismissed BMA's application for declaratory relief that the decision was void on the condition that BGC repay BMA the amount affected by jurisdictional error. The judge declined to exercise his discretion to grant the relief sought by BMA on the basis that he had a discretion to make an order that was a more convenient and satisfactory remedy in the circumstances and given the nature of the error.

BMA appealed. There was no challenge to the primary judge's finding that the adjudicator had exceeded his jurisdiction by including the component for termination costs in the adjudicated amount.

Decision

The appeal was allowed on the basis that once a court determines that a decision of an adjudicator is affected by jurisdictional error the decision cannot give rise to legal consequences.

Given that finding it was not open to the primary judge to find that there was any remedy other than to order BGC to repay the adjudicated amount to BMA. BMA, having paid the adjudicated amount when it had no obligation to do so, had a right to recover that amount.

Heavy Plant Leasing Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd & Ors [2013] QCA 386

Significance

The adjudicator committed jurisdictional error by basing his decision on documents which were found not to constitute the actual payment schedule.

Facts

An adjudicator decided that McConnell Dowell Constructors (Aust) Pty Ltd (MacDow) should pay Heavy Plant Leasing Pty Ltd (HPL) almost $27m.

The primary judge declared the decision void as the adjudicator based his decision on a group of documents dated 6 March that he found constituted a payment schedule. The adjudicator had ignored the document entitled 'Payment Schedule' which was delivered on 8 March.

Decision

The Court of Appeal dismissed the appeal, upholding the primary judge's decision that the adjudicator had committed a jurisdictional error by basing his decision on the earlier set of documents rather than the actual payment schedule.

The court rejected the proposition that a document that meets the requirements of section 18 of the Qld Act is necessarily a payment schedule, observing that a claimant cannot be expected to use its own initiative to compose a payment schedule for a respondent by assembling miscellaneous documents.

The 6 March documents were patently incomplete and could not have been said to constitute a payment schedule under the Qld Act. By taking them into account, rather than the document headed 'Payment Schedule' delivered within the statutory period, the adjudicator had fallen into jurisdictional error.

The court declined to remit the matter to the adjudicator for determination according to law.

HM Hire Pty Ltd v National Plant and Equipment Pty Ltd & Anor [2013] QCA 6

Significance

A rental agreement for dry hire of equipment is a 'construction contract' for the purposes of the Qld Act.

Facts

HM Hire Pty Ltd (HM) entered into a subcontract with Thiess Burton to provide operators, supervision, machinery and equipment for clear and grub works, topsoil stripping and placement and construction of drains at Burton Coal Mine (subcontract).

HM and National Plant and Equipment Pty Ltd (NPE) entered into two identical rental agreements (rental agreement) for the dry hire of four dump trucks and a loader (equipment) while HM's own equipment was under maintenance. Although the rental agreement did not expressly mention the subcontract or state the proposed use of the equipment, it provided that the equipment would be used at Burton Coal Mine.

NPE made an adjudication application. The adjudicator determined HM pay NPE $516,586.95.

HM sought a declaration that the adjudication decision was void on the basis that the rental agreement was not a 'construction contract' under the Qld Act because it related to its subcontract with Thiess Burton which was not for 'construction work' as it was for extraction of minerals and was therefore excluded under section 10(3) of the Qld Act. The primary judge dismissed the application.

In its appeal, HM contended that the rental agreement for the supply of the equipment was not 'for use in connection with the carrying out of construction work' within the meaning of section 11(1) of the Qld Act and accordingly was not a 'construction contract'.

Decision

The court dismissed the appeal. The court held that:

- the rental agreement was a 'construction contract' under which NPE undertook to supply equipment to HM for use 'in connection with' the carrying out of 'construction work' under the subcontract; and
- despite the absence of a provision in the rental agreement identifying the intended purpose for which the equipment was supplied, it could be inferred from the rental agreement and from the evidence that the equipment was supplied for use 'in connection with' HM performing its obligations under the subcontract.

The fact that some of the subcontract works were not 'construction work' did not preclude a finding that the rental agreement was a 'construction contract'.

J & D Rigging Pty Ltd v Agripower Australia Limited & Ors [2013] QCA 406

Significance

Whether work forms part of land calls for a practical assessment of the physical relationship between the thing worked on and the land.

Facts

Agripower Australia Limited (Agripower) entered into a contract with J & D Rigging Pty Ltd (JD Rigging) for the dismantling and removing of a kaolin treatment plant. The plant was located at the Skardon River Mine which was the subject of two mining leases issued under the *Mineral Resources Act 1989* (Qld).

An adjudicator decided Agripower should pay JD Rigging approximately $3m under the Qld Act.

The primary judge declared the adjudicator's decision void on the basis that the dismantling and removal of the plant was not 'construction work' for the purpose of the Qld Act.

JD Rigging appealed.

Decision

The Court of Appeal allowed the appeal.

In considering whether the phrase 'forming, or to form, part of land' in section 10(1) of the Qld Act should be interpreted in the context of the Qld Act by reference to rules about fixtures in the law of real property the court held that the inquiry as to whether a building or structure forms or is to form part of land calls for a practical assessment of the physical relationship between the thing and the relevant land. It does not call for an inquiry about the intention of some stranger to the construction contract, nor the intention of the parties at the time the building or structure was constructed, possibly many years before, nor for investigation of the legal ownership of the land.

While a mining lease may not be legally categorised as 'land', the actual land on which a building or structure is affixed does not change its character by reason of the existence of a mining lease.

Kellett Street Partners Pty Ltd v Pacific Rim Trading Co Pty Ltd and Ors [2013] QSC 298

Significance

A payment claim remains effective even if an adjudication application based on it is withdrawn or otherwise does not proceed to adjudication. If no further reference dates arise under the contract, the claimant loses its rights to claim for the work included in that payment claim.

Facts

Kellett Street Partners Pty Ltd (Kellett) engaged Pacific Rim Trading Co Pty Ltd (Pacific Rim) to perform work. Pacific Rim performed work up until 28 March 2012 when the contract was terminated.

Pacific Rim served a payment claim on 31 August 2012 in relation to work performed in March 2012 (August payment claim). It did not proceed to an adjudication as the application was withdrawn by consent. Pacific Rim subsequently made four other payment claims relating to work performed in March 2012.

Kellett applied to have two of these claims declared void on the basis that more than one claim had been made for the same reference date.

Kellett argued that the contract had been terminated on 28 March 2012, and so no further reference dates could occur to enable any future claims.

Pacific Rim submitted that because its adjudication application had been withdrawn, the August payment claim was ineffective and the reference date had not been used.

Decision

Douglas J held that the two claims were invalid and should be declared void.

His Honour found that the August payment claim did not become ineffective after it was withdrawn, and so no other payment claims could be served in relation to the March reference date.

This would not prevent Pacific Rim from making other payment claims provided there were future reference dates. However, Douglas J found that the contract was terminated by Kellett on 28 March 2012. His Honour confirmed that no further reference dates could occur following termination.

Matrix Projects (Qld) Pty Ltd v Luscombe [2013] QSC 4

Significance

A payment claim under the Qld Act must relate to only one construction contract, undertaking or other arrangement.

Facts

Matrix Projects (Qld) Pty Ltd (Matrix) and Luscombe Builders (Luscombe) entered into a 'period subcontract' by which Luscombe agreed to perform unspecified rectification works to buildings for a lump sum (subcontract). Under the subcontract, Matrix could issue written work orders for certain projects (work orders), which Luscombe was entitled to accept or refuse.

In addition to issuing nine work orders, Matrix verbally directed Luscombe to undertake rectification works on a further five homes on a 'do and charge' basis on the understanding Luscombe would issue invoices for work done (do and charge work).

Luscombe made a payment claim in respect of the repair works it carried out for the 14 homes. The adjudicator found that the work orders and the do and charge work collectively constituted an 'arrangement' under the Qld Act and determined Luscombe be paid $407,445.19. The adjudicator calculated this amount based on the subcontract lump sum prices without any discount for incomplete work rather than assessing the value of the work completed up to the reference date.

Matrix sought a declaration that the adjudicator's decision was void for two reasons:

- the payment claim was invalid because it comprised more than one distinct claim based on distinctly different contracts rather than a single 'arrangement' as required by sections 12 and 17 of the Qld Act; and
- the adjudicator fell into jurisdictional error by calculating the amount payable on a ground for which neither Luscombe nor Matrix had contended thereby denying the applicant an opportunity to make submissions.

Decision

Douglas J ordered Luscombe be restrained from obtaining an adjudication certificate.

His Honour held that:

- the payment claim could not be described as being made under a single 'contract, undertaking or arrangement' under the definition of 'construction contract' in the Qld Act because the work was divisible into work done pursuant to the subcontract and the do and charge work pursuant to a different regime (with different reference dates) where the respondent could decide whether to perform the work it was offered; and
- the term 'arrangement' in the definition of 'construction contract' did not permit claims in respect of a number of contracts or arrangements to be made the subject of a single payment claim.

In respect of the second ground, His Honour held the adjudicator fell into error as the statutory scheme does not permit an adjudicator to determine an adjudication on the basis of a view of the law for which neither party has contended.

McCarthy v State of Queensland [2013] QCA 268

Significance

A respondent that fails to serve a payment schedule is not entitled to raise any defence in a summary judgment application.

Facts

McCarthy t/as P J McCarthy Commercial and Residential Builders (McCarthy) entered into a contract with the State of Queensland (State) for the construction of an apartment complex in Toowoomba. McCarthy served a payment claim on the State. The State did not serve a payment schedule. McCarthy applied for summary judgment.

The State submitted that McCarthy's claim was not a valid payment claim because it contravened section 17(5) of the Qld Act as it was in respect of work the subject of previous claims in relation to earlier reference dates. The primary judge dismissed the application on the basis that full and detailed evidence was required both of the work involved and the manner in which the claimed amounts were calculated. McCarthy sought leave to appeal.

Decision

The Court of Appeal allowed the appeal.

The court found that section 17(5) of the Qld Act had not been infringed and that the primary judge erred in not having due regard to the scheme of the Qld Act.

Muir JA stated: '*Section 19 operates to give a claimant a prima facie right to judgment for the unpaid amount of its claim if the respondent failed to serve a payment schedule on the claimant within the prescribed period and failed to pay the whole or any part of the claimed amount on or before the prescribed date. Significantly, the respondent is unable to rely on any counterclaim or on any "defence in relation to matters arising under the construction contract".*'

McCarthy v State of Queensland [2013] QCA 313

Significance

Provided an application for summary judgment is drafted broadly enough to cover a claim for interest, there is no reason why summary judgment cannot include interest that the claimant is entitled to recover pursuant to section 15 of the Qld Act.

Facts

This decision varies the Court of Appeal's judgment in respect of interest, which was the subject of the preceding decision of *McCarthy v State of Queensland* [2013] QCA 268.

Section 15 of the Qld Act permits recovery of interest on an unpaid amount of a progress payment according to the rate specified under the contract. In reliance upon section 15 of the Qld Act, McCarthy sought interest calculated by reference to the rate specified in the contract for overdue payments.

Decision

Muir JA held that the order for interest in the summary judgment should be varied. McCarthy was entitled to be paid the overdue progress payment plus interest calculated by reference to the rate specified in the contract.

His Honour acknowledged that sections 17 to 20 of the Qld Act do not contemplate the recovery of interest on the amount claimed in a payment claim, unless the interest is part of the progress payment claimed. His Honour noted that the only defences raised by the State in the summary judgment and appeal concerned the validity of McCarthy's payment claim, and did not address interest. McCarthy's application for summary judgment was drafted broadly enough to cover the interest claim.

In the circumstances, Muir JA held there was no valid reason why the summary judgment could not include interest.

McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd [2013] QSC 269

Significance

This case confirms that no reference date can arise after termination unless specifically provided for in the contract. Whether 'determination' of employment under a contract results in a termination of the contract depends on the context of the contract as a whole.

Facts

McConnell Dowell (MacDow) engaged Heavy Plant Leasing Pty Ltd (HPL) to undertake subcontract works.

Administrators and receivers and managers were appointed to HPL.

MacDow exercised its contractual right to 'determine' the employment of HPL under the subcontract, to expel it from the site and to take over all plant, equipment and materials provided by HPL and to use them to have the work completed.

The contract provided that in the event of a determination HPL would pay MacDow the amount of any loss, damages, costs and expenses caused to MacDow by reason of the determination. It provided that MacDow was not bound to make further payment to HPL until after completion of the subcontract works. It then set out a mechanism for the assessment of either a debt payable to MacDow by HPL or an amount payable by MacDow to HPL after completion of the subcontract works.

Soon after the employment of HPL was determined, HPL served a payment claim. The matter proceeded to an adjudication and a decision was made in HPL's favour for just over $10m.

The issue was whether the decision was void for jurisdictional error because there was no reference date on which a payment claim could be made.

Decision

The court declared the decision void for a lack of jurisdiction.

Applegarth J found that determination of HPL's employment under the subcontract terminated the subcontract. His Honour held that the contract appeared to treat the terms 'determine the subcontract' and 'determine … the sub-contractor's employment under this subcontract' as meaning the same thing.

Because the determination of HPL's employment terminated the subcontract, no reference date could arise for the purposes of the Qld Act as the subcontract did not expressly provide for a reference date after its termination. The adjudicator therefore lacked jurisdiction to make a decision.

His Honour further held that even if the subcontract was not terminated, the determination of HPL's employment would operate to bring HPL's principal obligations under the subcontract to an end. Therefore the subcontract could only be on foot for the limited purpose of providing for the assessment of any amount owing and payable after completion of the subcontract works. From the date on which the subcontract was determined, there was no statutory entitlement to claim under the Qld Act as the subcontract was no longer a 'construction contract' under the Qld Act.

McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd & Ors [2013] QSC 293

Significance

This case demonstrates the high bar for making a successful claim for jurisdictional error in an adjudicator's decision. Even though an adjudicator may make errors in the construction of a contract, misinterpret submissions and reverse the onus of proof, those may not be jurisdictional errors that attract declaratory relief.

Facts

McNab Developments (McNab) engaged MAK Construction (MAK) to undertake subcontract works.

McNab issued a direction to rectify defects and took responsibility for defective work out of the hands of the MAK. Three months later McNab issued a show cause letter and purported to terminate the contract. The next day MAK served a payment claim which identified the reference date as the day the claim was served. In fact the claim related to work carried out up to the last reference date before termination.

McNab argued that MAK could not rely on a different reference date from that identified in the payment claim. McNab also argued that the adjudicator failed to assess the claim on its merits and failed to identify the source of legal entitlement of the amounts allowed by the adjudicator. McNab correctly highlighted that the adjudicator misinterpreted contract provisions relating to preconditions to payment for variations and liquidated damages. The effect of this was that the adjudicator misinterpreted and then rejected a number of McNab's submissions. The adjudicator also incorrectly reversed the onus of proof when considering a number of questions of fact.

Decision

The adjudicator's decision was not void for a lack of jurisdiction.

Mullins J found that the nomination of a patently incorrect reference date in the payment claim that otherwise related to an outstanding reference date did not deprive the adjudicator of jurisdiction to decide the application.

Her Honour further held that even though the adjudicator made errors in the construction of the contract, misinterpreted McNab's submissions and reversed the onus of proof, those were not jurisdictional errors that could attract declaratory relief.

The adjudicator had appropriate recourse to the relevant materials and submissions in the circumstances. Mullins J referred to *John Holland Pty Limited v TAC Pacific Pty Limited* [2010] 1 Qd R 302 regarding the fact that adjudicators are required to determine complex legal issues quickly and the detection of flaws in reasoning or poorly expressed reasons in a decision do not compel the conclusion that the adjudicator did not attempt to understand and apply the contract.

McNab NQ Pty Ltd v Walkrete Pty Ltd & Ors [2013] QSC 128

Significance

The termination of a construction contract extinguishes a claimant's entitlement to bring a payment claim under the Qld Act. It is irrelevant whether a dispute is in process under the dispute resolution clause in the contract.

Facts

Walkrete Pty Ltd (Walkrete) was a subcontractor to McNab NQ Pty Ltd (McNab) for concrete work on a building project at Rockhampton. During the course of construction Walkrete removed a prop from a concrete panel contrary to site instructions. This gave rise to a substantial safety risk.

On 10 September 2012, McNab terminated the subcontract. The letter of termination said that removal of the prop enlivened clause 53 of the subcontract which entitled McNab to terminate the subcontract if Walkrete defaulted 'in the performance or observance of any serious condition'.

Walkrete served a payment claim on 12 November 2012 and subsequently made an adjudication application. McNab contended that Walkrete's entitlement to make a payment claim under the Qld Act was lost upon termination of the subcontract.

Walkrete contended that the subcontract was not properly terminated, or alternatively, the dispute resolution clause had been invoked and was therefore still on foot.

The adjudicator decided that the removal of the prop was not a breach of a 'serious condition' and therefore McNab was not entitled to terminate the contract. The adjudicator therefore found that the Qld Act applied to the payment claim.

McNab applied to the Supreme Court for a declaration that the adjudicator's decision was void.

Decision

Chief Justice de Jersey found that removal of the prop involved serious potential risk entitling McNab to terminate the subcontract as it had. His Honour held that Walkrete had no right to recover any outstanding moneys under the Qld Act.

In reaching the decision, His Honour adopted the reasoning in *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* [2012] 2 Qd R 90. Although the contract in that case contained a clause stating that the parties' rights reverted to those found at common law after termination, de Jersey CJ did not find the absence of such a clause reason to distinguish the case.

His Honour also noted that the dispute resolution clause, which stated that the parties must continue to perform the subcontract during a dispute, did not maintain the subcontract after it was terminated pursuant to clause 53 of the subcontract.

Ooralea Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd & Anor [2013] QSC 254

Significance

This case is another example of circumstances in which an unlicensed builder could not take advantage of the Qld Act.

Facts

Ooralea Developments Pty Ltd (Ooralea) engaged Civil Contractors (Aust) Pty Ltd (CCA) to perform works in connection with a subdivision development. The works under the contract included roadwork, stormwater drainage and sewer and water reticulation.

CCA was not licensed under the *Queensland Building Services Authority Act 1991* (Qld) (QBSA Act).

CCA made an adjudication application under the Qld Act. Ooralea argued that CCA was not entitled to submit an adjudication application as it was unlicensed.

The adjudicator determined that the work carried out by CCA did not fall within the definition of 'building work' under the QBSA Act. He found the roadworks came within the ambit of building work excluded by section 5 of the *Queensland Building Services Authority Regulation 2003* (Qld) (QBSA Regulation).

Ooralea applied to have the decision declared void on the basis of jurisdictional error.

Decision

Daubney J declared the decision void.

His Honour considered the meaning of 'building work' under the QBSA Act and followed previous authority which found that the term 'building' applied to any 'fixed structure', not just a traditional building.

His Honour noted that stormwater drainage, sewer and water reticulation could come within the ambit of a 'fixed structure'.

When considering the operation of the exclusion under section 5 of the QBSA Regulation, Daubney J noted that it included:

- 'water reticulation and sewerage systems or stormwater drains outside the boundaries of private property'; and
- a road that is 'an area of land, whether surveyed or unsurveyed ... dedicated, notified or declared to be a road for public use'.

His Honour found that the work was done on private property and that the road had not been declared for public use.

South East Civil & Drainage Contractors P/L v AMGW P/L & Ors [2013] QSC 45

Significance

An adjudicator must consider whether a payment claim has been made within the 12-month period prescribed by section 17(4) of the Qld Act, even if the respondent fails to raise the point, where it is apparent on the face of the material which the adjudicator is obliged to consider. The incorrect naming of the Qld Act in an endorsement is not fatal to a payment claim where the reader is not left in any doubt that it is a claim under the Qld Act.

Facts

AMGW Pty Ltd (AMGW) supplied precast concrete panels to South East Civil and Drainage Contractors Pty Ltd (South East Contractors). The last supply of panels were delivered on 22 October 2011 (goods).

On 23 November 2012, AMGW issued an invoice for the goods which stated that it was a 'claim under the Building and Construction Industry Security of Payment Act 2004 Queensland'. South East Contractors failed to provide a payment schedule within the time allowed by section 21(2) of the Qld Act.

On 21 December 2012, AMGW made an adjudication application. The accompanying submissions disclosed that the goods were supplied more than 12 months before the payment claim was served.

The adjudicator expressly did not consider whether the payment claim was invalid under section 17(4) of the Qld Act because the point was not raised in a valid payment schedule.

South East Contractors applied for a declaration that the adjudicator's decision was void.

Decision

Jackson J held that the decision was void for jurisdictional error.

His Honour found that the adjudicator was not entitled to ignore the non-compliance with section 17(4) of the Qld Act because South East Contractors failed to raise the point in a valid payment schedule.

His Honour found that the adjudicator had a duty under section 26(2) of the Qld Act to consider the non-compliance because it was clear on the material before him. The adjudicator did not have authority to put the point aside.

Jackson J held that the error in the endorsement was not fatal to the payment claim as the reader was not left in any doubt that it was a claim under the Qld Act.

Spinks & Co Pty Ltd v Tomkins Commercial and Industrial Builders Pty Ltd [2013] FCA 107

Significance

The terms of the Qld Act do not affect the court's determination of an application to set aside a statutory demand under section 459H of the *Corporations Act 2001* (Cth) if the court is satisfied there is a genuine dispute or offsetting claim.

Facts

Spinks & Co Pty Ltd (Spinks) engaged Tomkins Commercial and Industrial Builders Pty Ltd (Tomkins) to construct a mixed use commercial building. Spinks terminated the contract.

Tomkins made an adjudication application. The adjudicator determined that Spinks owed Tomkins $264,934.50. The adjudicated amount included an allowance of $91,366 for 'claim 3' with an additional 10% margin for a combined amount of $100,502.60. Tomkins filed an adjudication certificate in the District Court as judgment for the unpaid amount.

Tomkins served a statutory demand (demand) on Spinks under section 459E of the *Corporations Act 2001* (Cth) (Corporations Act) for the judgment debt. Spinks applied for an order under section 459G of the Corporations Act to set aside the demand. Spinks alleged that, pursuant to section 459H of the Corporations Act there was a 'genuine dispute' about the amount of the debt the subject of the demand, being the adjudicator's allowance for claim 3 and the additional 10% margin.

Decision

Logan J held the terms of the Qld Act do not affect the operation of section 459H of the Corporations Act if the court is satisfied there is a genuine dispute or offsetting claim.

His Honour ordered that:

- the amount of the demand be varied by deducting the amount genuinely disputed; and
- the varied demand was effective as of the date it was first served.

His Honour varied the amount of the demand in recognition of Tomkins' concession that there was a genuine dispute in relation to claim 3 and the 10% margin. He was not satisfied, however, there was a genuine dispute about the remaining amount of the demand.

Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Ors [2013] QSC 141

Significance

This case considers but distinguishes *BM Alliance Coal Operations v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67 on the facts.

Facts

Warren Brothers Earthmoving Pty Ltd (Warren) served an adjudication application under the Qld Act on Thiess Pty Ltd (Thiess). The adjudicator failed to take into account a reduction by Warren of the amount claimed for one element of its payment claim and Thiess' submission on the reduction. It was accepted by both parties that as a consequence the adjudication amount was incorrect.

Justice Ann Lyons determined that the adjudicator's decision was void.

Prior to the delivery of Her Honour's decision on orders and costs, Warren sought leave to make further submissions, relying on the decision in *BM Alliance Coal Operations v BGC Contracting & Ors (No 2)* [2013] QSC 67 (*BM Alliance* decision). That decision signalled a departure from the established position that where a decision is infected with jurisdictional error, an aggrieved respondent would ordinarily be entitled to have a decision declared void. In the *BM Alliance* decision, Applegarth J held that a court may exercise its discretion and decline to declare a decision void where there is a more convenient and satisfactory remedy available.

Warren argued that Justice Ann Lyons should exercise her discretion in accordance with the *BMA* Decision and decline to make an order declaring the decision of the adjudicator void.

Decision

Justice Ann Lyons dismissed Warren's submission and ordered that the decision of the adjudicator be declared void.

Her Honour distinguished the *BM Alliance* decision on the facts. She rejected arguments advanced by Warren that the jurisdictional error was confined to a discrete component of the adjudicated amount. She held that the jurisdictional error in this case tainted the whole of the decision making process.

Her Honour suggested that the Qld Act be amended to include provisions which allow an adjudicator's decision to be declared partially void in some instances.

Note: In *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2013] QCA 394, the Queensland court of appeal subsequently reversed the *BM Alliance* decision.

Watpac Construction (Qld) Pty Ltd v KLM Group Ltd & Ors [2013] QSC 236

Significance

This case is an example of where an adjudicator makes errors of law but the court allows the decision to stand because the errors were not jurisdictional errors.

Facts

Watpac Construction (Qld) Pty Ltd (Watpac) engaged KLM Group Ltd (KLMG) as a subcontractor to assist with works at the Translational Research Institute at Woolloongabba.

KLMG made an adjudication application under the Qld Act for $7m. The adjudicator decided that KLMG was entitled to:

- variations valued using 'reasonable rates', despite having found that the parties had agreed to use the schedule of rates to value variations; and
- delay costs, despite KLMG failing to give any notice of delay or written extension of time claim as required under the contract and despite the fact the superintendent's power to extend time at any time for any reason was not for the benefit of KLMG.

Watpac applied to the Supreme Court to set aside the adjudicator's decision on multiple grounds including that the adjudicator's findings mentioned above constituted jurisdictional errors.

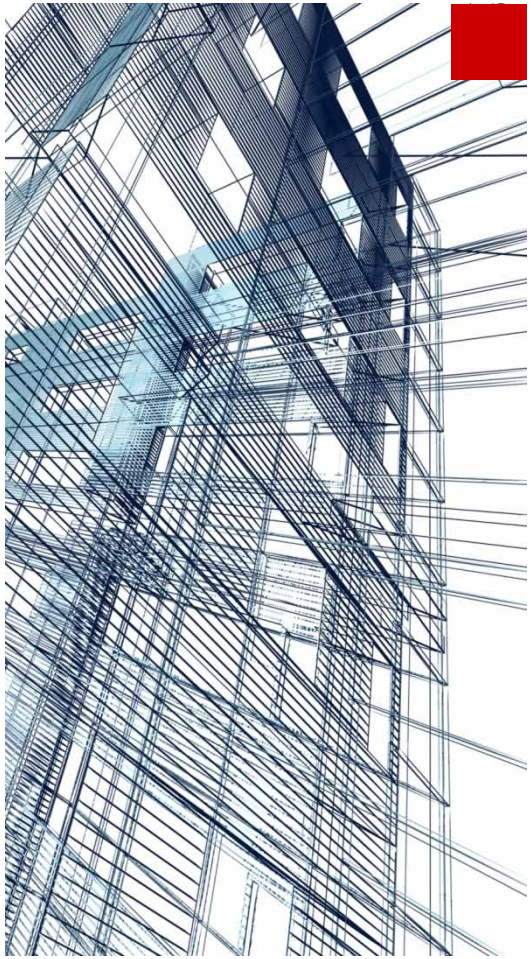
Decision

McMurdo J held that although the adjudicator had made errors in the interpretation of the contract, the adjudicator's decision should stand because the errors were not jurisdictional errors.

His Honour relied on the statement of law by Applegarth J in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2012] QSC 346 at [8]:

'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'.

VICTORIA



CASE INDEX

Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd & Ors [2013] VSC 552
Mackie Pty Ltd v Neil Counahan and Anor [2013] VSC 694
Maxstra Constructions Pty Ltd v Active Crane Hire Pty Ltd [2013] VSC 177
Maxstra Constructions Pty Ltd v Gilbert & Ors [2013] VSC 243
Sugar Australia Pty Ltd v Southern Ocean Pty Ltd & Anor [2013] VSC 535

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

VIC OVERVIEW

Developments

The service of more than one payment claim in respect of a reference date will render void a second claim which is identical to an earlier claim (*Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd & Ors* [2013] VSC 552). The earlier claim can only validly be incorporated into a second claim if it forms part of additional works or services which have been provided.

The courts will hold a respondent to its own assertions as to the date on which a payment claim was served and prevent the respondent from turning its back on the validity of its own payment schedule when the respondent had earlier behaved consistently with the payment schedule being valid and the initiating payment claim having been served on a particular date (*Maxstra Constructions Pty Ltd v Active Crane Hire Pty Ltd* [2013] VSC 177).

The Vic Act contains an apparent conflict in relation to the role of defective work in the valuation to be undertaken by an adjudicator. This potential conflict arises through section 11(1)(b)(iv) and section 10(2)(c) was interpreted in a way which avoided the conflict and permitted an adjudicator to take account of the estimated cost of rectifying defective work when undertaking a valuation using the legislative methodology (*Maxstra Constructions Pty Ltd v Gilbert & Ors* [2013] VSC 243). This legislative methodology is only available if the contract does not contain a valuation methodology.

In applications for judicial review, a court can review findings of fact made by an adjudicator where those findings related to the validity of payment claims in circumstances where a claimant relies on allegations of misleading conduct or fraud as a ground to found certiorari (*Sugar Australia Pty Ltd v Southern Ocean Pty Ltd & Anor* [2013] VSC 535).

The issue of what constitutes a final payment or a final payment claim falls to be decided on the basis of common usage in the industry *(Mackie Pty Ltd v Neil Counahan and Anor [2013] VSC 694).*

Emerging trends

The courts continue to display a very strong purposive approach to the interpretation of the Vic Act. The flexibility displayed by the courts, in the context of interpreting and giving effect to complex legislative drafting, is quite stark. There is no reason to expect this flexibility not to continue.

The courts have not been hesitant in ruling that adjudications are invalid where there has been a taint in the factual matrix underlying the adjudication process.

Future

Clear, simple and careful drafting, both of relevant contractual provisions and the documents relevant to the adjudication process, is important in avoiding the imposition of surprising or unpredictable outcomes by the courts. The same care must be displayed by the parties and the adjudicator in reviewing the factual material relevant to the adjudication process.

Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd & Ors [2013] VSC 552

Significance

This case considered the operation of sections 14(8) and 14(9) of the Vic Act. A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract. A later payment claim can include an earlier payment claim that is outstanding if the later payment claim relates to different construction work or a different supply of goods and services and is referable to a different reference date.

Facts

Cooperative Builders Pty Limited (Cooperative) served on Jotham Property Holdings Pty Limited (Jotham) three payment claims for works carried out under three HIA building contracts (original payment claims). As a result of differences between them, the parties signed a settlement deed which was terminated after a dispute over its compliance arose.

Cooperative then served on Jotham a further payment claim which attached the original payment claims (2013 claim) and contended that the 2013 claim was a 'single' or 'one-off' payment claim under the Vic Act and resulted in the reference dates and time limits for the original payment claims being deemed irrelevant.

The adjudicator heard and determined the matter as a single application and found in favour of Cooperative.

Jotham sought to quash the determination on the grounds that the adjudicator exceeded his jurisdiction by applying incorrectly sections 9, 14(4), 14(5) and 14(8) of the Vic Act.

Cooperative argued that section 14(9) would not prevent the 2013 claim from including fresh claims for amounts in the original payment claims so long as those amounts remained outstanding.

Decision

Vickery J found that the 2013 claim was invalid. The adjudication determination was also invalid as there was no valid adjudication application to found it.

His Honour also applied the recent decision in *Sugar Australia Pty Limited v Southern Ocean Pty Limited* [2013] VSC 535, to receive additional relevant evidence.

Single or one-off payment claim

Vickery J rejected the argument that the payment claims constituted a single or one-off payment claim. His Honour ruled that, in accordance with the contractual terms and the statutory regime that applied to the building contracts, the progress payments were 'milestone' payments and could not be characterised as 'single' or 'one-off' payments.

Claims for amount outstanding under earlier payment claims

Vickery J noted that there is no specific case law on the operation of section 14(9) of the Vic Act. His Honour was of the view that, where the amount of an earlier payment claim is outstanding, section 14(9) permitted a later payment claim to include the unpaid amount provided that the later payment claim was also in relation to different construction work or the supply of different goods and services and was calculated by reference to a different reference date under the contract. However the combined effect of section 14(8) and section 14(9) did not permit the making of repeated payment claims which were identical to previous payment claims.

Vickery J also ruled that the original payment claims were valid but Cooperative failed to apply for adjudication of these claims in accordance with the time requirements of section 18 of the Vic Act. Accordingly any adjudication of these earlier payment claims would be invalid.

Mackie Pty Ltd v Neil Counahan and Anor [2013] VSC 694

Significance

The requirements for a valid payment claim under section 14(2) of the Vic Act are objective and should be assessed in a practical manner in its context. A 'final payment claim' is a payment, when made, discharges the principal from making further payment under the construction contract and the statutory requirements for a 'final payment claim' are mandatory under sections 14 (2)(c) to (e) of the Vic Act.

Facts

Mr Counahan (Counahan) supplied and constructed furniture for installation. Work was done up to March 2013. Mackie Pty Ltd (Mackie) requested more work in June 2013. Counahan completed the additional work on 25 July 2013. The next day, he emailed a payment claim, without any adjustments, which stated 'Balance of work completed' stated 'Screens were completed yesterday. Final invoice is attached.' (July payment claim).

On 25 August 2013, Counahan served the 'final' payment claim for 'all works, being the contract sum less payments and credits to date' that stated 'works are complete' (August payment claim). An adjudication over the August payment claim was determined in Counahan's favour.

Mackie applied to the Supreme Court to set aside or quash the adjudication determination on the grounds that the August payment claim:

- and the July payment claim failed to identify the construction work to which each related , in breach of section 14(2)(c) of the Vic Act;
- was served out of time, in breach section 14(4); and
- was the second payment claim in relation to a particular reference date, in breach of section 14(8).

Decision

Vickery J dismissed the application on all three grounds of review.

Section 14(2)(c) – adequate identification of construction work

His Honour ruled the July payment claim invalid as it did not sufficiently identify the relevant work and was interim in nature. The August payment claim was held to be valid and in the nature of a 'final payment claim'.

Drawing on Finkelstein J's observations in *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 and subsequent case law, His Honour stated that the test as to whether section 14(2) has been satisfied is objective and to be applied in a commonsense practical manner. The document must contain the required information in the context of the industry and the project and be reasonably comprehensible. It must also be reasonably specific to enable the principal to decide whether to accept or reject the claim and to respond appropriately in a payment schedule if the claim is rejected.

His Honour noted that 'final payment' in section 4 and 'final ... payment' in section 14 are undefined and held that their meaning 'must be divined by reference to ordinary language as commonly used in the building and construction industry and in general usage'. A factual assessment needs to occur based on contextual indicators of 'non-finality' in order to distinguish between a final payment and a progress payment.

Section 14(4) – time limit for serving payment claims

His Honour held that the August payment claim was served well within the statutory timeframe. The reference date of a 'final payment claim' is determined by section 14(5), not section 14(4). As the additional work beyond March 2013 was completed on 25 July, His Honour held that the correct reference date was 26 July under section 9(2)(d)(iii).

Section 14(8) - second payment claim

This ground of review failed as the July payment claim was held to be invalid.

Maxstra Constructions Pty Ltd v Active Crane Hire Pty Ltd [2013] VSC 177

Significance

A party will not be able to retrospectively dispute the dates of service of payment claims to which it attested in a filed payment schedule under the Vic Act. Furthermore, by reference to past decisions, this case affirms that the adjudicator is permitted to consider facts the existence of which would trigger the adjudicator's jurisdiction.

Facts

Active Crane Hire Pty Limited (Active Crane) supplied and erected a crane for Maxstra Constructions Pty Limited (Maxstra) and submitted invoices endorsed as payment claims under the Vic Act.

Maxstra served a payment schedule on Active Crane which was headed 'This is a payment schedule under the Building and Construction Security of Payment Act 2002' and stated that Maxstra had received payment claims on 14 January 2013 (by mail).

Active Crane applied for adjudication. Maxstra asserted that the adjudicator did not have jurisdiction to determine the application. It claimed that Active Crane had no right to make the application due to section 18(1)(a) of the Vic Act because Maxstra failed to lodge its payment schedule within the 10 day period stipulated under section 15(4)(b)(ii), based on an earlier date of service which was different from the date Maxstra stated in its payment schedule.

The adjudicator determined that it did have jurisdiction and determined in favour of Active Crane for the full amount claimed.

Maxstra applied for the determination to be declared void for jurisdictional error and that Active Crane be restrained from enforcing the adjudication certificate.

Maxstra claimed that Active Crane had no right to apply for the adjudication under sections 18(1)(b) and 18(2) of the Vic Act because Active Crane did not notify Maxstra of its decision to apply for adjudication. Further, Maxstra claimed that the adjudicator failed to discharge his functions under the Vic Act by failing to address the claim made by Active Crane on its merits and peremptorily rejecting Maxstra's jurisdictional error claim.

Decision

The relief sought by Maxstra was refused.

The court held that Maxstra's payment schedule was valid, and that the schedule's heading evinced an intention that it was a payment schedule, for the purposes of the Vic Act. Further, the relevant service date was the date asserted in its payment schedule rather than the earlier dates which it subsequently asserted.

The court noted that it did not consider timely service of a payment schedule to be a precondition to the adjudicator having jurisdiction under the Vic Act. The court confirmed that the adjudicator's decision on the matter of service of the payment schedule was a proper exercise of his power under the Vic Act.

As the court held that Maxstra's payment schedule was valid, Maxstra was not able to contend that further notice was required to be given by Active Crane of its decision to apply for adjudication.

Finally, the court noted that the conduct of an adjudication requires at minimum a determination regarding whether the construction work that is the subject of a payment claimed has been performed and its value. The court found that the adjudicator had determined that the construction work identified in Active Crane's claim was performed. Active Crane's payment claims and adjudication application were supported by independent evidence of the value of the work. Also, Maxstra did not make submissions disputing Active Crane's evidence. Accordingly, the court considered that the adjudicator had performed its 'basic and essential functions under the Vic Act'.

Maxstra Constructions Pty Ltd v Gilbert & Ors [2013] VSC 243

Significance

This case clarified how progress payments for defective work are valued when the contract makes no express provision for calculation. When valuing the work the subject of the payment claim, consistent with the language and purpose of the Vic Act as a whole, the estimated cost of rectifying any defective work is not an assessment of damages for breach of the contract that will be excluded by section 10(2)(c) of the Vic Act.

Facts

Maxstra Constructions Pty Ltd (Maxstra) subcontracted Mr Gilbert (Gilbert) to perform concreting works in the construction of a service station.

In response to Gilbert's payment claim, Maxstra issued a payment schedule disputing the amount claimed and sought to set off the cost to complete certain items and the cost of rectification of damage. Gilbert referred the matter to adjudication under the Vic Act.

In the adjudication Maxstra further sought to set off an estimated cost of rectification of alleged defects. Maxstra asserted that section 11(1)(b)(iv) of the Vic Act required the adjudicator to deduct the estimated cost of rectification (if any of the work is defective) from the amount owing in determining the value of the work.

When he assessed the valuation of the work in dispute, the adjudicator accepted Gilbert's submission to characterise Maxstra's additional claim as a claim for damages for breach of contract and therefore an 'excluded amount' for the purposes of section 10B(2)(c).

The adjudicator made his determination in favour of Gilbert. Maxstra sought a declaration that the adjudicator's determination was unlawful and void and an order to quash that determination.

Decision

The Supreme Court quashed the adjudicator's determination and remitted the matter to the adjudicator to be determined afresh.

Vickery J resolved the apparent conflict between sections 10B(2)(c) and 11(1)(b)(iv) by examining the text of each provision in greater detail. His Honour cited the High Court case of *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 to assert that the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.

Distinguished by the class of analysis

Section 11(1)(b)(iv) is a purely statutory concept of cost, concerned only with 'the estimated cost of rectifying the defect' in the event of any work being defective. In contrast, an amount 'claimed for damages for breach of contract' is excluded by section 10B(2)(c) because damages seeks to place the party who has suffered loss in the position it would have been in had the other party performed its obligations.

Depth of enquiry necessary for each assessment

An assessment of damages is not amenable to a determination based on a mere 'estimate', but instead required a forensic enquiry, to a civil standard on the balance of probabilities based on admissible evidence adduced.

His Honour held that section 11(1)(b) required an adjudicator to value the work in dispute 'having regard to' the four factors in section 11(1)(b)(i) to (iv), individually and as a whole. The failure of the adjudicator to consider section 11(1)(b)(iv) - whether the work the subject of the payment claim was defective and, if so, the estimated value of rectifying any such defective work - did not satisfy a 'basic and essential requirement of the [Vic] Act for a valid determination', resulted in jurisdictional error.

Sugar Australia Pty Ltd v Southern Ocean Pty Ltd & Anor [2013] VSC 535

Significance

It is open to a court in an application for judicial review to review findings of fact made by an adjudicator as to the validity of payment claims under the Vic Act in circumstances where a claimant relies on allegations of misleading conduct or fraud as the basis of a ground to found certiorari.

Facts

Southern Ocean Pty Limited (Southern) claimed that it had served three separate payment claims against Sugar Australia Pty Ltd (Sugar) on 22 February 2013 (by email and by post).

Sugar alleged that what was attached to Southern's email of 22 February 2013 was an invoice and not endorsed as a payment claim under the Vic Act (as required by section 14(2)(e) of the Vic Act). Sugar also asserted that:

- it did not receive properly endorsed payment claims until 6 March 2013;
- the letter from Southern dated 22 February 2013 was never received; and
- Southern's assertion that the letters had been sent on 22 February 2013 was false and fraudulent.

Sugar sought a writ of certiorari on the grounds of jurisdictional error or fraud in order to have the adjudication quashed. It proposed to issue subpoenas for the production of Southern's computer in support of its application.

The key issue for the court was the construction of the Vic Act: whether the existence of facts that, by the operation of the Vic Act, confer jurisdiction on an adjudicator can be distinguished from an adjudicator's opinion or determination as to whether those facts indeed existed. In other words, were findings of fact made by the adjudicator as to the validity of the payment claims amenable to judicial review in the circumstances.

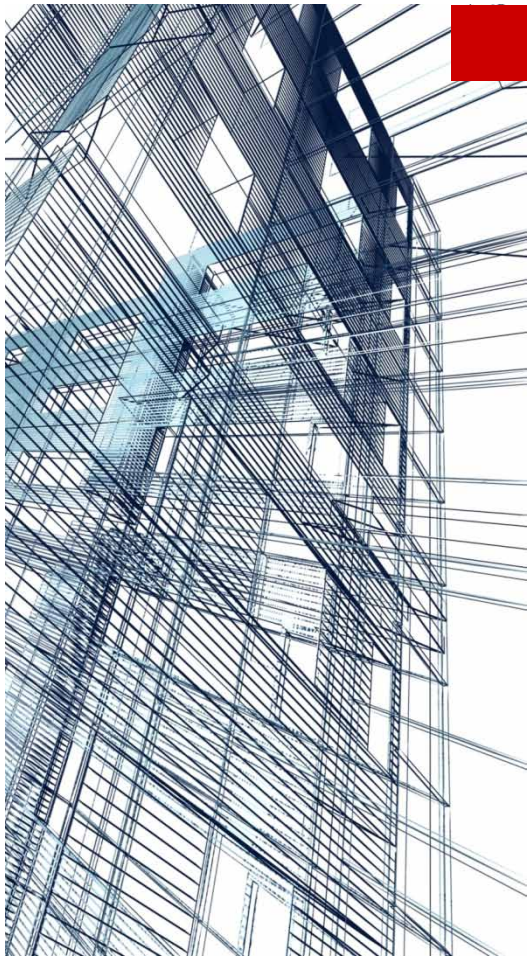
Decision

Vickery J held that it was open for judicial review to consider the findings of fact made by the adjudicator as to the validity of the payment claims in circumstances which included allegations of misleading conduct and fraud (as grounds for certiorari).

His Honour reached this conclusion using the following reasoning:

- Section 23 of the Vic Act strictly provides for what the adjudicator is to determine and the matters to be considered in making a determination. The section does not permit the adjudicator to finally determine the validity of an adjudication application. His Honour did not follow *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture & Ors* [2009] VSCA 426 on this issue.
- If an adjudicator receives material which disputes its jurisdiction to make a determination, the adjudicator should still determine the question of jurisdiction and give reasons for its findings.
- If the adjudicator's decision on jurisdiction is challenged on review, the court may deal with the matter afresh and receive additional evidence on the matter if it is relevant to the question.

WESTERN AUSTRALIA



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The MCIC Nominees Trust trading as Capital Projects & Developments and Red Ink Homes Pty Ltd [2013] WASAT 177

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

WA OVERVIEW

Developments

Being careful and accurate in relation to the use of the expression 'days'. Expressly nominating 'calendar days' or 'business days' (or some other type of days) and then undertaking an accurate count having regard to the relevant type of days nominated can be critical to the validity of payment claims and adjudication applications (*City Residence Pty Ltd and Catoi* [2013] WASAT 29).

The cases also illustrate the importance of a careful and proper counting of days, and the noting of relevant days in payment claims and responses (*EC & M Pty Ltd v CTEC Pty Ltd* [2013] WASAT 114 and *The MCIC Nominees Trust trading as Capital Projects & Developments and Red Ink Homes Pty Ltd* [2013] WASAT 177).

A request for more information about a claim does not amount to the disputing of the claim (*Digdeep Investments Pty Ltd and NW Constructions Pty Ltd* [2013] WASAT 60).

A statutory demand based upon judgment which in turn was based upon an adjudication under the WA Act (which could result in the winding up of the corporate recipient) will not be undermined by an assertion (which is common enough in winding up proceedings) that there is a genuine dispute as to the underlying debt (*Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2013] WASC 407).

The inclusion, in a construction contract, of a third party valuation process will not prevent an adjudicator from being entitled to undertake a valuation in accordance with the WA Act (*EC & M Pty Ltd and CTEC Pty Ltd* [2013] WASAT 114).

Where a party seeks the leave of the court to enforce an adjudication determination as a judgment, the onus lies on the opposing party to persuade the court that it would not be appropriate to grant leave (*KPA Architects Pty Ltd v Diploma Constructions (WA) Pty Ltd* [2013] WADC 106).

Whilst an adjudicator is entitled to consider documents served out of time, and whilst the electronic service of documents (including attachments in a less standard electronic form) can constitute sufficient service it is prudent to serve material on an adjudicator in a readily readable form and in good time. This is the lesson to be learnt from *Re David Scott Ellis; ex parte Triple M Mechanical Services Pty Ltd [No 2]* [2013] WASC 161. This decision was the final decision following an earlier *ex parte* decision in *Triple M Mechanical Services Pty Ltd v Ellis* [2013] WASC 67.

The case of *Re Graham Anstee-Brook; ex parte Karara Mining Ltd [No 2]* [2013] WASC 59 highlights the distinction between the extension of the time for the delivery of response to an adjudication application (which cannot be extended by an adjudicator) and the information which the adjudicator can have regard to in making a determination (which could be information which becomes available after the relevant time limit). The case also confirms the recognition that it is not all errors by an adjudicator which will be amenable to judicial review, only a jurisdictional error.

The assertion of, and the possible existence of, a jurisdictional error by the adjudicator is not necessarily enough to result in a court declining to register an adjudication as a judgment of the court (*RNR Contracting Pty Ltd v Highway Constructions Pty Ltd* [2013] WASC 423). Even if the adjudication was not registered as a judgment the adjudication could still be enforced through the service of a statutory demand (*Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2013] WASC 407 and *RNR Contracting Pty Ltd v Highway Constructions Pty Ltd* [2013] WASC 423).

Emerging trends

The Western Australian courts have demonstrated a focus on care in drafting contracts and preparing claims and responses. This care was considered relevant to the counting of days, the definition of days and the mode and timing of service of documents. A failure to take the necessary care can undermine a party's position in an adjudication.

The courts also displayed support for the enforcement of adjudications even in circumstances where there may be an argument as to error or as to the ultimate indebtedness (*Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2013] WASC 407 and *RNR Contracting Pty Ltd v Highway Constructions Pty Ltd* [2013] WASC 423).

Future

It is clear that whilst parties can expect the court to support the adjudication process and give effect to the purpose of the WA Act which it can the court also expects the parties to take the appropriate care in managing their own participation in the contractual and adjudication processes.

City Residence Pty Ltd and Catoi [2013] WASAT 29

Significance

When specifying time periods in a contract, it is important to indicate clearly whether 'days' refer to working days or calendar days. A failure to do so may result in an adjudication application being made out of time.

Facts

The contract between the parties contained definitions for both 'days' and 'working days'. Clause 25.7 of the contract provided that payment of progress claims must be made 'within the period stated in Appendix I item 4 of the contract or, if not stated, within seven working days of the date of submission ... of the claim'. Appendix I item 4 to the contract stated 'Period for payment of progress claims or final account. If none provided, five working days.' and, against that statement, there was a handwritten numeral of '7' in front of 'days'.

The adjudicator interpreted the '7' as seven calendar days. He then found that the application was made one day outside of the 28 day time limit under the WA Act and dismissed the application.

City Residence Pty Ltd (City Residence) sought a review of the adjudicator's interpretation, asserting that the period should be seven working days because seven calendar days would usually mean the same as the default period of five working days that is already stated in Appendix I item 4. City Residence also relied on the explanation of its managing director in his statutory declaration that the numeral '7' was inserted to make Appendix I item 4 consistent with clause 25.7.

Decision

The State Administrative Tribunal (Tribunal) upheld the adjudicator's determination to dismiss the application and agreed with the adjudicator's interpretation that the contract provided that a progress claim was to be paid within seven calendar days.

According to the Tribunal, its duty in construing a written contract is to attempt to discover the parties' intentions from the written words that embodied the contract. This is even where the interpretation yields a seemingly unreasonable result or a guess or suspicion that the parties intended something different.

The Tribunal noted that the contract drew very clear distinctions between 'working days' and 'days'. It concluded that the proper and unambiguous construction of the contract would have been a period of five working days (as stated in Appendix I item 4) if no numeral had been inserted in item 4. As Appendix I item 4 stated a period, the reference to seven working days in clause 25.7 could never apply.

Relying on existing cases, the Tribunal confirmed its duty to give effect to the written words used where their meaning is unambiguous and therefore declined to give regard to the managing director's statutory declaration being 'no more than a subjective statement of the belief or understanding of the parties about their rights and liabilities'.

Digdeep Investments Pty Ltd and NW Constructions Pty Ltd [2013] WASAT 60

Significance

A request for more information in order to process a payment claim may not, of itself, be a notice of dispute for the purposes of the WA Act.

A party seeking to dispute a payment claim must follow the method of responding to the claim provided for in the contract, if there is one. If not, the party must consider the requirements of a notice of dispute which are set out in clause 7 of Schedule 1, Division 5 of the WA Act.

Facts

NW Constructions Pty Ltd (NW Constructions) engaged Digdeep Investments Pty Ltd (Digdeep) to carry out earthworks. The day after Digdeep served a payment claim on NW Constructions, the project manager for NW Constructions emailed Digdeep requesting for additional documentation 'in order to process the payment claim' (documentation email). The documentation email included a simple statement 'less all backcharges' and ended with the advice that, until receipt of all requested documentation, NW Constructions was withholding payment. Digdeep responded to the documentation email nearly two weeks later. NW Constructions then wrote to Digdeep disputing an amount in the payment claim. Digdeep referred the matter to adjudication under the WA Act.

As the contract did not set out how to respond to a payment claim, section 17 of the WA Act implied the terms of Schedule 1, Division 5 of the WA Act into the contract. Clause 7 of Schedule 1 specifies that a party who disputes a payment claim must provide, within 14 days, a notice of dispute that contains all of the information required by that clause.

The adjudicator found that the dispute arose on the date of the documentation email and dismissed Digdeep's application on the basis that it was served out of time.

Digdeep applied for a review of the adjudicator's decision on the ground that there was no payment dispute to be adjudicated since the documentation email did not contain all the information required by the WA Act of a notice of dispute.

Decision

The State Administrative Tribunal (Tribunal) found that the adjudicator erred in his decision that the dispute arose on the date of the documentation email and set aside the determination. The Tribunal referred the matter back to the adjudicator for a further determination.

The Tribunal found that the documentation email was a request for further information and could not of itself be seen as a rejection or partly or wholly disputing the claim. Without more, it could not have been a notice of dispute under the WA Act .

Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd [2013] WASC 407

Significance

Once a determination is given under the WA Act, payment becomes due and no other matters can affect a party's entitlement to use the statutory demand procedure. Additionally, when drafting a statutory demand, the amount of interest should be calculated and the amount claimed should be clearly expressed.

Facts

This follows on from the decision of Deputy Registrar Hewitt in the District Court - *KPA Architects Pty Ltd v Diploma Constructions (WA) Pty Ltd* [2013] WADC 106 - to register adjudication determinations in favour of KPA Architects Pty Ltd (KPA) totalling over $500,000 as a judgment against Diploma Construction (WA) Pty Ltd (Diploma).

KPA served a statutory demand on Diploma that included the judgment amount 'plus interest'.

Diploma sought to set aside the statutory demand under section 459J(1)(b) of the *Corporations Act 2001* (Cth) on the grounds that:

- there was a 'genuine dispute' as to the amount which could only be resolved by court action;
- there is an offsetting claim and 'some other reason' why the demand ought to be set aside; and
- it was defective as it was uncertain as to the amount that had to be paid to satisfy the demand.

Decision

Master Sanderson dismissed the application by Diploma and, in doing so, applied the reasoning of the High Court of Australia in *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* [2008] HCA 41 (*Broadbeach* decision). In the *Broadbeach* decision, the court held that the operation of the provisions of the relevant statute providing for the recovery of debts could not be 'sidestepped' by an application to set aside a statutory demand seeking to recover the relevant debt.

Master Sanderson found that payment became due because the statutory requirements of the WA Act that are necessary to establish the existence of the debt owed by Diploma were met when the adjudicator gave his determination. The operation of the 'genuine dispute' provisions to the statutory demand procedure would not be available. No other matters could affect KPA's entitlement to use the statutory demand procedure. To conclude otherwise would subvert the clear legislative intent of the WA Act. Master Sanderson went on to confirm that the same reasoning applied to the any offsetting claim.

Master Sanderson also took the view that the registration of an adjudication determination as judgment is not a necessary precursor to the issue of a statutory demand, based on the reasoning in the *Broadbeach* decision.

Additionally, the court accepted that the statutory demand was defective. However, it was not so defective to warrant it being set aside. The court noted that while statutory demands should clearly express the amount of interest being claimed, Diploma could have easily calculated the amount of the interest.

EC & M Pty Ltd and CTEC Pty Ltd [2013] WASAT 114

Significance

It is important to note the dates of any correspondence in response to a payment claim. Such a correspondence might constitute a payment dispute and affects the time limit by which an adjudication application must be made. In drafting construction contracts, parties should consider stipulating when and how to respond to a progress claim; otherwise Schedule 1 Division 5 of the WA Act will be implied into the contracts.

Facts

EC & M Pty Ltd (EC&M) engaged CTEC Pty Ltd (CTEC) to undertake construction work. Under the contract, a superintendent would assess payment claims made by CTEC and issue a progress certificate for all or part of the claim which was binding on the parties.

In a letter dated 8 August 2012 (Letter), EC&M disputed parts of an uncertified progress claim. The superintendent issued a progress certificate on 24 August 2012 that rejected some of the claims on that progress claim. On 19 September 2012, CTEC filed an adjudication application. The adjudicator dismissed the application on the basis that it was not filed within 28 days after the payment dispute arose. The adjudicator considered that the Letter established the start of the payment dispute.

CTEC applied for a review of the adjudicator's decision on the grounds that:

- the case of *Blackadder Scaffolding (Aust) Pty Ltd v Mirvac Homes (WA) Pty Ltd* [2009] WASAT 133 (*Blackadder* decision), which the adjudicator relied upon in finding that the date of the payment dispute is the earlier of the date on which the payment claim was wholly or partially disputed and the date on which payment was due but not paid in full, was decided wrongly; and
- in the alternative, the *Blackadder* decision could not apply as only the superintendent had the right to assess any claims. The Letter was incapable of constituting a payment dispute as it had no effect on either party.

Decision

The State Administrative Tribunal (Tribunal) affirmed the adjudicator's decision but gave different reasons.

The Tribunal acknowledged the difficulties faced in the *Blackadder* decision in construing the WA Act but declined to conclude that the case was decided wrongly as the case has been approved and followed by a number of previous decisions.

Departing from the adjudicator's reasoning, the Tribunal accepted CTEC's contentions that the Letter, having no effect on either party, could not constitute a rejection of the progress claim sufficient to create a payment dispute as defined in section 6 of the WA Act. It was accepted that the contract did not give room for any payment dispute to arise as both parties had to accept the superintendent's determinations.

However, the Tribunal was of the view that the relevant contract did not contain provisions as to how to respond to a progress claim. Schedule 1 Division 5 clauses 7(1) and 7(2) of the WA Act were then implied into the contract which obliged EC&M to respond to the payment claim by giving a notice of dispute if it disputed the whole or part of the claim.

The Letter was effectively a 'notice of dispute' for the purposes of clause 7 of Schedule 1 Division 5 and constituted a payment dispute within the meaning of section 6 of the WA Act. The adjudication application was filed more than 28 days after the date of the Letter and so was filed out of time.

KPA Architects Pty Ltd v Diploma Constructions (WA) Pty Ltd [2013] WADC 106

Significance

Where a party seeks the leave of the court to enforce an adjudication determination as a judgment and entry of judgment in terms of the determination under section 43 of the WA Act, the onus lies on the opposing party to persuade the court that it would not be appropriate to grant leave.

Facts

KPA Architects Pty Ltd (KPA) and Diploma Constructions (WA) Pty Ltd (Diploma) were respectively the architects and the builder of redevelopment works to the Kwinana Hub Shopping Centre. A number of disputes arose between the parties of which two adjudications were determined, both in favour of KPA.

KPA sought the leave of the District Court under section 43(2) of the WA Act to enforce the determinations as a judgment and to enter judgment in the terms of the determination.

Diploma opposed the grant of leave on two bases:

- first, that the determinations were fundamentally flawed and should not be permitted to be enforced; and
- secondly, Diploma was issuing court proceedings against KPA alleging that as a result of KPA's breaches of the contract, Diploma suffered loss and damage.

Decision

The court followed *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2008] WASC 58, which held that the scheme of the WA Act was such that on an application under section 43(2) for leave to enforce a determination, the defendant must point to circumstances which justified a refusal to grant leave. A failure to do so will result in leave being granted.

In relation to Diploma's first argument, the court found that Diploma had not initiated any judicial process to review the determinations. Diploma's argument was therefore an appeal against the adjudications and was beyond the power of the court.

As to Diploma's second argument, the court held that Diploma failed to satisfactorily plead its case and that the pleading was lacking so severely in particulars that it would have been liable to be struck out.

Therefore, because Diploma had failed to discharge its onus, the court granted leave to KPA to enforce the determinations as a judgment and to enter a judgment in the terms of the determinations.

Re David Scott Ellis; ex parte Triple M Mechanical Services Pty Ltd [No 2] [2013] WASC 161

Significance

An adjudicator has no power to extend the time for service of a response. An adjudicator retains a broad discretion to inform himself or herself of relevant material, including a response filed out of time, but is not obliged to consider such material. While it is possible to serve documents on an adjudicator by electronic means, it is crucial to use electronic file types that are commonly used and ensure that the adjudicator has the means to open the files within the time limits for service specified in the WA Act.

Facts

Triple M Mechanical Services Pty Ltd (Triple M) subcontracted United Industries Pty Ltd (United) to perform air-conditioning steelwork at the Fiona Stanley Hospital site.

United applied for an adjudication under the WA Act of a dispute of a variations claim and David Scott Ellis was appointed as the adjudicator.

Triple M attempted to serve voluminous attachments to its response twice on 31 January 2013 by electronic means. First, as 'rar' compressed files, and the second, 'pdf' files and 'Yousendit' links. Hard copies of the attachments were delivered to the adjudicator and United on 1 February 2013.

The adjudicator could not open the 'rar' files as his computer lacked the appropriate software. Though he was able to access the 'Yousendit' links, he only did so on 1 February 2013. Under the WA Act, the time limit for serving the response was 31 January 2013. The adjudicator considered that the attachments were served out of time and refused to have regard to the attachments in the adjudication.

Triple M applied for a order of certiorari to quash the adjudicator's determination.

Decision

Heenan J refused to grant certiorari.

His Honour's overriding concern was to uphold the legislative purpose of the WA Act of facilitating rapid adjudications. To allow a challenge of the adjudicator's determination on the basis of a failure to have regard to attachments that the adjudicator considered to have been served out of time would have frustrated that legislative purpose.

Heenan J affirmed previous authorities that the time limit stipulated in section 27 of the WA Act is strict. An adjudicator does not have power to extend the time for service of a response and is not obliged to consider any of the attachments filed out of time. Since section 32 of the WA Act confers power on an adjudicator to 'inform himself or herself in any way he or she thinks fit', Heenan J considered that there may be circumstances in which an adjudicator may consider documents filed out of time. However, a refusal of the administrator to do so is not a jurisdictional error or a failure to provide procedural justice.

Heenan J agreed with Triple M that the attachments were served within time. Triple M had submitted that there are well-known applications that can be downloaded free of charge which would have enabled the adjudicator to open the 'rar' files ('rar' applications). Heenan J found that it was reasonable to expect that the documents contained in the 'rar' files would be 'readily accessible so as to be useable for subsequent reference'. Section 9 of the *Electronic Transactions Act 2011* (WA) would have deemed Triple M to have complied with section 27 of the WA Act.

In spite of this finding, Heenan J did not consider that the adjudicator committed a jurisdictional error. The adjudicator had the authority under section 32(1) of the WA Act to decide if the attachments were filed within time and had reached, at most, within that authority a reasonable but erroneous decision.

Re Graham Anstee-Brook; ex parte Karara Mining Ltd [No 2] [2013] WASC 59

Significance

An adjudicator does not have a discretion to consider a response that is served after the statutory timeframe under the WA Act. The adjudicator would not then commit any error of law in making a determination on the application alone. A determination under the WA Act is not amenable to judicial review for a non-jurisdictional error of law.

Facts

Karara Mining Ltd (Karara) contracted DM Drainage and Construction Pty Ltd (DMC) to construct a pipe and associated works to connect a borefield to a mine site. Following Karara's refusal to pay, DMC made an adjudication application.

Karara served its response after the 14-day statutory timeframe in section 27(1) of the WA Act. The adjudicator determined in favour of DMC and stated in his decision that he was obliged to ignore Karara's late response and to make the determination solely on DMC's application.

Karara obtained an order nisi from the courts for a writ of certiorari to quash the adjudicator's determination on two grounds:

- in concluding that he was obliged under the WA Act to ignore Karara's response, the adjudicator misapprehended the nature or limits of his functions or power under the WA Act and committed a jurisdictional error; and
- by making his determination without considering Karara's response, Karara was denied procedural fairness.

Decision

Le Miere J dismissed Karara's application for the order nisi to be made absolute.

His Honour ruled that the adjudicator made no error of law in failing to consider Karara's response. His Honour applied the reasoning of Commissioner Gething in *Witham v Raminea Pty Ltd* [2012] WADC 1. The adjudicator does not have a discretion under section 27 of the WA Act to consider a response that is not prepared and served in accordance with the WA Act. A response that is filed out of time is not a response for the purposes of section 27.

Where an adjudicator, pursuant to section 32(2) of the WA Act, invites parties to file further materials, he or she is not exercising a discretionary power to extend the time for service. Section 32(1)(a) of the WA Act is emphatic that the adjudicator must 'if possible' make the determination on the basis of the application and the response. The adjudication process is not a final determination of the rights of the parties. The purpose of the WA Act is to provide a rapid adjudication process that operates in parallel to any other legal or contractual remedy.

His Honour also confirmed that had the adjudicator made an error of law, it would not be a jurisdictional error by applying the High Court's reasoning in *Craig v State of South Australia* (1995) 184 CLR 163.

Le Miere J also ruled that there was no denial of procedural fairness as Karara had the opportunity under the WA Act to respond. The adjudicator was not required to take steps to ensure that Karara took the best advantage of the opportunity to respond. It would be contrary to the purpose of the WA Act if the adjudicator was obliged to consider whether or not to have regard to a response that was not served within the timeframe.

RNR Contracting Pty Ltd v Highway Constructions Pty Ltd [2013] WASC 423

Significance

An arguable allegation of jurisdictional error by the adjudicator alone will not warrant a refusal to register a determination as a judgment. Consideration of all the relevant circumstances and the policy of the WA Act is required. Parties should take further steps to overturn the determination of an adjudicator (by making an application for a prerogative writ or issuing proceedings to have its rights determined by court) which, in conjunction with an allegation of jurisdictional error, may constitute a good reason for the determination not to be registered as a judgment.

Facts

RNR Contracting Pty Ltd (RNR) entered into a construction contract with Highway Constructions Pty Ltd (HC) to provide bituminous sealing to a highway.

RNR performed the work under the contract and submitted four invoices to HC on four separate dates. Three invoices remained outstanding and went to adjudication, where RNR received a determination in its favour. RNR sought to register the determination as a judgment under section 43 of the WA Act.

HC submitted that the adjudicator had made a jurisdictional error:

- on the proper construction of section 32(3) of the WA Act read in conjunction with sections 25 and 26, the adjudicator has jurisdiction to determine only one payment dispute at a time; and
- the jurisdiction of the adjudicator may be expanded by agreement of the parties under section 32(3) of the WA Act; however, HC had not consented.

Decision

Master Sanderson upheld RNR's application to register the determination as a judgment.

In his reasoning, Master Sanderson considered the construction of section 26 in conjunction with section 32(3). Section 26 refers to a payment dispute as a single payment dispute. Section 32(3) provides that an adjudicator may, with the consent of the parties, adjudicate two or more payment disputes simultaneously. Master Sanderson recognised it was arguable that the adjudicator had made a jurisdictional error as consent was not obtained from HC. However, His Honour was not satisfied that this argument alone was enough to refuse to register the judgment. If His Honour refused to register the determination as a judgment, the determination itself remains in existence and could be enforced by a statutory demand to which HC had no viable ground of objection.

Master Sanderson further considered that had HC had taken steps to overturn the adjudicator's decision (either by applying to the court for prerogative relief or issuing proceedings to have its rights determined by court), the position may have been different.

The court confirmed the discretion in section 43 of the WA Act is dependent on the circumstances of each case and the policy considerations of the WA Act. The legislative intention of the WA Act in ensuring efficiency and maintaining cash flow to parties in construction contracts is of paramount importance.

The MCIC Nominees Trust trading as Capital Projects & Developments and Red Ink Homes Pty Ltd [2013] WASAT 177

Significance

In calculating when a payment dispute arises, the day on which a payment claim was made is excluded. However, in determining the last day for serving an adjudication application, the day on which the payment dispute arises is included.

Facts

The MCIC Nominees Trust trading as Capital Projects & Developments (MCIC) allegedly entered into an oral agreement to provide services for residential homes constructed by Red Ink Homes Pty Ltd (Red Ink). MCIC made a payment claim on 28 March 2013.

The adjudicator found that the payment dispute arose on 25 April 2013 which was 28 days from, but excluding, 28 March 2013. The adjudicator concluded that the last day for service of the adjudication (being 28 days from, but excluding, 25 April 2013) fell on 23 May 2013. As the adjudication was served on 24 May 2013, the adjudicator dismissed the adjudication application on the basis that it was served a day late and out of time.

MCIC applied for a review of the decision in the State Administrative Tribunal (Tribunal) to set aside the decision of the adjudicator on the grounds that the last day for service of the adjudication application was 24 May 2013, and the application was served within time.

Decision

The Tribunal affirmed the adjudicator's decision to dismiss the adjudication application but for a different reason: Red Ink was not party to the 'construction contract' for the purposes of the WA Act. Therefore the adjudication had not been prepared and served in accordance with section 26 of the WA Act.

Although it was unnecessary, the Tribunal found that the adjudicator has miscalculated and the adjudication application was served within time under section 26.

Calculating the date the payment dispute arose

The Tribunal found that the payment dispute arose at midnight on 26 April 2013 or, in other words, at 00:00 hours on 27 April 2013.

The Tribunal applied the rule in *Prowse v McIntyre* (1961) 111 CLR 264 (*Prowse* decision) where Windeyer J stated that, in calculating a period of time where an event is specified, the date of the event is excluded. Therefore, the day that the payment claim was issued should be excluded when determining the date on which a payment dispute arises.

The Tribunal initially calculated that the 28 day period ended on 25 April 2013. While the adjudicator reached the same conclusion, the Tribunal agreed with MCIC's assertion the adjudicator failed to then exclude 25 April 2013, being a public holiday, by reason of section 61(1)(e) of the *Interpretation Act 1984* (WA).

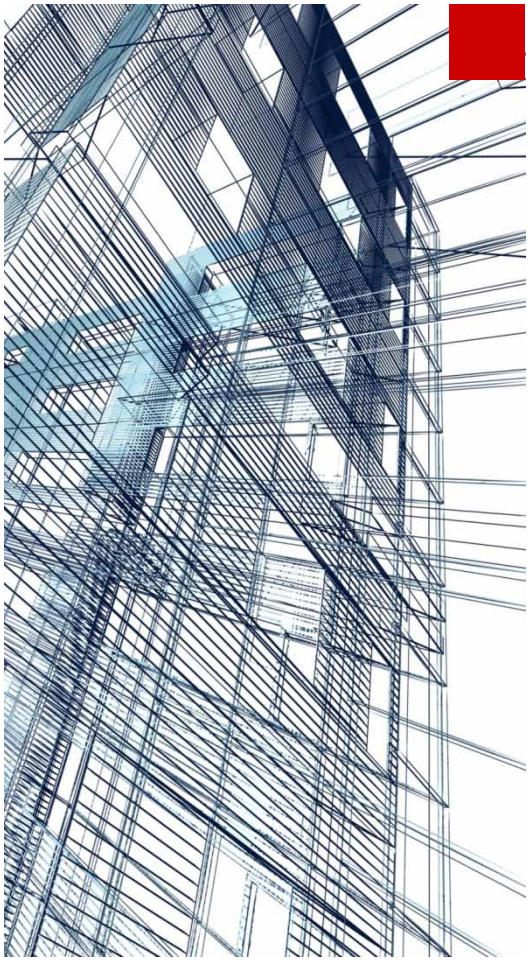
Calculating the last day for service of an adjudication application

The Tribunal found that the last day of service was 24 May 2013 which meant that the application had been served within time.

The Tribunal held that the rule in the *Prowse* decision is not universal. When a period of time is 'from' a specified event and 'within' a period of time coupled with the word 'when', authorities such as *Edelsten v Health Insurance Commission* [1998] FCA 258 suggest that the day of the specified event is included because the moment when the event occurred was intended to be the starting point of the calculation of the time period.

The adjudication application must have been served 'within' the 28 day period which ran 'from' the moment 'when' the payment dispute arose - from 00:00 on 27 April 2013.

AUSTRALIAN CAPITAL TERRITORY



CASE INDEX

Ling Chan v Stuart Wood and Kai Design & Construction Pty Ltd [2013] ACTSC 228
Pines Living Pty Ltd v O'Brien and Walton Construction Pty Ltd [2013] ACTSC 156
Walton Construction Pty Ltd v Pines Living Pty Ltd [2013] ACTSC 114

Please note in this section, the *Building and Construction Industry (Security of Payment) Act 2009* (ACT) is referred to as the 'ACT Act'.

ACT OVERVIEW

Developments

2013 saw the first judicial consideration of the ACT Act. In all, three cases were heard by the Supreme Court. No substantive amendments have been made to the ACT Act since its introduction in 2010.

When determining whether the ACT Act applies to the construction of a residential building, the owner's intention to reside in the property is a jurisdictional fact and should be considered as at the time the construction contract is entered into (*Ling Chan v Stuart Wood and Kai Design & Construction Pty Ltd* [2013] ACTSC 228).

To prevent a party from an unjust departure from an assumption of fact, the representations must be about existing facts, there must be clear evidence of reliance upon the representations, and the reliance must not be unreasonable (*Ling Chan v Stuart Wood and Kai Design & Construction Pty Ltd* [2013] ACTSC 228).

An amount claimed in an earlier payment claim under the ACT Act may be included in a subsequent payment claim and that both claims may be sought to be enforced simultaneously (*Pines Living Pty Ltd v O'Brien and Walton Construction Pty Ltd* [2013] ACTSC 156).

The Supreme Court has confirmed that the underlying policy of the ACT Act is 'pay now, argue later' and indicated that courts will be reluctant to depart from that position by restricting dealing with funds pending resolution of a dispute (*Walton Construction Pty Ltd v Pines Living Pty Ltd* [2013] ACTSC 114).

Emerging trends

While ultimately unsuccessful, the Supreme Court appears to be receptive to considering common law estoppel claims in relation to representations of fact which are relevant to determining whether an adjudicator made a jurisdictional error in making a determination (*Ling Chan v Stuart Wood and Kai Design & Construction Pty Ltd* [2013] ACTSC 228).

Future

The ACT Act is becoming more frequently utilised within the building and construction industry in the ACT. We can expect to see more judicial consideration of the ACT Act in the future.

The ACT Act required the Minister for Environment and Sustainable Development to review of the operation of the ACT Act and report to the ACT Legislative Assembly by 1 July 2013. Whether or not this will result in any future amendments to the ACT Act remains to be seen.

Ling Chan v Stuart Wood and Kai Design & Construction Pty Ltd [2013] ACTSC 228

Significance

When determining whether the ACT Act applies to the construction of a residential building, the owner's intention to reside in the property is a jurisdictional fact and should be considered at the time of execution of the construction contract.

Estoppel in pais (a common law estoppel preventing a party from an unjust departure from an assumption of fact which has caused another party to adopt or accept) only applies to representations about existing facts and requires clear evidence that the other party relied on the representation where that reliance must not be unreasonable.

Facts

In March 2011, Ms Ling Chan (Chan) obtained ownership of a property in a land ballot (Harrison property). In November 2011, Chan entered into a contract with Kai Design & Construction Pty Ltd (Kai) for the construction of a substantial residential dwelling on another property (Franklin property). In May 2012, a notice to stop work was issued for the Franklin property and construction ceased until November 2012.

Chan asserted that while her initial intention was to live in the Franklin property, due to the delay in its construction, she changed her mind and intended to live in the Harrison property. Chan signalled her intention to reside in the Harrison property by applying for discounted land rent in August 2012. After that application was approved, Chan signed a building contract with Kai for the Harrison property in September 2012.

Following a dispute, Kai terminated the building contract for the Harrison property and made a payment claim.

The adjudicator found that there was no independent documentation to support Chan's contention that she was a resident owner. Chan sought to have the adjudication determination set aside on the basis that she intended to live in the Harrison property at the time she contracted to have it built. Therefore under section 9(2)(b) of the ACT Act, the adjudication determination was invalid due to lack of jurisdiction.

Kai contended that:

- Chan did not intend to live in the Harrison property, which was considerably smaller and cheaper than the Franklin property;
- Chan lacked credibility and her evidence should be given little weight; and
- Chan's previous representations to Kai about her intention to live in the Franklin property meant she should be estopped from departing from those representations and asserting an intention to live in the Harrison property.

Decision

The Supreme Court held that Chan was not estopped from asserting her intention to live in the Harrison property, accepted her claim that at the time of entering into the contract with Kai for the Harrison property she intended to live in the Harrison property, and declared that the adjudication determination was made without jurisdiction and is of no effect.

Master Mossop held that estoppel was not established. Estoppel in pais only applies to statements of existing facts, not representations about future conduct. Moreover, there was no evidence suggesting that Kai relied in any way on any statement relating to the Franklin property being the 'family home'. It was also held that any reliance on those statements after the delays caused by notice to stop work on the Franklin property would have been unreasonable.

Pines Living Pty Ltd v O'Brien and Walton Construction Pty Ltd [2013] ACTSC 156

Significance

A subsequent payment claim under the ACT Act may include an amount claimed in an earlier payment claim. Also an applicant may seek to enforce both claims simultaneously.

Facts

Walton Construction Pty Ltd (Walton) served on Pines Living Pty Ltd (Pines) a payment claim (PC28) but Pines did not respond with a payment schedule.

Subsequently, Walton served a further payment claim (PC29) which included amounts claimed in PC28 and amounts for additional works undertaken between in the interim. Pines disputed the amount, validity and valuation of PC29.

An adjudicator found in favour of Walton. Pines sought an order in certiorari to quash the adjudicator's determination and leave to appeal the adjudicator's decision pursuant to section 43 of the ACT Act on the basis that:

- PC29 was not a payment claim under the ACT Act because section 15(6) prevents any amount included as part of a previous payment claim to form part of a later claim;
- Walton was entitled to enforce either PC28 or PC29, but was not both simultaneously. This led to an absence of jurisdiction on the part of the adjudicator or, alternatively, amounted to an abuse of process under the ACT Act;
- the adjudicator exceeded his jurisdiction or, alternatively, made a non-jurisdictional error of law when he placed the onus on Pines to prove that Walton was responsible for delays in the project in order to deduct liquidated damages; and
- the adjudicator fell into jurisdictional error or, alternatively, made a non-jurisdictional error of law, in failing to appropriately deal with Walton's alleged breach of its obligations to correct defects.

Decision

The Supreme Court dismissed Pines' claim and upheld the adjudication determination.

Master Mossop held that section 15(3) of the ACT Act makes it clear that the 'claimed amount' may be made up of component 'amounts'. While section 15(5) limits the frequency of payment claims to one per reference date, section 15(6) operates as a qualification to that limitation, allowing an amount which has been the subject of a previous payment claim to be included in a payment claim. Section 15 as a whole contemplates a total 'amount' which can be made up of other 'amounts' including amounts the subject of a previous payment claim.

The court also held that nothing in the text of the ACT Act imposes a requirement for a claimant to make an election between enforcing an earlier payment claim in relation to which no payment schedule was given and pursuing an adjudication in relation to a later claim including the same amount in relation to which a payment schedule was served. Walton was not prevented from making and enforcing PC29 despite suspending the works as a consequence of PC28.

The adjudicator was correct in placing the onus on Pines to prove that Walton was responsible for the delays since he was not satisfied from the adjudication submissions that the delay was caused by Walton and Pines was unable to displace Walton's evidence.

The adjudicator did not fall into jurisdictional error or commit any error of law in dealing with Walton's alleged breach to correct defects as the adjudicator was not satisfied that the alleged defects were, in fact, defective work. That was an issue of fact and was a conclusion open to the adjudicator to make. The adjudicator also found that if the work was defective, it was capable of being dealt with under the defect liability provisions of the contract. Since Pines had not had to rectify those works itself, it had suffered no damage.

Walton Construction Pty Ltd v Pines Living Pty Ltd [2013] ACTSC 114

Significance

This case confirms that the underlying policy of the ACT Act is 'pay now, argue later' and that courts will be reluctant to depart from that position by restricting a respondent from dealing with funds pending resolution of a dispute.

Facts

This decision concerned an interlocutory application in the matter which was substantively dealt with by the court in *Pines Living Pty Ltd v John O'Brien & Walton Construction Pty Ltd* [2013] ACTSC 156.

Following the determination of an adjudicator that Pines Living Pty Ltd (Pines) should pay Walton Construction Pty Ltd (Walton) under a construction contract, Walton had judgment entered in the ACT Supreme Court and obtained a garnishee order from the NSW Supreme Court.

Pines subsequently filed an application in the ACT Supreme Court for an order in the nature of certiorari to quash the adjudicator's determination, as well as leave to appeal the adjudicator's determination pursuant to section 43 of the ACT Act.

Pending resolution of the substantive application, Pines applied to the court seeking orders to have all moneys paid to Walton in relation to the adjudicator's determination paid into court, to stay enforcement of the adjudicator's determination and to restrain Walton from taking further steps to enforce the adjudicator's determination.

Pines' claim was based on the following arguments:

- there was a serious question to be tried;
- it was under severe financial pressure as a result of the garnishee order; and
- Walton was also under financial pressure and might not be in a position to repay should Pines be successful in its substantive application.

Decision

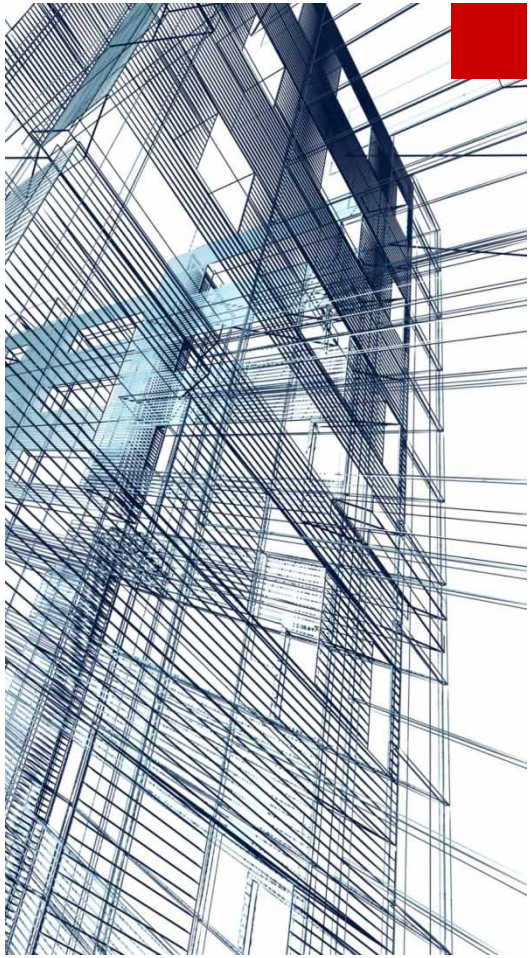
The court dismissed the application with costs.

Master Mossop accepted that there was a serious question to be tried and that Pines had a significant need for the funds which had been garnished. However, Master Mossop found that there was no indication that the money would be irrecoverable from Walton, it being a substantial company which continued to trade. Further, Pines had the benefit of a bank guarantee which provided it with some security.

Finally, Master Mossop held that the policy underlying the ACT Act is clearly 'pay now, argue later' so as to maintain the cash flow of construction businesses. The effect of this is that the risk of insolvency is assigned to parties in the position of Pines.

The court held that the risks to Pines were not sufficient to warrant departure from the policy underlying ACT Act.

SOUTH AUSTRALIA



CASE INDEX

Adelaide Interior Linings Pty Ltd v Romaldi Constructions Pty Ltd [2013] SASC 110
Built Environs Pty Ltd v Tali Engineering Pty Ltd & Ors [2013] SASC 84
Romaldi Constructions Pty Ltd v Adelaide Interior Linings Pty Ltd (No 2) [2013] SASCFC 124

Please note in this section, the *Building and Construction Industry Security of Payment Act 2009* (SA) is referred to as the 'SA Act'.

SA OVERVIEW

Developments

The SA Act commenced on 10 December 2011 and its first judicial consideration occurred in 2013.One of the disputes under the SA Act was initially heard in the Magistrates Court. The case then proceeded through to the District Court and to the Supreme Court. It was finally settled by the Full Court of the Supreme Court in *Romaldi Constructions Pty Ltd v Adelaide Interior Linings Pty Ltd (No 2)* [2013] SASCFC 124.

The Full Court considered the circumstances in which an interlocutory injunction might be granted to restrain a party from obtaining an adjudication certificate. These include granting an injunction to preserve the subject matter of the substantive action, to avoid the result of a separate action between the same parties being rendered of no effect or to protect the integrity of the court's processes once set in motion.

Payment claims under the SA Act do not need to be calculated on an incremental basis and sufficient details as to the legal principles relied upon in substantiating an application for adjudication must be provided to allow the other party to prepare a response (*Built Environs Pty Ltd v Tali Engineering Pty Ltd &Ors* [2013] SASC 84).

An adjudicator's determination may be void for apprehended bias where an authorised nominating authority has links with a party to adjudication (*Built Environs Pty Ltd v Tali Engineering Pty Ltd & Ors* [2013] SASC 84).

Emerging trends

The Full Court of the Supreme Court in *Romaldi Constructions Pty Ltd v Adelaide Interior Linings Pty Ltd (No 2)* [2013] SASCFC 124 also confirmed the circumstances in which a stay of execution of judgment may be granted to prevent an adjudication certificate being filed as a judgment for debt. The Full Court held that to make out a ground for a stay of execution of judgment, an applicant needed to establish that, if no stay was granted, there was a prospect that:

- the applicant would succeed in its substantive claim for damages; and
- such success in its substantive action would be rendered of no effect due to the respondent not having the means to repay the adjudication amount in that event.

While the Full Court held that Romaldi failed to establish these grounds, the Full Court further considered the relevant factors that need to be considered once a ground for a stay has been established.

In summary, the Full Court observed that it is necessary to balance all of the relevant considerations and give each factor the weight it deserves. However, the Full Court observed that it is not necessarily the case that the risk of the respondent being insolvent must be 'very high' before the discretion can be exercised in favour of the applicant.

Future

The Supreme Court observed that the NSW Act legislation is in large part identical to the SA Act and, accordingly, NSW cases might be used as guidance in understanding the rights and obligations of parties under the SA Act (*Built Environs Pty Ltd v Tali Engineering Pty Ltd & Ors* [2013] SASC 84).

It will be interesting to see the extent to which NSW decisions will be used as guidance by courts in South Australia to determine disputes under the SA Act.

Adelaide Interior Linings Pty Ltd v Romaldi Constructions Pty Ltd [2013] SASC 110

Significance

Granting an injunction to prevent the issue of an adjudication certificate circumvents the object of the SA Act. Apart from the general right to judicial review, an adjudication determination may only be challenged under section 22(5) of the SA Act.

Facts

An adjudicator determined that Romaldi Constructions Pty Ltd (Romaldi) should pay Adelaide Interior Linings Pty Ltd (AIL) for work performed under a construction contract.

Romaldi commenced proceedings against AIL in the District Court for damages for breach of contract.

Romaldi also sought an interlocutory injunction to restrain AIL from obtaining an adjudication certificate until such time as the claim for damages was determined. The District Court granted the injunction. Barrett J held that, on balance of convenience, there was a high likelihood of AIL becoming insolvent and a real risk that AIL would be unable to repay the adjudication sum.

AIL appealed on the basis that in granting the injunction sought by Romaldi on the basis of the purported impecuniosity of AIL, Barrett J had circumvented the purpose of the SA Act.

Decision

Anderson J, a single judge of the Supreme Court, allowed the appeal and held that the injunction ought to be discharged.

His Honour stated that the objects of the SA Act make it clear that the legislation was intended to create a regime for the payment of amounts owing to subcontractors. The SA Act sets out a very precise pathway, by which an adjudication certificate can be obtained.

His Honour held that AIL's attempts to follow the natural progress contemplated by the SA Act were frustrated by the decision of the District Court.

According to Anderson J, if the Judge of the District Court regarded the process set out under the SA Act for challenging the decision of an adjudicator as a general right to appeal, then this was an error. Under section 22(5) of the SA Act there is provision for either the adjudicator or either of the parties to correct the determination in the event that there is a clerical mistake, error from an accidental slip or omission, a material miscalculation of figures or a defect of form. Outside of those matters there is no mechanism providing an appeal of an adjudication determination under the SA Act, only the general right to judicial review.

As Romaldi had not elected to challenge the validity of the adjudication under the SA Act, Anderson J held that Romaldi cannot be permitted to circumvent the objects of the SA Act by taking its own action to prevent the issue of the adjudication certificate.

In the hearing before the District Court, Barrett J had analysed a series of cases in New South Wales that dealt with the power of a court to grant a stay according to the requirements of justice. Those cases made it clear that, where a payment made to a subcontractor may become irrecoverable because of a later insolvency, in the balancing act involved, there had to be a 'high level of likelihood of insolvency' as per Einstein J in *Taylor Projects Group Pty Ltd v Brick Department Pty Ltd* [2005] NSWSC 571. Anderson J determined that in applying the test of Einstein J, the evidence in this case did not go far enough to satisfy that test.

Note: This application of Einstein J's test was subsequently criticised by the Full Court of Supreme Court on appeal in *Romaldi Constructions Pty Ltd v Adelaide Interior Linings Pty Ltd (No 2)* [2013] SASCFC 124.

Built Environs Pty Ltd v Tali Engineering Pty Ltd & Ors [2013] SASC 84

Significance

Payment claims under the SA Act do not need to be calculated on an incremental basis. Sufficient detail as to the legal principles relied upon in substantiating an application for adjudication must be provided to allow the other party to prepare a response. Where an authorised nominating authority has links with a party to adjudication, this may be sufficient to support a claim for bias and voiding the adjudicator's determination.

Facts

Built Environs Pty Ltd (Built) claimed liquidated damages under a subcontract for delays resulting from Tali Engineering Pty Ltd (Tali) failing to achieve substantial completion.

Tali hired Edward Sain & Associates (ESA), a construction contract consultant, to advise and assist it on contractual issues with Built. ESA's chief executive officer (Sain) was also a manager of the nominating authority for appointing adjudicators (Nominator).

In response to Tali's payment claim, Built claimed in its payment schedule to set off liquidated damages and assessed the amount payable as nil. Tali applied for adjudication. The adjudicator determined that Built was not entitled to liquidated damages.

Decision

The court held that the determination was a nullity. Built had been denied natural justice and there was a reasonable apprehension of bias on the part of the Nominator.

Adjudicator had denied natural justice to Built

Blue J found that the adjudicator relied on the prevention principle (principle) in determining that Tali was prevented from completing certain works on time by Built's acts of prevention.

The adjudication application did not refer to the principle. This denied natural justice to Built as it was not given adequate notice that Tali was relying on the principle, or that the adjudicator might determine the adjudication on the principle. Built did not have the proper opportunity to make submissions or give its evidence on the principle.

Reasonable apprehension of bias on the part of Nominator

The court held that the evident purpose of sections 17(6), 19(1) and 29 of the SA Act is to ensure that the selection process of an adjudicator must be independent of the parties, in reality as well as in appearance of fairness. The court concluded that a 'fair-minded lay observer would regard the identity of the person selecting the decision-maker to be as important as the identity of the decision-maker itself'. Sain, the manager of the authorised nominating authority was also the chief executive officer of the consulting firm advising Tali. As an adviser to Tali, Sain had an interest in selecting an adjudicator who might tend to favour Tali. The court held that these facts alone would raise a reasonable apprehension of bias on the part of the Nominator. Whilst Sain had distanced himself from his position in the Nominator prior to Tali's adjudication application, the court was not persuaded that it was analogous to a 'Chinese wall' and noted that the Nominator owed a duty not to act in the interests of any party.

Adjudicator lacked jurisdiction as the claim contravened section 13(2) of the SA Act

This ground failed. Blue J held that the adjudicator's jurisdiction was dependent upon objective compliance with section 13(2) and found that the payment claim did comply. First, it was sufficiently comprehensible, despite arithmetical errors and redundancies. Secondly, His Honour rejected Built's submission that the SA Act requires a payment claim to be calculated on an incremental basis which would override the subcontract's terms that claims must include a cumulative account of amounts previously paid. Blue J noted that Built's view is contrary to the express requirements in sections 9(a) and 10(a) that progress payments are to be calculated 'in accordance with the terms of the contract'.

Romaldi Constructions Pty Ltd v Adelaide Interior Linings Pty Ltd (No 2) [2013] SASCFC 124

Significance

This case clarifies the circumstances in which a court may grant an interlocutory injunction to restrain a party from obtaining an adjudication certificate, and the criteria that will be relevant to determining an application for a stay of execution of judgment founded on an adjudication certificate being filed as a judgment for debt.

Facts

Romaldi appealed to the Full Court of the Supreme Court against the decisions of:

- Anderson J in the Supreme Court in *Adelaide Interior Linings Pty Ltd v Romaldi Constructions Pty Ltd* [2013] SASC 110 to discharge the injunction granted in favour of Romaldi at first instance preventing AIL from recovering the adjudication amount; and
- the magistrate who dismissed the application for a stay of execution (of the adjudication certificate that had been registered as a judgment for debt) pending a determination of Romaldi's claim for damages in the District Court.

Decision

Blue J (with Sulan and Stanley JJ agreeing) dismissed both appeals.

There were three issues for determination:

Was a ground established for an interlocutory injunction restraining AIL from obtaining an adjudication certificate as considered by Anderson J on appeal in the Supreme Court?

The court held that Anderson J on appeal was correct to discharge the interlocutory injunction since, whether or not the injunction was granted, Romaldi could still apply for a stay of execution of the judgment once the adjudication certificate was filed in court.

Did Anderson J err in concluding that the proper exercise of the discretion on the material before the judge at first instance would have been to deny a stay of execution?

The court held that Anderson J was also correct that the proper exercise of the discretion was to deny a stay of execution on the judgment. Romaldi had to establish that if no stay were granted, there was a prospect that Romaldi would succeed in its damages claim and such success would be pointless if AIL did not have the means to repay the adjudication amount. As Romaldi failed to do this, there was no evidence that it would be exposed to a risk of prejudice if a stay was not granted.

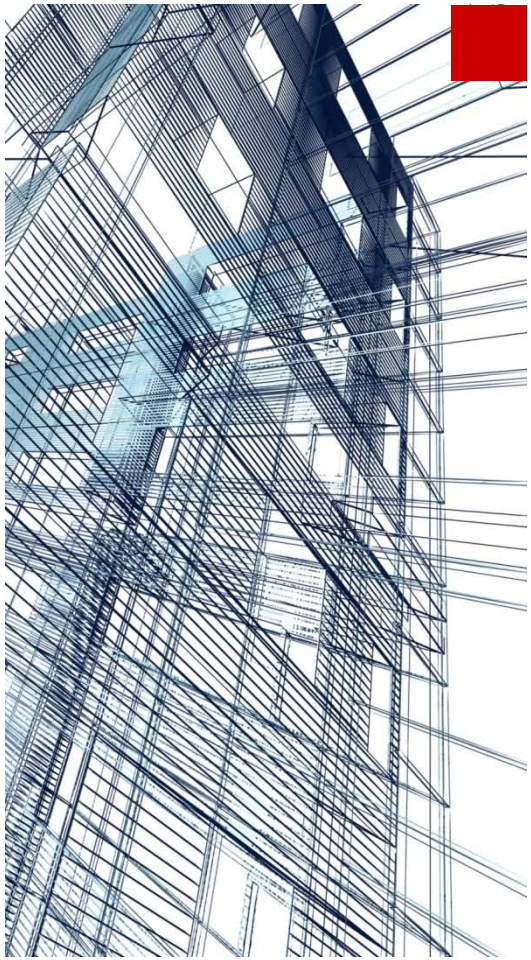
However, the court observed that it cannot be said that the risk of insolvency must be 'very high' (as per Anderson J) before the discretion can be exercised in favour of the applicant seeking a stay. The court observed that once a ground for a stay has been established, the exercise of the discretion involves a balancing of all relevant considerations, giving each the weight it deserves. In obiter, the court summarised some of the relevant considerations as follows:

- the strength of the plaintiff's claim;
- the likelihood of the defendant's inability to pay;
- the potential prejudice to the defendant if a stay were granted;
- the effect of the SA Act to place the risk that a subcontractor will be unable to refund progress payments upon a final determination on the owner or head contractor; and
- the entitlement of the defendant to a progress payment.

Was a ground established for a stay of execution of the judgment founded on the adjudication certificate in the Magistrates Court?

While the court held that the magistrate erred in refusing to hear and determine the application for a stay of execution of judgment on the merits, it was inevitable that the application for a stay would be dismissed on the merits because Romaldi failed to establish that it had a viable claim for damages for breach of contract.

TASMANIA



CASE INDEX

Skilltech Consulting Services Pty Ltd v Bold Vision Pty Ltd [2013] TASSC 3

Please note in this section, the *Building and Construction Industry Security of Payment Act 2009* (Tas) is referred to as the **'Tas Act'**.

TAS OVERVIEW

Developments

This year saw the first judicial consideration of the Tas Act since its commencement on 17 December 2009. The case which grabs the limelight of being the first is *Skilltech Consulting Services Pty Ltd v Bold Vision Pty Ltd* [2013] TASSC 3.

It is clear from the case that the expectations of the court of adjudicators is similar to the expectations of arbitrators – if the adjudicator is to proceed with an analysis different to that submitted by the parties, the adjudicator should give the parties an opportunity to comment on that analysis.

The case also clarified that where there may be multiple purported payment claims, the relevant claim is the one which complies with the relevant requirements rather than the first in time.

Emerging trends

The early indications are that the Tasmanian court will follow the approach of the courts in other jurisdictions and adopt a purposive interpretation of the legislation.

Future

The future is currently an open landscape for the Tasmanian court (subject to its inclination to be guided by courts in other jurisdictions).

Skilltech Consulting Services Pty Ltd v Bold Vision Pty Ltd [2013] TASSC 3

Significance

An adjudicator is under a duty to invite further submissions from the parties if his or her thinking will differ from the existing submissions of the parties. Where the adjudicator does not seek further submissions and makes a finding that is partly inconsistent with the submission of each party, natural justice is not denied if the adjudicator made that finding solely on the existing submissions.

When multiple purported payment claims are submitted in relation to a single reference date, the particular payment claim that satisfies the conditions of the Tas Act is the valid payment claim for that reference date, rather than the first of those multiple purported payment claims.

Facts

An adjudicator determined that Skilltech Consulting Services Pty Ltd (Skilltech) should pay Bold Vision Pty Ltd (Bold Vision) on a set of documentation dated 14 August 2012 that related to a reference date of 25 July 2012. These were among multiple documents that purported to be payment claims.

The parties disagreed on what constituted the contract and its terms. Without requesting further submissions from the parties, the adjudicator determined that a subcontract agreement signed by the parties was the relevant contract. This was partially inconsistent with the parties' submissions.

Skilltech sought to quash the adjudicator's determination.

Decision

The court upheld the adjudicator's determination.

The adjudicator made his decision based only on the submissions of the parties and did not move outside these submissions. The adjudicator was therefore not required to consider further submissions of the parties. Denial of natural justice had not occurred.

Blow J was satisfied that the adjudicator had not overlooked any critical facts and had not breached the requirement in section 25(2)(d) of the Tas Act to consider all submissions made in support of the payment schedule. Whilst His Honour concluded that the adjudicator may have given less weight to some of the material submitted (possibly due to Skilltech's failures to paginate the supporting material and to match these up with Skilltech's submissions) this did not amount to a denial of natural justice.

Regarding the validity of the payment claim, the court adopted Finkelstein J's reasoning in *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248, and held that a payment claim will be sufficiently detailed if a reasonable principal is able to understand the basis of the claim.

The 14 August claim was a valid payment claim because it did not lack any of the characteristics of a valid payment claim under section 17 of the Tas Act. The earlier documents did not constitute valid payment claims because these documents did not specify a reference date (as distinct from an invoice date or a date for payment), nor did they relate to the full range of work Bold Vision had been undertaking for Skilltech.

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