Security of Payment Roundup

A comprehensive review of cases in 2014

MinterEllison

CONTENTS

NATIONAL OVERVIEW

We are pleased to present to the construction industry our annual Security of Payment Roundup for 2014.

The year has seen major amendments to the legislation in New South Wales and Queensland. Interestingly, the amendments to the New South Wales legislation have been aimed at protecting claimants' rights as a result of the Collins Inquiry and Report while the Queensland amendments remove a number of harsh consequences of the process in the legislation that were previously the bug-bear of the respondents (and their lawyers).

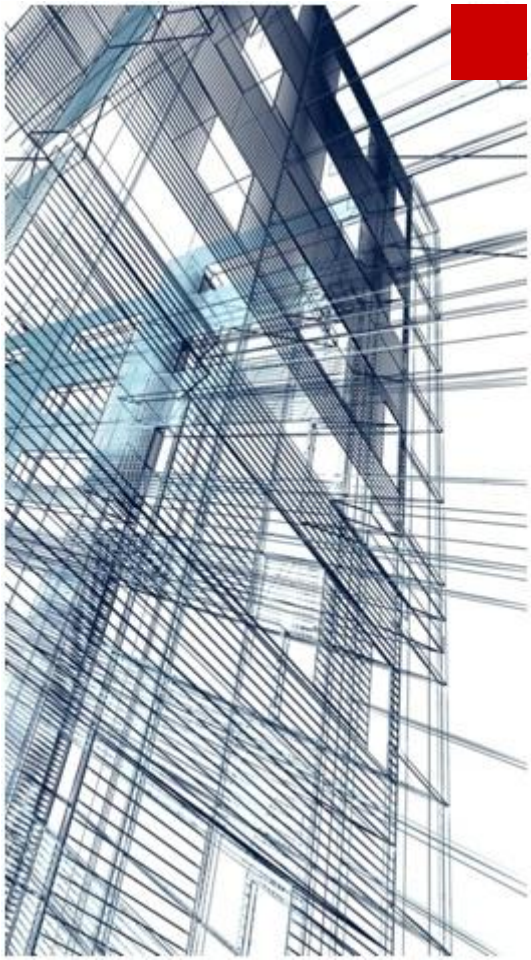
These amendments are outlined in this Roundup as well as the major cases that have been reported in the various jurisdictions.

The year ended with the announcement of a Senate Inquiry into insolvency in the construction industry, and the terms of reference for that inquiry include the adequacy of legislation which will include the security of payment legislation. The report from the Senate Inquiry is due on 11 November 2015 – maybe the Commonwealth is about to enter the SOP space?

Richard Crawford
Partner – Projects, Infrastructure and Construction

NEW SOUTH WALES

◄ CONTENTS ►



NSW CASE INDEX

Anderson Street Banksmeadow Pty Ltd v JCM Contracting Pty Ltd [2014] NSWSC 102
Burrell v JGE Machinery [2014] NSWSC 19 and [2014] NSWSC 32
Cornerstone Danks Street v Parkview Constructions [2014] NSWSC 866
Dewu Pty Ltd v Fabiano [2014] NSWSC 943
Eastland Truss & Timber Pty Limited v Matthew John Byrnes t/as Qualibuilt Constructions [2014] NSWSC 1461
FAL Management Group v Denham Constructions [2014] NSWSC 747
John McMillan v Complete Irrigation (NSW) Pty Ltd [2014] NSWCATCD 75
Kitchen Xchange v Formacon Building Services [2014] NSWSC 1602
Ku-Ring-Gai Council v Ichor Constructions Pty Ltd [2014] NSWSC 1534
Lewance Construction Pty Ltd -v- Southern Han Breakfast Point Pty Ltd [2014] NSWSC 1726: 04/12/2014
N Moit & Sons (NSW) v Denham Constructions [2014] NSWSC 905
Nefiko Pty Ltd v Statewide Form Pty Ltd (No 2) [2014] NSWSC 840
Omega House Pty Ltd v Khouzame [2014] NSWSC 1837
Patrick Stevedores Operations No. 2 Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd [2014] NSWSC 1413
Pittwater Council v Keystone Projects Group Pty Ltd [2014] NSWSC 1791
PPK Willoughby v Eighty Eight Construction [2014] NSWSC 760
Seabreeze Manly v Toposu [2014] NSWSC 1097
State Water Corporation v Civil Team Engineering Pty Ltd [2013] NSWSC 1879
TQM Design and Construct Pty Ltd v Department of Finance and Services [2013] NSWADT 249
Tresedar Pty Ltd v Property Builders (Constructions) Pty Ltd (In Liquidation) [2014] NSWSC 382

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 biggest development in NSW this year was the commencement of the legislative changes on 21 April 2014. These amendments can be summarised as follows:

- the introduction of "due dates for payment" being 15 Business days for a head contractor and 30 business days for a subcontractor;
- removal of the requirement that a payment claim is to be endorsed with the words "this is a payment claim made under the Building and Construction Security of Payment Act 1999";
- the introduction of the requirement that a payment claim issued by a head contractor must contain a supporting statement declaring payment of subcontractors has been made;
- the introduction of the ability for the government to make regulations requiring head contractors to hold retention monies on trust fro subcontractors (**Trust Fund Regs**).

The Government released draft consultation papers on the Trust Fund Regs and eventually release draft regulations but those regulations did not commence before the end of 2014. The draft Trust Fund Regs provide for the provision of trust funds where the head contract sum is greater than $20million.

A steady number of cases continued to make its way through the courts although none of the cases were ground breaking. There were a number of challenges to the adjudicators' jurisdiction as well as cases that gave further definition to the provisions of the NSW Act.

Three of the most interesting decisions were:

- *Patrick Stevedores Operations No 2 v McConnell Dowell Contractors (Aust) Pty Ltd* [2104] NSWSC 14113 *and Omega House Pty Ltd v Khouzame* [2104] NSWSC 1837 which held that the statutory reference date (i.e. on the last date of the month) did not come into play after termination of a contract so that unless the contract provided for a reference date after termination a claimant could not claim under the NSW Act;
- *Kuring-Gai Council v Inchor Constructions Pty Ltd* [2014 NSWSC 1534 which held that where an adjudicator makes a finding based on evidence provided in an adjudication, a subsequent adjudicator cannot reconsider that matter the subject of the previous adjudication just because it is presented with new or better evidence addressing failings in the previous evidence. To do so is an abuse of process.

Emerging trends

From a legislative perspective the emerging trend was for amendments that assist the Claimants to enforce their rights under the legislation and this trend should continue in the future.

Despite concerns that the amendments (especially the removal of the requirement to identify that the payment claim was being made under the NSW Act) would lead to more cases there was only one decision concerning the amendments being *Kitchen Xchange v Formacon Building Services [2014] NSWSC 1602* which confirmed that a payment claim issued without a supporting statement could not be relied on to enforce rights under the NSW Act.

The lack of cases may be due to the transitional provisions so this may be a trend that emerges next year as more contracts are entered into after the commencement of the amendments.

Future

The Trust Fund Regs will come into force this year.

Additionally the Regulatory Impact Statement introducing the draft Trust Fund Regs foreshadowed continual review of the legislation including applying the trust fund provisions to subcontracts of $1million.

Anderson Street Banksmeadow Pty Ltd v JCM Contracting Pty Ltd [2014] NSWSC 102

Significance

An adjudicator's obligation to comply with the rules of natural justice is affected by the nature of the process to which those rules apply. Even where there is a failure to follow these rules, relief may be denied if it can be shown the compliance with these rules could have made no difference to the outcome.

Facts

Anderson Street (**Anderson**) engaged JCM Contracting (**JCM**) in October 2012 to perform excavation work. The contractual arrangements required progress claims to be submitted on the 15th of each month.

On 15 November 2012, JCM sent two invoices to Anderson by email: the first was sent at 2.34pm and dated 5 November 2012 and the second at 2.35pm and dated 15 November 2012. The second invoice was not paid and JCM served a notice of its intention to suspend work. In its adjudication response, Anderson stated that as only one payment claim can support each reference date (erroneously identified as 31 October 2012), the second invoice could not support the suspension notice. JCM did not return to the site and Anderson terminated the contract.

The matter went to adjudication and the adjudicator found in favour of JCM. Anderson challenged the adjudicator's determination primarily on the ground that the adjudicator rejected its submission that the first and second invoices were made on the same date being the reference date of 15 November 2012, for reasons that were not raised by JCM, and on which Anderson was given no opportunity to make submissions.

Decision

The court dismissed Anderson's application.

In this case, Anderson's submission was first made in its adjudication response. Ball J held that there can be no denial of natural justice because the adjudicator decided the issue by reference to arguments and materials not raised by JCM since, under the procedures of the NSW Act, JCM had no further right to make submissions. His Honour held that the adjudicator was not required to invite further submissions from JCM or give Anderson the opportunity to comment on his reasoning process as it was based on material and evidence that was already before him. His Honour found that Anderson's substantive complaint boiled down to a denial of an opportunity to address the adjudicator's reasoning in reaching his conclusion.

Ball J reaffirmed that 'any entitlement to natural justice must accommodate the scheme of the NSW Act' (*Watpac Construction (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168 at [142]) and, for the court to grant relief in respect of a denial of natural justice, the denial must be material. Materiality requires that the matter to which the adjudicator did not provide an opportunity to be heard was significant to the actual determination and might have affected the outcome.

His Honour also found that even if there was a denial of natural justice, the denial was not material. First, it is not clear what further submissions or evidence Anderson could have made that would have made a difference. Secondly, whether or not the invoices were sent on the same day was not relevant to the determination of the four items which gave rise to a right to terminate the contract.

Burrell v JGE Machinery [2014] NSWSC 19 and [2014] NSWSC 32

Significance

It is arguable that the time limitations in section 13(4) of the NSW Act are mandatory, and that satisfaction of those conditions is a condition of jurisdiction, or a necessary precondition of obtaining the benefits given to people by the NSW Act.

Facts

Ms Burrell (**Burrell**) sought an injunction in the Equity Division of the Supreme Court of NSW to restrain JGE Machinery (**JGE**) from enforcing an adjudication determination.

JGE had issued a confusing series of payment claims, to which Burrell did not provide any payment schedule. The matter then went to adjudication.

One of the issues said to found the grant of interlocutory relief was whether there was any basis for the adjudicator to find (as he did) that work under the contract (if there was one) was last performed no more than 12 months before service of the relevant payment claim.

Burrell accepted that she had engaged the principal of JGE to cause a company then controlled by him to carry out what might be construction work in 2005 or 2006. The adjudicator noted that JGE did not state when the work was completed and determined that *'given that the amount claimed in that Tax Invoice is for the entire scope of works, it seems to me that in most probability [JGE] would have issued that Tax Invoice shortly after completing the works'*. The adjudicator concluded that the requirements of section 13(4)(b) of the NSW Act had been satisfied on that basis.

Burrell also raised as an issue that JGE's financial position meant that if she was required to pay the adjudicated amount, she would be at risk of losing that money in the event of a successful challenge to the adjudicator's determination.

Decision

McDougall J found that it is *'(at least) seriously arguable'* that the time limitations in section 13(4) of the NSW Act are mandatory, and that satisfaction of those conditions is a condition of jurisdiction, or a necessary precondition of obtaining the benefits given to people by the NSW Act.

McDougall J held that the adjudicator's reliance on 'probability' or 'an inference from business practice' to satisfy himself that the requirements of section 13(4) of the NSW Act had been met was a circular reasoning process. The judge noted that the work dockets relied upon appeared to be dated in 2006, 2007 and 2008, and that the invoice supporting the payment claim was dated 21 December 2012. His Honour commented that the date of the invoice might, of itself, be a reason to negate the drawing of the inference. In the circumstances, his Honour was held that there was a serious question to be tried and on the basis that Burrell was prepared to pay the adjudicated amount into court, the balance of convenience favoured the granting of interlocutory relief.

McDougall J also reaffirmed that one of the legislative policies embodied in the NSW Act is the transfer of the risk of insolvency pending final resolution of disputes (*RJ Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390 at [40]). As such there was no ground for restraint based on insolvency.

Cornerstone Danks Street v Parkview Constructions [2014] NSWSC 866

Significance

An adjudicator must determine all the issues in dispute to comply with their obligation to determine an application pursuant to s 21(3) of the NSW Act.

Facts

Cornerstore Danks Street (**Respondent**) engaged Parkview Constructions (**Claimant**) to design and construct a mixed-use development. A dispute arose between the parties in relation to a discrepancy between the payment claim issued by the Claimant and the payment schedule provided by the Respondent. Subsequently, the Claimant made an application to the Authorised Nomination Authority (**ANA)** for adjudication of the payment claim. The ANA referred the matter to an adjudicator (**Adjudicator**) who was required to determine the application by 29 April 2014.

The Adjudicator requested an extension of time of 10 business days until 13 May 2014, which was granted. On 13 May 2014, the Adjudicator requested a further extension of time. The Respondent consented to the further extension but the Claimant was not prepared to do so and, on 14 May 2014, wrote to the ANA to withdraw its application for adjudication in accordance with s 26 of the NSW Act.

On 19 May 2014, the Adjudicator sent to the ANA its determination, which included, among other things, the adjudicated amount for which the Claimant claimed payment. In response the Respondent disputed that the determination was a valid exercise of the adjudicator's powers on the basis that:

- the Adjudicator had failed to comply with his obligation to determine the application within the time agreed by the parties under section 21(3) of the *Building and Construction Industry Security of Payment Act 1999* (NSW);
- by proceeding without the grant of an extension of time, the Adjudicator had acted outside the scope of his powers; and
- the Adjudicator had denied the Respondent natural justice.

Decision

The court considered each section of the determination and observed that by 13 May 2014 the Adjudicator had determined all the issues in dispute except: whether the Claimant was entitled to profit and overheads, a claim for variation and the value of deletions to the scope of works. After the withdrawal of the claim, he simply used the amounts nominated for those claims contained in the payment schedule in his determination. The Court held that this was not determining the matter by 13 May 2014.

The Court decided that, because the Adjudicator had not completed its task by 13 May 2014, it had failed to determine the application by that date. With the application having been withdrawn by the Claimant on 14 May 2014, it was not open to the Adjudicator to complete its task and finalize the determination.

The Respondent was successful in the relief sought and the alternative arguments were not considered.

Dewu Pty Ltd v Fabiano [2014] NSWSC 943

Significance

An error as to the terms, or proper construction or application, of a construction contract is an error within the jurisdiction of an adjudicator making a determination under the NSW Act. It does not quash or make void the determination nor is it a failure to exercise powers in good faith taking into account the purpose for which they were given.

Facts

Dewu Pty Ltd (**Plaintiff**) had entered into a construction contract with Mr Fabiano (**Defendant**), who undertook to build a number of townhouses for the Plaintiff.

A dispute arose about payment and the matter was referred to an adjudicator for determination under the NSW Act. In its determination, the adjudicator determined that the Defendant was entitled to be paid around $166,000 and the costs of the adjudication.

The contract was executed on 20 January 2013. A revised schedule of payments was sent by the Defendant to the Plaintiff on 21 March 2013 titled 'Scheduled Payment' which set out occasions for payment and amounts for payment.

The Plaintiff submitted that the adjudicator erred by determining the adjudicated amount on the basis of s10(1)(a) of the NSW Act which requires that construction work be valued in accordance with the construction contract.

The adjudicator applied s10(1)(a) of the NSW Act because he concluded that the contract included the 'Scheduled Payment' document. Having so concluded, the adjudicator took the view that it was not open to the Plaintiff to seek to abrogate from its obligations under the contract in relation to progress payments.

Section 10(1)(b) of the NSW Act applies in circumstances where the construction contract makes no express provision for how construction work is valued. The argument put forward by the Plaintiff was that, had the adjudicator relied on section 10(1)(b) of the NSW Act, he would have been able to take into account the Plaintiff's two reasons for non-payment under its payment schedule. These were that the work done was defective requiring rectification and that the value of the works claimed was overstated.

Decision

McDougall J held that an error by the adjudicator in deciding that the terms of the contract included the 'Scheduled Payment' document would not be jurisdictional. The reason for this decision was that an error as to the terms, or the proper construction or application of a construction contract is at least in general or in principle an error within jurisdiction.

In his Honour's view, the adjudicator correctly concluded that the construction contract, as understood in its statutory sense, included an arrangement that there was to be a payment schedule and that the 'Scheduled Payment' document was intended to fill that purpose.

It followed that the question of good faith did not arise.

The application for orders to quash the determination was dismissed with costs to be paid by the Plaintiff.

Eastland Truss & Timber Pty Limited v Matthew John Byrnes t/as Qualibuilt Constructions [2014] NSWSC 1461

Significance

An adjudicator's determination will be void for jurisdictional error if the adjudicator does not determine whether construction work the subject of the payment claim has been performed and its value.

Facts

In response to a payment claim from Matthew John Byrnes (**Claimant**), Eastland Truss (**Respondent**) claimed that the Claimant failed to provide material and services in accordance with the construction contract between them and that the Claimant owed the Respondent money for back charges and other costs associated with the defective work.

Following an adjudication NSW Act, the Respondent sought a declaration that the adjudicator had committed a jurisdictional error by failing to discharge his duty under s 22(1)(a) of the Act to determine the amount of the progress payment to be paid, which required the adjudicator to determine whether the construction work identified in the Claimant's payment claim had been carried out and the value of that work.

In particular, the Respondent argued that the adjudicator failed to value the work in the manner required by s 10(1)(b)(iv) of the NSW Act which required the adjudicator to identify and consider the estimated cost of rectifying defects.

Decision

Bergin CJ held that the determination was not void for jurisdictional error.

Firstly, her Honour accepted that although the issues of the performance of the construction work and its value were not expressly put to the adjudicator, the adjudicator was still required to determine those issues as they are essential requirements of the validity of a determination, confirming the principle set out in *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* [2006] NSWSC 13.

Her Honour questioned whether it was necessary to value the construction work in accordance with s 10(1)(b) given that the value of the work under the fixed price contract did not appear to be an issue during the determination and therefore the adjudicator may have valued the work in accordance with the contract under s 10(1)(a). On the assumption that it was necessary, it was held that while the adjudicator did not refer specifically to ss 22 or 10 of the NSW Act, the adjudicator clearly considered individually those items which made up the total estimated cost for rectification claimed by the Respondent (for additional labour to complete the project, accommodation for those labourers, materials and defect refection).

In regards to those items, the adjudicator considered the documents that had been submitted, the submissions of the parties and whether the Respondent had any rights under the contract to incur labour, materials and defects rectification costs and unilaterally recover them from the Claimant. These considerations, which were clearly referenced in the adjudicator's determination, were sufficient for the adjudicator to discharge his obligation under s 22(1)(a) to determine the amount of the progress payment payable by the Respondent, by valuing the construction work that had been carried out in a manner that was consistent with s 22(2).

FAL Management Group v Denham Constructions [2014] NSWSC 747

Significance

The court will not reverse the consequences of a party's commercial decision to adhere to an adjudication determination, unconstrained by any misapprehension or coercion.

Facts

FAL Management Group Pty Ltd as trustee for TF Investment Trust (**FAL**) and Denham Constructions Pty Ltd (**Denham**) were parties to a construction contract. A dispute arose between the parties in regards to a payment claim (number 5) which was submitted to adjudication. Before the nominated adjudicator prepared his adjudication determination, a further dispute arose in regards to a further payment claim (number 6) issued by Denham.

The adjudicator did not consider FAL's adjudication response in relation to payment claim number 5 as it was not submitted within the prescribed statutory timeframe. The adjudication application was given to FAL by fax on 5 May 2014, but FAL stated that it did not receive notification of the acceptance until 9 May 2014. The adjudicator alleged the response was submitted out of time. FAL alleged its adjudication application response was lodged in time. FAL also maintained that even if the adjudication response was submitted out of time, a failure by the adjudicator to consider it amounted to the denial of natural justice.

The adjudicator issued his determination concerning payment claim number 5. FAL did not challenge the determination and paid the difference between the claimed amount and the scheduled amount. FAL subsequently sought to have the determination quashed, by relief in the nature of certiorari, and have the amount paid by it in excess of the scheduled amount, to be appropriated towards its obligations under payment claim 6.

Decision

McDougall J reaffirmed his decision in *Pacific General Security Ltd v Soliman & Sons Pty Ltd & Ors* [2005] NSWSC 378 regarding the outer time limit for lodging an adjudication response, vis-à-vis section 20 of the NSW Act. The receipt of the notice of acceptance is the fact that sets the clock running in respect of statutory time bars.

The court considered that FAL's decision to pay the balance due following the adjudication determination was a commercial decision, unopposed by anything attributable to Denham.

Accordingly, FAL's application for interlocutory relief was dismissed with costs.

John McMillan v Complete Irrigation (NSW) Pty Ltd [2014] NSWCATCD 75

Significance

This case reaffirms the principle that in order to rely on section 32 of the NSW Act to bring a claim in civil proceedings, the claim cannot be identical to cross claims that have been previously considered and determined by an Adjudicator.

Facts

In January 2014, Mr John McMillan (**Applicant**) sought orders against Complete Irrigation (NSW) Pty Ltd (**Respondent**) to pay a sum of $20,564.55 arising out of a defective supply of bore pressure pumps, piping and sprinklers. The Applicant purchased the goods in October 2010 and became aware of their alleged defect in September 2011.

The Applicant relied on section 32 of the NSW Act to bring civil proceedings in respect of anything arising under the contract or things done or omitted to be done under the contract.

The respondent sought to have the proceedings struck out on the basis that the claims were cross claims which had been raised in previous proceedings where an Adjudicator determined the amount of a progress payment in dispute between the two parties under the NSW Act.

Decision

The Civil and Administrative Tribunal of New South Wales (**NCAT**) considered the issues that were put before the Adjudicator when he made his determination in 2012, and decided that the submissions presented very little evidence to enable the Adjudicator to offset any cross claim. In any event, section 22 of the NSW Act does not empower an Adjudicator to consider a potential cross claim.

The NCAT was not satisfied that the Adjudicator's determination operated to preclude the bringing of a cross claim otherwise permitted by section 32 of the NSW Act, and called for the claim for the defective supply of goods to be determined on its merits in a formal hearing.

Kitchen Xchange v Formacon Building Services [2014] NSWSC 1602

Significance

A payment claim served in breach of section 13(5) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) in respect of the same reference date as an earlier payment claim is not a valid payment claim.

Section 13(7) renders ineffective service of a payment claim served without the requisite supporting statement.

Facts

In May 2014, Kitchen Xchange (**Plaintiff**) and Formacon (**Defendant**) entered into a construction contract (**Contract**). The Defendant engaged subcontractors to perform works under the Contract and was therefore a head contractor for the purpose of the Act.

The Defendant served three payment claims in relation to the same reference date. The first payment claim was withdrawn. The Plaintiff served a payment schedule in response to the second payment claim. The Plaintiff failed to respond to the third payment claim. None of the payment claims were accompanied by a supporting statement.

The third payment claim was referred for adjudication. The Plaintiff applied to set aside the determination of the adjudicator.

Decision

McDougall J held that section 13(5) of the NSW Act prohibits the service of more than one payment claim in respect of each reference date. The third payment claim, which was served in respect of the same reference date as the second payment claim, was therefore not a valid payment claim.

The Defendant submitted that it had withdrawn the second payment claim. McDougall J declined to decide whether or not a claimant could unilaterally withdraw a payment claim.

McDougall J also held that section 13(7) of the NSW Act prohibits the service of a payment claim that is not accompanied by the requisite supporting statement. This had the effect of rendering ineffective service of the payment claims.

In the circumstances, the adjudicator lacked jurisdiction to make his determination.

Ku-Ring-Gai Council v Ichor Constructions Pty Ltd [2014] NSWSC 1534

Significance

An attempt to rectify the shortcomings of evidence in subsequent adjudications of a claim under the NSW Act may be an abuse of process of the NSW Act.

Facts

Inchor Constructions (**Claimant**) served a payment claim on Ku-Ring-Gai Council (**Respondent**) which included a claim for delay damages. The Claimant made an adjudication application. In support of its claim for delay damages, the Claimant relied on a report of iSet which 'found' that the Claimant was entitled to damages for 115 days of delay (report).

The first adjudicator found that the report had serious shortcomings which he outlined in his determination. The first adjudicator concluded that he 'was unable to replicate the assessment process to assess the true extent of [the defendant's entitlement] to an EOT'. He made it clear that he had not assessed the claim as Nil, but rather he was unable to assess it.

Some months later the Claimant made a further payment claim which included the claim for the delay costs that the first adjudicator had been unable to assess. In support of the second adjudication claim, the Claimant served a further report of iSet that had been prepared to address the shortcomings of the report raised by the first adjudicator.

The Respondent contended that an issue estoppel arose preventing the Claimant from making a second application. Alternatively, the second application was an abuse of process of the NSW Act.

Decision

Stevenson J held that there was no issue estoppels as there had been no issue determined adversely to the Claimant.

His Honour, however, considered the second adjudication application to be an abuse of process of the NSW Act.

His Honour considered that the case involved more than a mere repetition of the claim earlier made. The Claimant had used the first adjudicator's observations as an 'advice on evidence' and had made a second attempt to prove the same case, requiring the Respondent, for the second time, to meet it. This, his Honour considered, was an abuse of process.

Lewance Construction Pty Ltd -v- Southern Han Breakfast Point Pty Ltd [2014] NSWSC 1726: 04/12/2014

Significance

If a superintendent is authorised by a principal to provide a payment schedule, the payment schedule will be taken to have been issued on the principal's behalf for the purposes of the NSW Act.

Facts

On 18 January 2013, Lewance Construction (**Plaintiff**), as the contractor, entered into a construction contract with Southern Han Breakfast Point (**Defendant**), as principal. The contract required the Plaintiff to appoint a superintendent, who was identified in the contract as Mr Kwee. All progress claims were to be given in writing to the superintendent and within 14 days the superintendent was required to provide a progress certificate to the parties evidencing his opinion of the monies due from the Defendant to the Plaintiff. The contract also allowed the superintendent to appoint individuals as the superintendent's representative. On 5 February 2014, Mr Kwee advised the Plaintiff of the appointment of Mr McMahon as the superintendent's representative.

On 6 February 2014 McMahon had a conversation with the director of the Plaintiff in which McMahon advised that the Defendant and superintendent had agreed that 'from here on' he would be assessing the Plaintiff's progress claims and issuing payment schedules.

Between 6 February 2014 and 7 July 2014, McMahon assessed the Plaintiff's progress claims 9 – 14. On each occasion, McMahon provided to the Plaintiff a document titled 'Contractor Payment Schedule' and a payment voucher or progress certificate for the scheduled amount.

On 8 August 2014, the Plaintiff sent progress claim 15 for $2,189,897.40. On 22 August 2014 Mr McMahon delivered a letter to the Plaintiff which included a 'Contractor Payment Schedule' and a progress certificate for the scheduled amount of $1,133,791.45. The Defendant paid the scheduled amount.

The Plaintiff sought to recover the unpaid portion of progress claim 15 on the basis that Mr McMahon was exercising the superintendent's function under the contract to act as an independent certifier and was not acting on behalf of the Defendant for the purpose of providing a payment schedule under the NSW Act.

Decision

The Court held that the evidence supports the finding that Mr McMahon was authorised by the Defendant to provide the payment schedule on its behalf, and the Plaintiff was not entitled to recover the unpaid portion of progress claim 15 as a debt due under s 15(2).

N Moit & Sons (NSW) v Denham Constructions [2014] NSWSC 905

Significance

Interlocutory relief under either section 26B of the NSW Act or section 14 of the Debts Act will only be granted where the evidence shows a contractual relationship between the relevant parties. The requirement for the Court to be 'satisfied, on the basis of the application' imports a higher degree of satisfaction than is conveyed by the concept of 'a serious question to be tried'.

The Court will have regard to the policy, under the NSW Act, for progress claims to be paid swiftly when considering the balance of convenience of granting interlocutory relief.

Facts

FAL Management Group Pty Ltd (**Third Defendant**) contracted with Denham Constructions Pty Limited (**First Defendant**) to perform works relating to a mixed residential and commercial development. Denham Constructions Project Company 960 Pty Ltd (**Second Defendant**) contracted with N Moit & Sons (NSW) Pty Ltd (**Plaintiff**) for excavation and piling works. A payment dispute arose in relation to the piling works.

Decision

Under section 26A of the NSW Act, a payment withholding request can be made by a claimant who has made an application for adjudication of a payment claim, in circumstances where the respondent to that payment claim is or may be owed money by the principal.

In this case, there was no suggestion that there was any contractual relationship between, or any money owing by, the Third Defendant to the Second Defendant. It follows that there can be no valid payment request sufficient to engage the operation of section 26B(1). Accordingly, the Court was not satisfied that there was serious question to be tried as to the protection of the Plaintiff's rights.

Section 14 of the Debts Act provides that a court may make an attachment order only if it is 'satisfied, on the basis of the application' that, amongst other things, there is money owing by the principal to the defaulting contractor. McDougall J held that this requirement imports a higher degree of satisfaction than is conveyed by the concept of 'a serious question to be tried'. As stated above, there was no evidence of any money owing by the Third Defendant to the Second Defendant and nothing that would enable the Court to attain the requisite degree of satisfaction.

When considering the court's general power and the balance of convenience of granting interlocutory relief, McDougall J held that there is clear policy under the NSW Act for progress claims to be paid swiftly. In this case, it would be inconsistent to allow payment to be held up while the dispute between the parties is sorted out on a final basis.

Nefiko Pty Ltd v Statewide Form Pty Ltd (No 2) [2014] NSWSC 840

Significance

There is a distinction between a determination by an adjudicator of a jurisdictional fact with binding legal effect and a conclusion reached by an adjudicator in relation to a jurisdictional fact.

Facts

Ms Cheong was a director of Nefiko Pty Ltd (**Nefiko**). Statewide Form Pty Ltd (**Statewide**) was engaged to perform construction work on a house owned and resided in by Ms Cheong. Statewide served Nefiko with a payment claim and notice under section 17(2) of the NSW Act. Nefiko did not serve a payment schedule in response to either the payment claim or the notice. Statewide subsequently lodged an application for adjudication in relation to its payment claim.

In a letter to the adjudicator, Nefiko's lawyer asserted that the contract was between Statewide and Ms Cheong, not between Statewide and Nefiko. If this assertion was accepted, the NSW Act (pursuant to section 7(2)(b)) would not apply as the contract would be for the carrying out of residential building work on the property in which Ms Cheong (as the contracting party) resided.

The adjudicator concluded that since Nefiko had not served a payment schedule in relation to the payment claim, it was prevented by section 20(2A) of the NSW Act from lodging an adjudication response. The adjudicator also concluded on the evidence before him that the contracting party was Nefiko.

Nefiko challenged the validity of the adjudicator's determination on three grounds:

- the adjudicator had no jurisdiction to determine the issue of who the parties to the contract were and had made a jurisdictional error in doing so;
- there was no contract between Nefiko and Statewide;
- the adjudicator had denied Nefiko natural justice by failing to consider the submission made in the letter from Nefiko's lawyer.

Decision

The court dismissed Nefiko's appeal on all three grounds and found that:

- the adjudicator was entitled to reach a conclusion as to who (either Nefiko or Ms Cheong) was the contracting party to the contract in order to decide whether or not he had jurisdiction to make a determination in respect of the adjudication application;
- the contract was between Nefiko and Statewide. This decision was based on the conduct of the parties and the fact that, although the invoice was addressed to Nefiko, Ms Cheong did not assert that Nefiko was not the contracting party until some time after receipt of the invoice; and
- there was no denial of natural justice by the adjudicator as section 22(2) of the NSW Act sets out the only matters an adjudicator could have regard to when making a determination and the lawyer's letter was not one of those matters.

Omega House Pty Ltd v Khouzame [2014] NSWSC 1837

Significance

The statutory reference dates provided by section 8 of the NSW Act do not resume once contractual reference dates stop working post contractual termination.

Facts

Omega House Pty Ltd (**Respondent**) and contractor, Mr Khouzame (**Claimant**) entered into a construction agreement (**Contract**) which contained provisions setting out reference dates for claims under the Act. The Respondent terminated the Contract before the works were completed.

After termination of the Contract, the Claimant submitted a claim under section 13 of the Act (**Claim**) for construction work performed under Contract leading up to termination. Adjudication followed and the adjudicator determined that the Respondent was liable to pay the majority of the sum claimed.

The Respondent challenged the adjudicator's decision on jurisdictional grounds, asserting the Claim was invalid because there was no reference date to support a claim under the NSW Act because the contractual reference dates ceased to operate upon termination and the statutory reference dates could not apply to the Claim as it was for work under Contract.

Decision

Darke J ruled that the Claim was invalid because the statutory reference dates provided by s 8(2)(b) of the NSW Act did not apply to the works and the reference dates under the Contract no longer existed. Accordingly there was no reference date which is required for a valid claim under the NSW Act.

Patrick Stevedores Operations No. 2 Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd [2014] NSWSC 1413

Significance

Where the contract provides for a reference date which does not survive termination and the contract is terminated prior to the reference date, work done after the last reference date and prior to termination cannot be claimed under the NSW Act.

Facts

Patrick Stevedores (**Plaintiff**) entered into a construction contract with McConnell Dowell Constructors (**Defendant**) on 13 March 2014. Clause 37.1 of the contract provided the reference date for payment claims as *'the last day of each month for WUC done to the second last day of that month*.'

The Plaintiff terminated the contract for convenience under the contract and on 30 June 2014, the Defendant served a payment claim stated to be made under the NSW Act in respect of amounts for work carried out prior to the date of termination, cost of plant and materials reasonably ordered for the Works, the reasonable cost of removing labour and plant from the site and a specified fixed amount (**termination payment claim**). The contract was silent in relation to a reference date after termination.

The Plaintiff provided a payment schedule and on 28 July 2014 the Defendant made an adjudication application in respect of the payment claim and the Plaintiff issued its response. The adjudicator released the determination which determined a number of claims made by the Defendant as 'zero' on the basis that there was no agreement to extend the date for the determination and there was insufficient time to address those items.

Following receipt of the determination, the Defendant withdrew its adjudication application and made a new adjudication application. The Plaintiff served an adjudication response in respect of the second adjudication and took issue with the appointment of the second adjudicator. The second adjudicator released a determination.

The Plaintiff sought a declaration that the determination of the first and second adjudicators are void because the payment claim was not a valid payment claim under the Act as there was no reference date and the claim was not a claim for 'progress payments' within the meaning of the NSW Act.

Decision

Ball J held that the payment claim was invalid and the determinations of both adjudicators were void.

His Honour held that amounts included in the termination payment claim for the cost of plant and materials ordered by the Defendant, and the costs of removing equipment from the site were not construction work under the contract or the supply of related goods or services. The Defendant was therefore not entitled to a progress payment for them under s 8 of the NSW Act.

As part of the termination payment claim for construction work related to work done prior to the last reference date before termination but was not claimed at that time, the contract expressly provided for a reference date so s 8(2)(b) of the Act did not apply.

In relation to work done between the last reference date before termination and termination, His Honour held that, as a matter of construction, the reference date in clause 37.1 did not operate after termination as there was no express survival provision. His Honour considered that there was still a contractual reference date at the time the work was performed so s 8(2)(b) did not apply. The fact the contract was terminated before the reference date arrived meant that no reference date for that work can arise and therefore a payment claim under the NSW Act could not be made in respect of that work.

Pittwater Council v Keystone Projects Group Pty Ltd [2014] NSWSC 1791

Significance

This case tests the boundaries of the adjudicator's duty under section 22 of the NSW Act. Although section 22 requires adjudicators to 'consider' the provisions of the contract in making their determination, this case establishes that the standard imposed upon them is not so high as to require them to 'play devil's advocate' for the respondent, or 'test' the payment claim and adjudication application for all possible defects and non-compliances with any provisions of the NSW Act or the contract.

Facts

On 31 July 2014, Pittwater Council (**Council**) entered into a building contract with Keystone Project Group (**Keystone**) for its surf life saving club at Avalon within the meaning of subsection 5 and 6 of the NSW Act. During the period for construction, Keystone served a payment claim to which the Council responded with a payment schedule indicating a significantly lower scheduled amount (see subsection 13(1) and 14 of the NSW Act). At issue was the Council's failure to include reasons in the payment schedule for withholding payment for certain items. Consequently, an application for adjudication was submitted by Keystone pursuant to section 17(1)(b) of the NSW Act. In the Council's adjudication response, it submitted that its reasons for withholding payment were not included in the payment schedule because:

- certain payments claimed were not approved variations under the contract; and
- a number of the claims related to delay damages for each extension of time granted, and Keystone's entitlement to delay damages under the contract was nil.

The reasons provided in the adjudication response were not considered by the adjudicator pursuant to section 20(2B) of the NSW Act. Section 20(2B) provides that *'the respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.'*

The Council then sought to challenge the adjudication determination on the grounds of jurisdictional error on the basis that the adjudicator failed to exercise his powers under section 22 of the NSW Act in good faith by failing to consider Keystone's entitlement under the contract for the claimed amounts. The Council specifically relied on the phrase regularly used by the adjudicator that he was *'left with no alternative'*, because there were reasons not referred to in the payment schedule as indicating that the adjudicator failed to consider all the material and blindly awarded the claimed amount without considering it

Decision

The court found against the Council, holding that the adjudicator had validly exercised his powers under section 22 of the NSW Act.

The court found that the adjudicator was properly satisfied of the amount claimed, notwithstanding the use of the phrase that he had *'no alternative'* when rejecting the Council's submissions.

The court concluded that, where a respondent has failed to set out its reasons for withholding payment in sufficient detail as to call attention to its entitlements, the adjudicator is not required to *'play devil's advocate'* on its behalf . Further to this point, the court held that the Council was precluded from introducing additional reasons in its adjudication response pursuant to section 20(2B) as a consequence of its failure.

On that basis, the court saw no reason to grant the orders sought, and the case was dismissed.

PPK Willoughby v Eighty Eight Construction [2014] NSWSC 760

Significance

An adjudicator may adopt a superintendent's valuation of construction work if the adjudicator determines the basis on which the superintendent valued the works to be the best evidence of the value of the work.

The term 'business day' should not be equated with 'working day'. A business day is a day other than Saturdays, Sundays and public holidays.

Facts

Eighty Eight Construction Pty Ltd (**Eighty Eight**) made an application for adjudication of a payment claim. The superintendent had valued the works in conjunction with a representative of PPK Willoughby Pty Ltd (**PPK**) and a quantity surveyor appointed by the financier. In determining the adjudication application, the adjudicator accepted the superintendent's valuation of the construction work. PPK alleged that in doing so, the adjudicator failed to exercise the statutory power given to him.

Decision

McDougall J found that the adjudicator had identified that the real dispute was whether any amount should be allowed as a set off for the cost of rectification of defects. The adjudicator concluded that there was no right to set off because the cost of the defect rectification work had not been established at the effective date of the payment claim.

Valuation of the work

The adjudicator then turned to the remaining question of the valuation of the work. The adjudicator referred to the process of valuing the work and that the value had been agreed by 'multiple highly experienced construction specialists', and concluded that the certified amount should be the adjudicated amount. McDougall J held that it was open to the adjudicator to conclude, as he did, that the agreement of these specialists provided the best evidence of the value of the work.

Meaning of 'business day'

There was a further issue of the meaning of 'business day'. PPK argued that the superintendent had failed to issue a payment certificate within time, as 'business day' for the purposes of this contract meant a working day. McDougall J held that it would be wrong to equate 'business day' with 'working day' or to conflate the two expressions. McDougall J held that the parties intended that the superintendent should have the benefit of 'business days', being days other than Saturdays, Sundays and public holidays, to issue the payment certificate. His Honour noted that if PPK's construction was accepted, the expression 'business day' would depend entirely on whether or not PPK was performing work under the contract. Any day on which work was not performed would cease to be a business day.

Seabreeze Manly v Toposu [2014] NSWSC 1097

Significance

An arrangement under which one party undertakes to carry out construction work for another party is a 'construction contract' for the purposes of the NSW Act. The arrangement does not need to be a legally enforceable contract.

Facts

Seabreeze Manly (**Plaintiff**) contracted with Castle Projects as builder. It was a term of the contract that Castle Projects could only retain subcontractors with the consent of the Plaintiff and that the Plaintiff would pay any subcontractors directly. The Plaintiff also instructed Castle Projects to ensure that all subcontractors would address their invoices to the Plaintiff.

Toposu (**Defendant**) was engaged by Castle Projects to perform construction work in relation to the Plaintiff's project. The Defendant submitted its invoices to Castle Projects and Castle Projects created a payment schedule which appeared to be addressed from the Plaintiff to the Defendant. These payment schedules were submitted by Castle Projects to the superintendent and then subsequently passed on to the Plaintiff by the superintendent as part of the process for certification of payment. The Plaintiff made four direct payments to the Defendant.

Following a determination by an adjudicator in relation to a payment dispute, the Plaintiff argued that there was no construction contract (as defined under the NSW Act, namely, a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party) between the Plaintiff and the Defendant, and on that basis, it sought to restrain enforcement of the adjudicator's determination.

Decision

McDougall J confirmed the meaning of 'arrangement' in the context of the NSW Act as a transaction or relationship which would not in law be regarded as a contract. An arrangement may be described as an engagement or state of affairs between two parties which although not legally enforceable, if the arrangement is one under which one party undertakes to carry out construction work for another party, it will satisfy the definition of 'construction contract' in section 4 of the NSW Act. An arrangement may be multilateral.

In this case, the Plaintiff instructed Castle Projects to implement a system whereby subcontractors would look to the Plaintiff to pay them directly, and the Defendant undertook the work on the basis that the Plaintiff was liable to pay it for the work done. The court found that in this circumstance, there was a trilateral arrangement under which the Defendant undertook to perform construction work for the Plaintiff and such arrangement amounted to a construction contract for the purposes of the NSW Act.

State Water Corporation v Civil Team Engineering Pty Ltd [2013] NSWSC 1879

Significance

An adjudicator may give consideration to submissions made in breach of section 20(2B) of the NSW Act. An adjudicator must also provide evidence of the reasoning process in his or her determination.

Facts

State Water Corporation (**State Water**) and Civil Team Engineering (**Civil Team**) entered into a contract for the construction of a fishway. A dispute arose over Civil Team's claims against State Water for costs arising from delays due to the flooding of the site.

First adjudication

Civil Team applied for adjudication. In his determination, the adjudicator took into account State Water's reasons for non payment which were not included in its payment schedule but rather, first appeared in State Water's adjudication response and subsequently State Water's submissions following a request from the adjudicator for further submissions on the interpretation of a particular provision in the contract.

Civil Team only challenged the first adjudication determination in response to State Water's challenge of the determination in the second adjudication.

Second adjudication

Civil Team had served a further payment claim and obtained a determination by a different adjudicator in its favour.

State Water sought an injunction to prevent Civil Team from enforcing the second determination on the basis that the adjudicator had considered an issue which was previously determined in the first adjudication, giving rise to an issue estoppel.

Decision

The Supreme Court ruled that the first adjudication determination should stand but the second determination was void and quashed by certiorari.

First adjudication

Sackar J found that:

- an adjudicator's request for further submissions could not be used to transform submissions which were not duly made to submissions duly and properly made. That would empower adjudicators to defeat the underlying purpose of section 20(2B) of the NSW Act, which was to avoid new submissions being introduced late in a process running on a strict timetable;
- whilst it is a matter for the adjudicator to determine if submissions are 'duly made', that does not place the adjudicator's decision on the matter beyond review by the court; and
- whilst State Water's submissions had not been duly made (as they offended section 20(2B) of the NSW Act), to afford the parties natural justice the adjudicator may consider submissions relevant to issues arising under sections 22(2)(a) or (b) of the NSW Act.

His Honour refused to quash the adjudicator's determination. The exercise of his Honour's discretion was considerably influenced by the delay of Civil Team in seeking any review of the first adjudication determination, which was only made after State Water contested the second adjudication determination.

Second adjudication

Sackar J rejected the majority of State Water's contentions including the issue estoppel and the alleged failure on the part of the second adjudicator to act in good faith.

The absence of explanation by the adjudicator as to the determination was so deficient that it amounted to a failure on the part of the adjudicator to exercise the jurisdiction given to him under the NSW Act. That absence was 'central and critical' and fatal to the reasoning process, leaving the adjudication determination without foundation and therefore void.

TQM Design and Construct Pty Ltd v Department of Finance and Services [2013] NSWADT 249

Significance

This decision confirms that, as a matter of law, the obligation to comply with the statutory warranties under s 18B(a) and (c) of the *Home Building Act 1989* (NSW) (**HBA**) is not relieved in circumstances where works are suspended by the operation of s 28(3) of the NSW Act.

Facts

In May 2005, the appellant as contractor (**Appellant**) entered into a contract with developers Giuseppe and Anna Maria Romeo (**Developers**) for the construction of a series of residential apartments and retail units (**Contract**). On a number of occasions, the Developers failed to pay the Appellant agreed amounts in accordance with various payment claims served upon them by the Appellant. As such, in April 2007 the Appellant served on the Developers a notice of intention to suspend works as a result of non-payment.

The Developers engaged other contractors to complete the work and the Appellant subsequently demobilised from the site. In doing so, the Appellant served a notice on the Developers stating that, despite termination, the suspension remained in place pursuant to the NSW Act and thus they would not be liable for any loss or damage suffered by the Developers or by any future occupants under s 27(3) of the NSW Act.

Following from complaints regarding defective works in 2010, the Appellant was found guilty in a disciplinary decision handed down by the Department of Finance and Services (**Agency**) of improper conduct as a result of breaches of the statutory warranties implied by s 18B(a) and (c) of the HBA. Under this section, the Contractor warrants that:

- the work will be performed in a proper, workmanlike manner, and in accordance with plans and specifications set out in the Contract; and
- the work will comply with all laws.

The Appellant applied to the Administrative Decisions Tribunal (**ADT**) for review of the Agency's determination. The critical issue before the ADT was whether the Appellant's statutory obligations under the warranties implied by s 18B(a) and (c) of the HBA remained in force, despite the valid suspension of works under s 28(3) of the NSW Act.

Decision

P H Molony confirmed that since the warranties in question are implied by the HBA, they cannot be excluded by contract. It was held that these warranties applied to all work done by the Appellant, and that there is nothing in the wording of s 27 of the NSW Act which suspended the Appellant's obligations in respect of those warranties. Although the Appellant was correct in its submission that it was under no obligation to complete the works under the Contract, the suspension did not operate to relieve it of the obligations imposed by the statutory warranties.

Tresedar Pty Ltd v Property Builders (Constructions) Pty Ltd (In Liquidation) [2014] NSWSC 382

Significance

A deed to settle construction disputes can become a 'construction contract' for the purpose of the NSW Act. Monies due under such a settlement deed may constitute a progress payment and be subject of a claim under the NSW Act.

Facts

A series of disputes arouse out of a construction contract (**Original Contract**) between Property Builders Constructions Pty Ltd (**Defendant**) and Tresedar Pty Ltd (a property developer) (**Plaintiff**) whilst the Defendant was building apartments for the Plaintiff in the suburb of Gordon in New South Wales.

The parties and their financiers entered into tripartite deed (**Settlement Deed**) to settle the disputes and to continue construction works, the Settlement Deed broadly provided that:

- the Plaintiff makes a series of payments to the Defendant at set intervals over the course of the next year (**Settlement Sum**);
- the Defendant performs construction work set out in the Original Contract and payment for the works be made in accordance with the Original Contract's terms;
- the parties release each other from all claims in relation to the Original Contract up to the date of the Settlement Deed; and
- the builder would not suspend works or exercise any right or remedy under the Settlement Deed unless it first gave the financier 14 business days notice and a chance to remedy the default on behalf of the developer.

For various reasons, the Plaintiff failed to make Settlement Sum payments. The Defendant served payments claims under the s7 of Act for parts of the Settlement Sum and then suspended construction work pursuant to s27 of the NSW Act.

The parties made a range of claims against each other, of particular significance is the claim that the suspension of work was a breach of Original Contract and the Settlement Deed and that the Defendant should pay consequential loss arising from this wrongful suspension.

Decision

The court held that that Settlement Deed is a construction contract defined by s7 of the NSW Act as it provides for payment in exchange for work set out in another a construction contract.

Even though the Settlement Deed was a construction contract, it does not follow that monies due pursuant to it were progress payments. Ball J said, “in order for the payment to be a progress payment, it must be a payment made in respect of the construction work” as the Settlement Sum was going to be payable whether or not any construction is carried out and was not dependent upon what stage the construction has reached, the Settlement Sum was not a progress payment defined by s4 of the NSW Act.

As the Settlement Sum was not a progress payment, the failure to pay it did not entitle the Defendant to exercise its rights to suspend work under s27 of the Act. The suspension was a breach of contract and also a breach of the Settlement Deed as the builder did not comply with notice provisions.

The usual evidential and legal difficulties in proving consequential loss were experienced and neither party was successful in recovering amounts claimed.

QUEENSLAND

QLD CASE INDEX

Agripower Australia Limited v J & D Rigging Pty Ltd and Ors [2014] HCATrans 106
Ball Construction Pty Ltd v Conart Pty Ltd [2014] QSC 124
Brimar Electrical Services Pty Ltd v Zi-Argus Australia Pty Ltd [2014] QDC 78
Caltex Refineries (Qld) Pty Ltd & Anor v Allstate Access (Australia) Pty Ltd & Ors [2014] QSC 223
Civil Mining & Construction Pty Ltd v Isaac Regional Council [2014] QSC 231
CMF Projects Pty Ltd v Masic Pty Ltd & Ors [2014] QSC 209
Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd and Anor [2014] QSC 30
Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd and Anor (No 2) [2014] QSC 180
Eco Steel Homes Pty Ltd v Hippo's Concreting Pty Ltd & Ors [2014] QSC 135
Isaac Regional Council v Civil Mining and Construction Pty Ltd & Ors [2014] QSC 105
J & D Rigging Pty Ltd v Agripower Australia Limited & Ors [2014] QCA 23
J Hutchinson Pty Ltd v Cada Formwork Pty Ltd & Ors [2014] QSC 63
Kaycee Trucking Pty Ltd v M and C Rogers Transport Pty Ltd & Ors [2014] QSC 185
Error! Reference source not found.
McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd & Ors [2013] QSC 293 OR [2014] QCA 232
Northbuild Construction Sunshine Coast Pty Ltd v Beyfield Pty Ltd [2014] QSC 80
Sunshine Coast Regional Council v Earthpro Pty Ltd & Ors [2014] QSC 271
Veolia Energy Technical Services Pty Ltd v FKP Hayman Pty Ltd [2014] QDC 267
Wiggins Island Coal Export Terminal Pty Ltd v Sun Engineering (Qld) Pty Ltd & Anor [2014] QSC 170

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

QLD OVERVIEW

Developments

There is no longer any doubt that the Qld Act applies to construction work carried out on land which is the subject of a mining lease following the High Court's rejection of the special leave application in *Agripower Australia Limited v J&D Rigging Pty Ltd* [2014] HCA Trans 106.

Time will not begin to run until the respondent has been properly served. Service does not occur until the respondent downloads the documents from a Dropbox (*Conveyer & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2014] QSC 30). Addressing a claim contained in 9 boxes to a PO Box is not good service (*Isaac Regional Council v Civil Mining and Construction Pty Ltd* [2014] QSC 105). Sending a notice of appointment of an adjudicator to a PO Box is not service (*CMF Projects Pty Ltd v Masic Pty Ltd* [2014] QSC 209).

Issue estoppel in relation to an adjudication decision is limited to preventing a claimant from pursuing a progress payment inconsistently with the determination of an issue by an adjudicator which was fundamental to that decision (*Caltex Refineries (Qld) Pty Ltd v Allstate Access (Australia) Pty Ltd* [2014] QSC 223).

Concurrent pursuit of a claim under the Qld Act and litigation or arbitration may, in very limited circumstances, be an abuse of process (*Civil Mining & Construction Pty Ltd v Isaac Regional Council* [2014] QSC 231).

It is unlikely that a party will obtain an indemnity costs order, despite making a Calderbank offer, because the tight timeframes in an application to have an adjudicator's decision declared void makes it difficult to demonstrate that the recipient of the offer has acted unreasonably or imprudently (*J&D Rigging Pty Ltd v Agripower Australia Limited* [2014] QCA 23).

Emerging Trends

Lack of good faith on the part of an adjudicator may not be a relevant consideration when considering whether that adjudicator's error of law will invalidate the decision. In *McNab Developments (QLD) Pty Ltd v MAK Construction Services Pty Ltd* [2014] QCA 232 there was powerful but contradictory obiter on the question of good faith. Gotterson JA followed the line of authority that holds that a failure to consider a matter properly raised only amounts to jurisdictional error if the adjudicator also acted without good faith and Jackson J expressly rejected the line of authority. Morrison JA and Jackson J held that a failure to consider a matter properly raised in a payment schedule is an error of law on the part of the adjudicator and that good faith, or lack thereof, is not a relevant consideration.

Principals drafting to impose preconditions on a reference date arising will be assisted by the decision in *Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd* [2014] QSC 293. The preconditions cannot unjustifiably prevent or inordinately delay a reference date from arising.

Future

Significant amendments to the Qld Act will become operational in 2015. The amending Bill has itself been amended three times in an effort to ensure that the amendments deliver the desired reforms. Time will tell whether the changes will improve the speed with which payments are received by contractors.

In cases where the claim is for less than $750,000 there will be a few changes, mainly of an administrative nature. For claims over $750,000, depending on the terms of the contract, there will be extended time frames for payment schedules.

Key changes include:

- an extended Christmas break to exclude the days between 22 December and 10 January;
- altered time frames including:
  - decreasing the time a claimant has to make progress claims (from 12 to 6 months after completion of the work);
  - extending the time for giving a payment schedule if the claim is for more than $750,000;
  - giving a respondent a second chance to introduce reasons for withholding payment in its adjudication response and introducing a right of reply to new reasons raised in an adjudication response;
  - removing the claimant's right to apply for judgment in default of a payment schedule without first giving the respondent a second chance to provide a payment schedule;
  - removing a claimant's opportunity to 'bank' payment claims in respect of which no payment schedule has been served;
  - abolition of the Authorised Nominating Authorities;
  - expressly giving an adjudicator the right to decide they do not have jurisdiction, but in those circumstances giving an entitlement to payment; and
  - giving an adjudicator longer to reach a decision if the claim is for more than $750,000.

Agripower Australia Limited v J & D Rigging Pty Ltd and Ors [2014] HCATrans 106

Significance

The Qld Act applies to construction work carried out on land subject to a mining lease.

Facts

J & D Rigging Pty Ltd served a payment claim under the Qld Act on Agripower Australia Ltd (**Agripower**) for work conducted on land subject to a mining lease.

At first instance it was held that the Qld Act did not apply.

The Court of Appeal held that*, 'while a mining lease may not be legally categorised as "land", the actual land on which the building or structure is affixed does not change its character by reason of the existence of a mining lease'*. If the works formed part of the land in a physical sense, the work could be 'construction work' for the purposes of the Qld Act. In reaching its decision, the Queensland Court of Appeal considered the ordinary meaning of 'land', as opposed to the technical or legal meaning which had been applied below.

Decision

The High Court refused Agripower's application for special leave to appeal on the basis that any appeal would have insufficient prospects of success.

Ball Construction Pty Ltd v Conart Pty Ltd [2014] QSC 124

Significance

The Qld Act requires payment claims to be brought under the parties' construction contract. A party that enters a construction contract through a deed of assignment or novation cannot make claims under the previous contract.

Facts

Ball Construction Pty Ltd (**Ball Construction**) entered into a construction contract with That Builder Pty Ltd (**That Builder**) on 2 August 2011.

On 31 October 2011, the director of That Builder swore a statutory declaration declaring that no variations, claims or other disputes existed under the contract between Ball Construction and That Builder. The managing director of Conart Pty Ltd (**Conart**) made a statutory declaration to the same effect on 1 December 2011.

On 5 December 2011, Conart undertook the obligations of That Builder under the construction contract pursuant to a deed of assignment.

Upon practical completion, a dispute arose between Ball Construction and Conart. The adjudicator determined that Conart was entitled to payment for a claim that included amounts relating to construction work carried out prior to the novation of the contract.

Ball Construction applied to the Supreme Court to have the adjudicator's decision quashed for jurisdictional error.

Decision

Douglas J quashed the adjudicator's decision for jurisdictional error and denial of natural justice.

His Honour observed that the Qld Act only allowed Conart to make payment claims relating to its construction contract with Ball Construction. His Honour held that the adjudicator erred in considering a claim that included amounts relating to the contract between Ball Construction and That Builder, especially considering the director of That Builder and the managing director of Conart had both declared that no claims were due under that contract.

Brimar Electrical Services Pty Ltd v Zi-Argus Australia Pty Ltd [2014] QDC 78

Significance

In determining whether or not a document satisfies the requirements of a payment schedule for the purposes of section 18 of the Qld Act, no particular form is required and the document should not be analysed in an unduly critical way.

Facts

Brimar Electrical Services Pty Ltd (**Brimar**) entered into a contract with Zi-Argus Australia Pty Ltd (**Zi-Argus**) for the supply and installation of electrical services. On 1 July 2013, Brimar served Zi-Argus with a payment claim which included five invoices.

On 4 July 2013, Zi-Argus sent emails with attachments to Brimar, by which Zi-Argus contended that it had served Brimar with a valid payment schedule. The attachments included a table listing the five invoices (with several invoices highlighted in red) and identifying, among other things, whether the claims were approved. In the email response, Zi-Argus provided comments for three of the five invoices, referred to invoices highlighted in red on the spreadsheet as 'not legitimate' and noted that certain aspects of the work were done on a fixed price and it was not prepared to pay additional sums for work which related to that fixed price.

Brimar contended that it was entitled to full payment under section 19 of the Qld Act as Zi-Argus did not:

- state the amount of the payment that it proposed to make; or
- provide reasons for withholding payment for the two invoices not referred to in the email response.

Decision

The court held that the Zi-Argus' payment schedule complied with section 18 of the Qld Act and dismissed the application, confirming Chesterman J's statements *in Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd & Ors* [2007] QSC 333 that:

- in determining whether or not a document satisfies the requirements of a payment schedule for the purposes of the Qld Act, the document should not be analysed in an unduly critical way and no particular form is required; and
- provided the relevant criteria in section 18 of the Qld Act are satisfied, the documents will be a payment schedule regardless of how they are expressed, the lack of formality, felicity or awkwardness.

Caltex Refineries (Qld) Pty Ltd & Anor v Allstate Access (Australia) Pty Ltd & Ors [2014] QSC 223

Significance

This case is an example of a denial of natural justice by the adjudicator who made his decision based on reasons not advanced by either party. It clarifies how the principles of issue estoppel apply to adjudication decisions. It also distinguishes between claims under the Qld Act and claims for damages.

Facts

Allstate Access (Australia) Pty Ltd (**Allstate**) issued payment claims to Caltex Refineries (Qld) Pty Ltd (**Caltex**). The claims went to adjudication, and the adjudicator decided that Caltex should pay Allstate over $4 million.

Caltex challenged the decision on a number of bases:

- *First, a denial of natural justice* -The payment claim included costs for the replacement of damaged scaffolding components. The adjudicator found that the contract expressly entitled Allstate to claim for damaged equipment in a progress payment, despite the fact that neither party argued that there was such an express term.
- *Second, a jurisdictional error* - Caltex argued there was a jurisdictional error because the claim for costs payable for damaged equipment was a claim for damages which could not be included in any payment claim.

Allstate argued there was an issue estoppel in relation to the jurisdiction argument raised by Caltex, as a similar argument had been advanced in a previous adjudication between the parties.

Decision

The adjudicator's decision was declared of no effect.

Caltex was denied natural justice as it could not have anticipated that the adjudicator would reach his conclusion based on an argument not advanced by either party.

Although McMurdo J agreed that the claim was for damages, his Honour found that this was a misinterpretation of the contract, rather than a jurisdictional error.

Issue estoppel did not apply in this case because the 'matters fundamental... to the prior decision' differed from the reasoning in the adjudication decision under consideration.

Issue estoppel in relation to an adjudication decision is limited to preventing a claimant from pursuing a progress payment inconsistently with the determination of an issue by an adjudicator which was fundamental to that decision.

Civil Mining & Construction Pty Ltd v Isaac Regional Council [2014] QSC 231

Significance

This case discusses the circumstances in which a payment claim or adjudication application may be an abuse of process.

Facts

Civil Mining & Construction Pty Ltd (**CMC**) and Isaac Regional Council (**the Council**) entered a contract for the construction of road works. CMC served a final payment claim for $14.8 million.

CMC sought a declaration that its final payment claim was valid. The Council counter-applied for an injunction to prevent the progress of the final payment claim, arguing it was, and any subsequent adjudication would be, an abuse of process under the Qld Act for three reasons:

- almost all components of the final payment claim had been the subject of previous adjudications, although each decision had been declared void by the court;
- CMC knew the claim was substantially disputed by the Council; and
- CMC had invoked the dispute resolution provision of the contract, and the parties were engaged in mediation and arbitration of effectively the same matters contained in the final payment claim.

Decision

The Council's cross-application for an injunction was dismissed, and as a result McMurdo J held that it was unnecessary to make the declaration sought by CMC.

The previous adjudication decisions had been declared void, so it was as if there had been no adjudications. The Qld Act did not prohibit CMC from making a further payment claim which included amounts the subject of a previous claim.

CMC's knowledge that its claim was disputed by the Council could not be a bar to pursuit of the claim under the Qld Act.

An adjudicator's decision is interim and does not finally resolve the rights of the parties under the contract, as an arbitration would. The remedies of arbitration or litigation and adjudication may therefore be pursued concurrently.

The concurrent pursuit of these remedies could be an abuse of process but, on the facts of this case, it was not.

CMF Projects Pty Ltd v Masic Pty Ltd & Ors [2014] QSC 209

Significance

Sending notice of an adjudicator's appointment to a PO Box does not satisfy the requirements for service under section 23(1) or section 103 of the Qld Act.

Facts

Masic Pty Ltd (**Masic**) made a payment claim under the Qld Act and CMF Projects Pty Ltd (**CMF**) issued a payment schedule asserting that no money was owing. Masic made an adjudication application.

On 14 January 2014, a notice of the adjudicator's appointment was sent to CMF's PO Box. The notice was not sent to CMF's registered address. CMF received the notice at its registered office on 20 January 2014 and sent an adjudication response to the adjudicator on 21 January 2014.

The adjudicator decided that the notice of appointment had been given to CMF on 15 January 2014, meaning CMF's adjudication response needed to be given no later than 17 January 2014. The adjudicator consequently excluded the adjudication response from consideration in the adjudication.

CMF sought a declaration that the adjudication decision was void.

Decision

Daubney J held that the adjudication decision was void because the adjudicator failed to consider the adjudication response and, in doing so, did not comply with the essential requirements of the Qld Act.

His Honour held that mailing to a PO Box does not satisfy the service requirements of the Qld Act. His Honour referred to section 103 of the Qld Act, which provides that service may occur in a manner provided under the contract or in accordance with the *Acts Interpretation Act 1954* (Qld). The *Acts Interpretation Act* permitted service at CMF's head office, the registered office or the principal place of business. His Honour held that service was not effected under either of:

- section 103(1) of the Qld Act because the contract did not provide for notices to be given at a PO box; or
- section 103(2) of the Qld Act as a PO box is not an office.

His Honour held that service occurred when the notice of adjudication was received at CMF's registered office on 20 January 2014. It followed that CMF's adjudication response was required by 22 January 2014. As the adjudication response was sent on 21 January 2014, his Honour concluded that the adjudicator should not have excluded the adjudication response from consideration.

Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd and Anor [2014] QSC 30

Significance

Uploading documents to an electronic file uploading facility (i.e. Dropbox) and providing a link to another party does not constitute service of those documents on the other party until the files are opened and downloaded.

Facts

Conveyor & General Engineering Pty Ltd (**Conveyor**) and Basetec Services Pty Ltd (**Basetec**) entered into contracts for the supply of pre-assembled pipe rack units.

On 23 August 2013 Basetec made an adjudication application. It sent an email to Conveyor's solicitors enclosing the adjudication application forms and a Dropbox link to the adjudication application submissions and supporting documents that had been sent to the ANA that day.

On 23 August 2013 Conveyor's solicitors read the email and its attachments, but not the documents contained in the Dropbox files.

On 26 August 2013 Basetec sent a similar email to a staff member of Conveyor who also read the email and attachments, but not the Dropbox files.

On 2 September 2013 Conveyor's solicitors became aware of the contents of the Dropbox file.

The adjudicator found that Basetec's application was served on 23 August 2013 and that in accordance with section 24(1) of the Qld Act, the deadline for the adjudication response was 30 August 2013. The adjudicator determined that he was precluded from considering any submissions served after this date.

Conveyor challenged the adjudication decision on the grounds that the application was not duly served, and therefore the adjudicator had no jurisdiction.

Decision

McMurdo J held that the adjudicator's decision was void for jurisdictional error.

His Honour found that the application was not served in any way permitted by section 39(1) of the *Acts Interpretation Act 1954* (Qld). The application was held by a remote third-party server, it was not 'left' at Conveyor's office until Conveyor opened the file and probably not until the contents had been downloaded to a computer at Conveyor's office.

In considering whether the adjudication application was in fact served, his Honour affirmed that a document will be duly served if the efforts of the person who is required to serve the document have resulted in the person to be served becoming aware of the contents of the document.

His Honour reasoned that service by the use of the Dropbox facility may have been practical and convenient, but, at least until 2 September 2013, it did not result in Conveyor becoming aware of the contents of the document.

Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd and Anor (No 2) [2014] QSC 180

Significance

There was no reason on the facts of this case (an application to set aside a decision by an adjudicator under the Qld Act) that the ordinary rule that costs should follow the event did not apply.

Facts

After an adjudication between Conveyor & General Engineering Pty Ltd (**Conveyor**) and Basetec Services Pty Ltd (**Basetec**), the adjudicator's decision was declared void on the basis of a denial of natural justice.

The costs of the application were not determined pending the outcome of a second adjudication. The result of the second adjudication was identical to the first. Basetec argued that the ordinary rule that costs should follow the event should not apply because:

- the second adjudication decision was identical to the first adjudication decision and this was a relevant factor for the costs of this proceeding; and
- the setting aside of the first adjudication was due to the adjudicator's breach of the rules of natural justice, not due to Basetec's conduct.

Decision

McMurdo J was not persuaded that there was any proper reason to depart from the ordinary rule that costs should follow the event. His Honour ordered Basetec to pay Conveyor's costs of the proceeding.

In relation to Basetec's submission that the result of the second adjudication was a relevant factor for the costs of the proceeding, his Honour stated that *'submission would have more force if an adjudicator's decision under [the Qld Act] constituted a conclusive determination of the merits of the parties' contractual dispute'.*

His Honour also found that Basetec was partly at fault and noted that it was Basetec that pressed for the validity of the adjudicator's decision which put Conveyor to the task of establishing that the decision was not made in accordance with the requirements of natural justice.

Eco Steel Homes Pty Ltd v Hippo's Concreting Pty Ltd & Ors [2014] QSC 135

Significance

Prior court proceedings do not prevent a party from having recourse to the adjudication process under the Qld Act. A payment claim will comply with section 17 of the Qld Act despite misnaming the legislation under which it is made and being served multiple times.

Facts

In an application to have an adjudication decision declared void for jurisdictional error, Eco Steel Homes Pty Ltd (**Eco**) argued:

- payment claims served by Hippo's Concreting Pty Ltd (**Hippo's Concreting**) did not comply with section 17 of the Qld Act because:
  - the claims mistakenly stated they were made under the 'Building and Construction Building Act 2004'; and
  - Hippo's Concreting served more than one payment claim in relation to a reference date;
- that prior proceedings instituted in the Magistrates Court prevented Hippo's Concreting from having recourse to the adjudication process under the Qld Act; and
- that it had not entered into a contractual agreement with Hippo's Concreting.

Decision

Daubney J found that the adjudicator's decision was not affected by jurisdictional error and dismissed the application.

His Honour found that the payment claims complied with section 17 of the Qld Act because:

- despite the error in naming the Qld Act, the payment claim was sufficient to achieve the statutory purpose and ought to be regarded as substantially compliant; and
- one of the payment claims was served three times on the same day and thus there were multiple servings of the same payment claim which did not contravene section 17(5) of the Qld Act.

His Honour referred to sections 5 and 100 of the Qld Act in concluding that the *'contractual rights and statutory rights conferred by the [Qld Act] co-exist in a dual system which is expressly contemplated by the legislation'*.

His Honour also found that the adjudicator's finding that there was a construction contract or other arrangement that existed was open on the material before her.

Isaac Regional Council v Civil Mining and Construction Pty Ltd & Ors [2014] QSC 105

Significance

If a contractor changes its usual method of making payment claims without notifying the principal of the change, the contractor's actions could amount to misleading and deceptive conduct.

Facts

The Isaac Regional Council (**Council**) entered into a road works contract with Civil Mining and Construction Pty Ltd (**CMC**). The contract required CMC to direct payment claims under the Qld Act to both the Council and its superintendent. This became common practice.

On 6 December 2012, for the first time, CMC submitted a payment claim to the Council but not to the Superintendent. The claim (in 9 boxes) was addressed to the Council's PO Box address and delivered to the post office, but not physically into the PO Box due to the claim's size. The Council did not provide a payment schedule in response.

On Christmas Eve, CMC served the Council with a notice of intention to make an adjudication application and provided a further opportunity for the Council to serve a payment schedule pursuant to section 21(2) of the Qld Act. The Council again missed the time to respond with its payment schedule, as the few staff working over Christmas did not see the notice. An adjudication decision was made in favour of CMC.

The Council applied to the Queensland Supreme Court for an injunction restraining CMC from enforcing the decision. The Council alleged that:

- CMC had engaged in misleading or deceptive conduct under the *Competition and Consumer Act 2010* (Cth); and
- the adjudication decision was void for want of jurisdiction.

Decision

Henry J held that the balance of convenience favoured granting the injunction.

The Council was entitled to assume that CMC would serve payment claims according to its usual process. Had this process been followed, the adjudication notice would have been discovered by the superintendent in time for the Council to respond. Accordingly, a prima facie case could be made that to change the method of making payment claims without notifying the Council was misleading and deceptive.

His Honour also found that the claim had not been validly served on the Council. The Qld Act requires payment claims to be served as specified in the contract (i.e. to the Council's PO Box address). The claim was delivered to the post office but not physically delivered into the PO Box because of the large volume of claim documentation. His Honour noted that, even if strict compliance with the Qld Act was impossible, CMC could have delivered a notification stating that the balance of the delivery was available elsewhere to the PO Box.

J & D Rigging Pty Ltd v Agripower Australia Limited & Ors [2014] QCA 23

Significance

Rejection of a Calderbank offer made before the hearing of an application to have an adjudicator's decision declared void may not be unreasonable in the circumstances.

Facts

Agripower Australia Ltd (**Agripower**) commenced proceedings in the Supreme Court to have the adjudicator's decision that it should pay J & D Rigging Pty Ltd (**J & D Rigging**) approximately $2.5 million declared void for jurisdictional error.

On 23 April 2013, one day after Agripower served its written outline, J & D Rigging made a Calderbank offer. The Calderbank offer was made on the following bases:

- the application be dismissed;
- the sum paid into court be released to J & D Rigging; and
- J & D Rigging pay Agripower's costs (fixed in the amount of $15,000).

J & D Rigging delivered its submissions after 4.00pm on 30 April 2013. The offer expired at 4.00pm on 1 May 2013, five business days before the hearing at first instance.

The Supreme Court declared the adjudicator's decision void. This decision was overturned on appeal. J & D Rigging then sought costs on an indemnity basis on the basis that Agripower had failed to accept the Calderbank offer.

Decision

The Queensland Court of Appeal awarded that costs of the proceedings at first instance, and of the appeal, to J & D Rigging on the standard basis.

The court stated that J & D Rigging had failed to demonstrate that Agripower had acted 'unreasonably or imprudently' in failing to accept the Calderbank offer. In reaching its decision, the court emphasised:

- the limited time Agripower had been given to assess the merits of J & D Rigging's submissions prior to the expiry of the offer;
- that the amount J & D Rigging offered to pay Agripower ($15,000 in costs) by way of compromise was relatively small when compared to the principal amount in dispute; and
- that at first instance Agripower had substantial chance of success.

J Hutchinson Pty Ltd v Cada Formwork Pty Ltd & Ors [2014] QSC 63

Significance

An adjudication decision will be void for failure to adhere to the rules of natural justice when an adjudicator receives and considers evidence without the knowledge of one party.

Facts

J Hutchinson Pty Ltd (**Hutchinson**) engaged CADA Formwork Pty Ltd (**CADA**) to provide formwork services for a residential units construction project.

CADA submitted a payment claim to Hutchinson under the Qld Act, which ultimately became the subject of an adjudication. CADA sent the adjudicator several emails and a site instruction as evidence that delays in completion were due to wet weather, for which Hutchinson was responsible. Hutchinson was not provided with a copy of these documents.

The adjudicator determined that CADA was entitled to $233,333.92 because Hutchinson was responsible for delays.

Hutchinson sought a declaration that the adjudicator's decision was void due to a breach of natural justice and a breach of section 26(2) of the Qld Act because the adjudicator had received and considered evidence without Hutchinson's knowledge.

Decision

P Lyons J declared the adjudicator's decision void.

His Honour made the following points:

- natural justice requires that a party be given the opportunity to respond to all matters adverse to their interests which a decision maker will take into account in making a decision;
- the adjudicator determined that CADA was not responsible for the delays based on documents that had not been validly served on Hutchinson. This constituted a breach of natural justice;
- section 26(2) of the Qld Act requires all submissions to the adjudicator to be *'properly made'*. P Lyons J reasoned that this meant *'properly made in the manner provided for in the [Qld Act]'*. As the relevant documents had not been served on Hutchinson, as required by the Qld Act, they were not *'properly made'*; and
- the purpose of section 26(2) of the Qld Act is to limit an adjudicator's decision to material to which the other party has had an opportunity to respond. If an adjudicator bases a decision on material not served on the other party, this is a breach of section 26(2) of the Qld Act which will invalidate that decision.

Kaycee Trucking Pty Ltd v M and C Rogers Transport Pty Ltd & Ors [2014] QSC 185

Significance

A party should clearly identify in its payment claim the relevant construction contract under which the payment claim is made.

Facts

In July or August 2012, Kaycee Trucking Pty Ltd (**Kaycee Trucking**) entered into a subcontract with M & C Rogers Transport, a partnership, to provide rig moving and rig support (**First Contract**). The First Contract ended on 7 April 2013.

On 16 January 2013, M & C Rogers Transport Pty Ltd (**M & C Rogers**) was incorporated. In April 2013, Kaycee Trucking and M & C Rogers entered into a second contract.

M & C Rogers' payment claim referred to a subcontract made on or about 15 July 2012, and then a further agreement in 2013. M & C Rogers' adjudication application referred to construction work performed by M & C Rogers pursuant to a construction contract entered into in or around March 2013.

Kaycee Trucking sought a declaration that an adjudicator's decision under the Qld Act was void because:

- the payment claim was not made by a party to a relevant construction contract. Kaycee Trucking argued the payment claim was brought under the First Contract, at which time M & C Rogers did not exist because it was not yet incorporated;
- the adjudication application sought adjudication of claims in respect of a contract made in 2013 and not in 2012 and thus did not seek to adjudicate the payment claim; and
- alternatively, there was more than one construction contract to which the payment claim related and therefore the payment claim was invalid.

Decision

The application was dismissed.

Phillipides J found that references in the payment claim to the First Contract did not identify it as the relevant construction contract, but rather gave historical background to the second contract. Accordingly, the payment claim related to the second contract and was not made in relation to two contracts. It followed that the adjudication application sought adjudication of the payment claim.

Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd & Anor [2014] QSC 293

Significance

Section 99 of the Qld Act invalidates any provision in a construction contract which unjustifiably prevents or inordinately delays a reference date arising under the Qld Act.

Facts

Lean Field Developments Pty Ltd (**Lean Field**) contracted with E & I Global Solutions (Aust) Pty Ltd (**E & I**) for the supply of high voltage and fibre optic cables (**Contract**).

The Contract required E & I to provide a draft payment claim at least fourteen days before serving a payment claim under the Qld Act. The Contract specified that a 'reference date' did not arise until E & I issued both the draft and actual payment claim. Under section 12 of the Qld Act, a party is only entitled to a progress payment when a reference date arises.

In April 2014, E & I commenced adjudication proceedings regarding a disputed payment claim. In its adjudication response, Lean Field argued that E & I's claim was invalid because no reference date had arisen as E & I had failed to issue the draft payment claim.

On 11 June 2014, the adjudicator decided that E & I should be paid $527,783.08.

Lean Field applied to the court, arguing that the adjudicator's decision was void for jurisdictional error. In response, E & I argued that the clauses of the Contract requiring E & I to issue a draft payment claim before a reference date could occur were void because the clauses placed conditions on E & I's statutory right to progress payments contrary to the provisions of section 99 of the Qld Act.

Decision

Applegarth J dismissed the application.

His Honour held that the provisions of the Contract requiring E & I to provide draft payment claims 'unjustifiably prevents or inordinately delays a reference date from arising'.

His Honour held that unjustifiably delaying a reference date from arising was contrary to the Qld Act. Under section 99 of the Qld Act, clauses which are contrary to the Qld Act are invalid.

His Honour recognised that not all clauses outlining the time at which a reference date arises are automatically contrary to the Qld Act. Instead, his Honour stressed that only those clauses which place unjustifiable conditions on a party's statutory entitlement to progress payments would be invalid.

McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd & Ors [2013] QSC 293 OR [2014] QCA 232

Significance

This case is significant because it canvasses the question of whether an error of law by an adjudicator will only invalidate the decision if there is also a lack of good faith by the adjudicator.

Facts

MAK Construction Services Pty Ltd (**MAK**) issued payment claims to McNab Developments (Qld) Pty Ltd (**McNab**). The claims went to adjudication, and the adjudicator determined that $241,441.20 was payable by McNab to MAK.

McNab sought a declaration that the adjudication decision was void for jurisdictional error. The application was dismissed.

McNab appealed on the bases that:

- the adjudicator did not give McNab an opportunity to respond to the construction of the contract adopted by the adjudicator before the adjudicator acted upon it;
- the adjudicator's decision to prefer MAK's interpretation of the contract was unreasonable;
- the adjudicator misapplied the QLD Act;
- the adjudicator wrongly disallowed a number of backcharges; and
- the adjudicator failed to consider one backcharge for $11,727 addressed in the payment schedule and adjudication submissions.

Decision

The appeal was dismissed unanimously on the basis that there was no jurisdictional error or failure to provide natural justice.

However, Morrison JA and Jackson J disagreed with Gotterson JA in relation to the adjudicator's failure to consider one backcharge of $11,727. This did not change the outcome of the appeal.

Gotterson JA followed a line of authority that held that a failure to consider a matter properly raised in a payment schedule, submissions or supporting documentation would only amount to a jurisdictional error if the adjudicator also acted without good faith.

Jackson J expressly rejected this line of authority. Morrison JA and Jackson J held that a failure to consider a matter properly raised in a payment schedule is an error of law on the part of the adjudicator and that good faith, or lack thereof, is not a relevant consideration.

Jackson J stated that on the proper construction of the Qld Act, the legislature could not have intended that failure to consider one backcharge would have the consequence of invalidating the entire adjudication decision. His Honour stated the adjudicator had complied with her obligations under section 26(2) of the Qld Act, but simply by accident or error omitted to deal with one part. This 'accidental slip or omission' could be rectified under section 28 of the Qld Act.

Jackson J noted that there remained instances where lack of good faith is a ground of invalidity for the exercise of an administrative power and could be a jurisdictional error.

Northbuild Construction Sunshine Coast Pty Ltd v Beyfield Pty Ltd [2014] QSC 80

Significance

If an adjudicator reaches a conclusion based on a ground which had not been argued by either party, there will be a substantial denial of natural justice (unless no submission could have produced a different result).

Facts

Northbuild Construction Sunshine Coast Pty Ltd (**Northbuild**) challenged an adjudication decision dated 9 August 2013 requiring it to pay Beyfield Pty Ltd (**Beyfield**).

It was common ground that the contract between Northbuild and Beyfield entitled Beyfield to delay costs if an extension of time (**EOT**) it had claimed had been granted by Northbuild.

Northbuild received a written EOT claim on 28 May 2014, four days after the relevant payment claim had been made.

Despite the fact that the EOT claim had not been made before the payment claim had been made, the adjudicator reasoned that because the relevant period or periods of delay all predated the reference date, Beyfield was entitled to the claimed delay costs.

Decision

McMurdo J found that the adjudicator's decision that Beyfield was entitled to delay costs was void for breach of natural justice.

An essential link in the adjudicator's chain of reasoning was that any period of delay predated the reference date. The notion that delay occurring prior to the reference date of itself could create an entitlement to delay costs was not suggested in either party's submissions.

His Honour therefore found that the adjudicator had reached his conclusions based upon a ground which had not been argued by either party. In doing so, his Honour affirmed that there will be a substantial denial of natural justice if the adjudicator reaches a conclusion on the basis for which neither party has contended, unless no submission would have produced a different result.

His Honour noted that it was unnecessary for Beyfield to demonstrate that it would have succeeded in persuading the adjudicator. It was sufficient that there was something to be put that might well have persuaded the adjudicator to change his mind.

Sunshine Coast Regional Council v Earthpro Pty Ltd & Ors [2014] QSC 271

Significance

Policy considerations behind the Qld Act weighed against the granting of an injunction to prevent enforcement of an adjudication decision until proceedings challenging that decision were determined.

Facts

In September 2014, an adjudication decision was made in favour of Earthpro Pty Ltd (**Earthpro**). The decision required Sunshine Coast Regional Council (**the Council**) to pay $1.4 million to Earthpro.

The Council brought proceedings challenging the validity of the adjudication decision. The Council sought an injunction preventing Earthpro from enforcing the adjudication decision until determination of the proceedings. Earthpro conceded that the Council had a prima facie case in the proceedings.

Decision

The application for an injunction was refused and the Council was ordered to pay Earthpro's costs of the application.

P Lyons J highlighted the legislative intention of the Qld Act is to maintain cash flow, and that an adjudication decision should be effective until an inconsistent decision is made by a court. It was acknowledged that in some instances an applicant may have such strong prospects of success to justify granting an injunction notwithstanding the policy considerations behind the Qld Act. This case did not fall into that category.

The risk a contractor would be unable to repay an adjudication amount if the adjudication decision is successfully challenged by the principal is a relevant consideration in an application for an injunction. However, his Honour held that there would need to be very strong evidence that Earthpro would be unable to make such a repayment for this consideration to outweigh the policy considerations behind the Qld Act. His Honour held there was insufficient evidence to outweigh the Qld Act's policy considerations.

Veolia Energy Technical Services Pty Ltd v FKP Hayman Pty Ltd [2014] QDC 267

Significance

A party must strictly adhere to the Qld Act to ensure its payment schedule is valid.

Facts

Veolia Energy Technical Services Pty Ltd (**Veolia**) performed works in the refurbishment of the Hayman Island Resort for FKP Hayman Pty Ltd (**FKP**). Veolia applied to the court under section 19(2)(a)(i) of the Qld Act for recovery of the unpaid portions of amounts withheld by FKP in seven payment claims:

- **September 2013**: Veolia commenced work on the Lagoon Wing on 23 September 2013. In relation to two payment claims, FKP sent a single response to the claims which did not expressly identify payments were being withheld. Veolia contended that FKP had failed to serve a valid payment schedule under section 18 of the Qld Act.
- **November 2013**: On 20 November 2013, the parties executed a written subcontract for the works on the Lagoon Wing which purported to prevent the accrual of reference dates. Veolia served two payment claims. FKP did not serve a payment schedule in response. FKP argued Veolia's claims were invalid because only one claim could be served per reference date.
- **March 2014**: A separate construction contract for the supply of goods for the Pool Wing between the parties commenced on 20 March 2014 and continued into April 2014. Veolia served payment claims on 10 April 2014 and 23 April 2014 but resent the latter on 7 May 2014. FKP argued that only one reference date was available and served a response in July 2014
- **February 2014**: Another engagement for the Pool wing occurred in February 2014. Whilst its payment claim was dated 17 July 2014, Veolia produced evidence that it was served at 5.13pm on 17 July 2014 and argued that the respondent's document served earlier on the same day, at 2.32pm was not a valid payment schedule.

Decision

The court held in favour of Veolia.

Clare SC DCJ held that:

- **September 2013**: whilst the Qld Act does not preclude a single payment schedule from responding to multiple payment claims, FKP had failed to provide sufficient detail for withholding Veolia's claimed amounts and breached section 19 of the Qld Act.
- **November 2013**: the Qld Act allows reference dates to accrue, that the two payment claims were validly served because the claims had been issued on two different accrued reference dates and held that the provisions of the subcontract preventing the accrual of reference dates were void under section 99 of the Qld Act.
- **March 2014**: two reference dates had accrued under the Qld Act and the payment claims related correctly to the reference dates of 31 March 2014 and 30 April 2014 respectively but the respondent's July 2014 response was too late to qualify as a 'payment schedule'; and
- **February 2014**: a payment schedule under section 18 of the Qld Act is to the 'reply' to a payment claim, which cannot validly occur if a payment schedule is issued prior to a payment claim being served.

Wiggins Island Coal Export Terminal Pty Ltd v Sun Engineering (Qld) Pty Ltd & Anor [2014] QSC 170

Significance

As a matter of policy, a respondent to an adjudication decision carries the risk that monies paid over pursuant to the adjudicator's decision may not be refunded by the claimant if the adjudicator's decision is ultimately declared void.

Facts

Wiggins Island Coal Export Terminal Pty Ltd (**WICET**) applied for an interlocutory injunction to stay an adjudicator's decision requiring it to pay more than $17 million to Sun Engineering (Qld) Pty Ltd (**Sun Engineering**).

Following the adjudicator's decision, WICET paid Sun Engineering the scheduled amount and paid the balance of the adjudicated amount into court in return for an undertaking by Sun Engineering not to enforce the adjudicator's decision until the determination of the interlocutory injunction application.

In its application, WICET contended that it should not have to pay the full adjudicated amount to Sun Engineering as the adjudicator's decision was void for jurisdictional error. Sun Engineering was not prepared to wait until the resolution of WICET's originating application seeking a declaration that the adjudicator's decision was void.

Decision

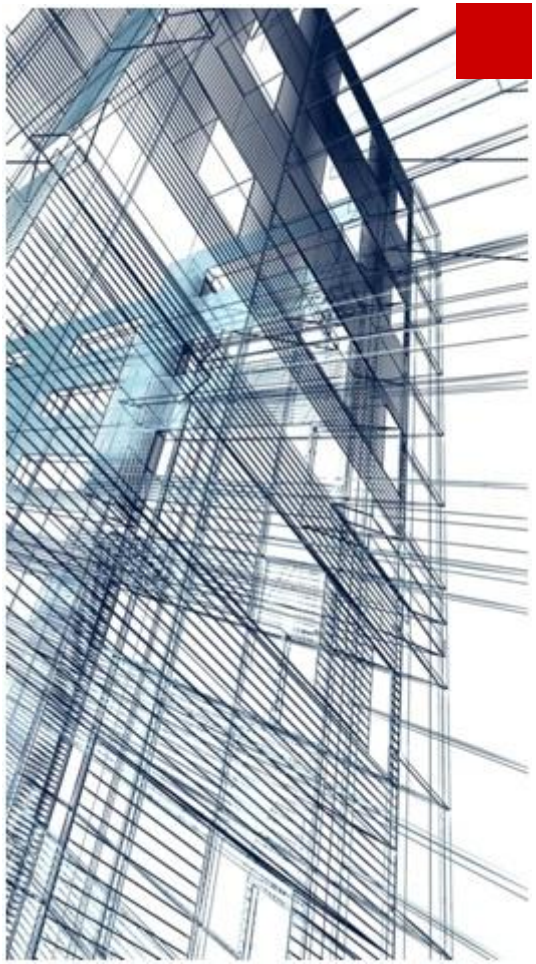
Daubney J refused WICET's application for interlocutory injunctive relief.

His Honour accepted that WICET had a prima facie case, however, considered that the balance of convenience lay in favour of Sun Engineering.

His Honour followed the observations of *Keane JA in R J Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390 concerning the legislative policy underlying the Qld Act.

VICTORIA AND TASMANIA

◄ CONTENTS ►



VIC AND TAS CASE INDEX

APN DF2 Project 2 Pty Ltd v Grocon Constructors (Victoria) Pty Ltd & Ors [2014] VSC 596

Branlin Pty Ltd v Totaro [2014] VSC 492

Hallmarc Construction v Saville [2014] VSC 491

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

VIC AND TAS OVERVIEW

Developments

Whilst there were fewer judgments concerning Vic Act than in previous years, the judgments that were delivered further clarified a number of the unique provisions of the Vic Act.

Previously the requirement in section 10A(3) of the Vic Act to avoid the second class of claimable variations that the contract include a 'method of resolving disputes' had been held by Shelton J in *AC Hall Air Conditioning Pty Ltd v Schiavello (Vic) Pty Ltd* [2008] VCC 1490 to require a binding dispute resolution mechanism separate from the Court system. That judgment was often relied upon by adjudicators concerning contracts that did not include a binding arbitration or expert determination agreement, to enliven the second class of claimable variations. In *Branlin Pty Ltd v Totaro* [2014] VSC 492 Vickery J held that Shelton J's analysis was not helpful, but left open the question of whether the method of resolving disputes needed to be separate from the court system.

In *APN DF2 Project 2 Pty Ltd v Grocon Constructors (Victoria) Pty Ltd and Ors (No. 3)* Vickery J held that an applicant for judicial review of an adjudication determination cannot avoid paying the challenged adjudication by paying the unpaid amount into Court under section 28R of the Vic Act. He said that 28R(1) creates a statutory entitlement in a person who has been provided with an adjudication certificate, subject to compliance with the procedural requirements of subsections 28R(2) to (4) , to judgment for the unpaid portion of the amount payable. He held that a person may pay money into court as security of the unpaid portion of the amount payable, if that person commences proceedings to have the judgment which had been entered set aside.

His Honour confirmed that section 28R(5)(a)(iii) precludes a party from setting aside a judgment by challenging the relevant adjudication determination upon which the judgment is founded.

There were no Supreme Court decisions on the Tasmanian Act during 2014.

Emerging trends

The unique features of the Vic Act have resulted in it not being used to the extent it is used in other states and had an adverse effect on its ability to achieve the policy purpose for which it was enacted.

The unique features of the Vic Act and the relatively small number of judgments concerning it, means that issues of uncertainty of interpretation remain concerning a number of significant provisions. In *Branlin Pty Ltd v Totaro* [2014] VSC 492 Vickery J referred to the drafting of section 10A of the Vic Act as 'remarkable' and 'unwordly' and compared it with other legislation described as 'incomprehensible'.

The low utilisation of the Vic Act has led to a comparatively small number of adjudicators being registered in Victoria, and some authorised nominating authorities have had their status withdrawn or suspended given the lack of adjudicators.

It is hoped that the Vic Act is subjected to an overall review and amendment to bring it into line with the other eastern states, but we are not aware of any plans for this to occur in the medium term.

Future

Judicial review applications concerning the Vic Act are heard in the Technology Engineering and Construction List usually by Vickery J. His Honour has adopted a relatively independent approach to the case law, and with the unique features of the Vic Act, we have seen the law concerning the Vic Act develop in a very different way to lines of authority in NSW and Queensland. For example, Vickery J has commented that he does not necessarily agree with the principles of issue estoppels that have been held to apply to adjudicators' determinations in NSW and Queensland. We can expect the independent development of the law concerning the Vic Act to continue.

APN DF2 Project 2 Pty Ltd v Grocon Constructors (Victoria) Pty Ltd & Ors [2014] VSC 596

Significance

A reimbursable costs contract is not excluded from the operation of the Vic Act. For the purposes of the Vic Act a 'construction contract' encompassed both by an original contract and any instrument which validly affects a variation of the original contract.

Facts

Minter Ellison acted for Grocon in this matter.

APN DF2 Project 2 Pty Ltd (**APN**) entered into a number of agreements with entities controlled by the Grocon Group for the purposes of the development, leasing and sale of a commercial office block at 150 Collins Street, Melbourne. APN and Grocon (**Scots Church**) Pty Ltd were co-developers and engaged Grocon Constructions (Victoria) Pty Ltd (**Grocon**) as the D&C Contactor.

The D&C Contract provided for the submission of payment claims on a monthly basis in the usual way.

In addition, the co-developers entered into a Side Deed with Grocon which provided for payment to Grocon of amounts calculated by reference to Actual Trade Costs defined as 'the actual trade, supply, consultant or subcontract cost payable by the Contractor... for the purposes of the building contract'.

On 2 June 2014 Grocon made a payment claim under the Vic Act pursuant to the D&C Contract claiming $3,670,202 excluding GST.

On 17 June 2014 the Superintendent under the D&C Contract issued a certificate under the D&C Contract for $3,392,504.

On 10 June 2014 Grocon also made a payment claim under the Vic Act pursuant to the terms of the Side Deed in the sum of $3,796,206 excluding GST.

Decision

APN made an application to the Supreme Court to set aside the adjudication determination and contended that the Side Deed was not a construction contract within the meaning of the Vic Act as no construction work was performed under it.

APN also contended that by section 7(2)(c), the operation of the Vic Act was excluded because the consideration payable for the construction work performed was to be calculated otherwise and by reference to the value of the work carried out.

Vickery J dismissed the application for review.

He held that it was plainly obvious that the concept of 'construction contracts' as defined in section 4 of the Vic Act encompassed both an original contract and any instrument which validly affects a variation of the original contract. He found that the Side Deed varied the original D&C Contract and that the payment claim was made under the D&C Contract as varied by the Side Deed and was thus made under the construction contact as defined by the Vic Act.

His Honour found that the D&C Contract, as amended by the Side Deed, provided detailed mechanism for the calculation of the consideration payable under the contract by reference to the definition of Actual Trade Costs, and by this means the parties agreed what the value of the work should be. His Honour held that the Vic Act gives recognition to this agreement and that as a result, section 7(2)(c) had no application.

Branlin Pty Ltd v Totaro [2014] VSC 492

Significance

Under section 10A(3) of the Vic Act, the second class of variations which may be taken into account in calculating the amount of a progress payment under the Act sets a requirement that the contract does not provide a method of resolving disputes under the contract. In order for a construction contract to provide a method for resolving disputes, at least three things are required namely:

- a process which could be described as a 'method' of dispute resolution;
- a process which is capable of resulting in a binding resolution; and
- a process which the contract makes it a binding obligation for the parties to enter upon and participate in.

Facts

Tony Totaro served a payment claim on Branlin Pty Ltd (**Branlin**) on 7 November 2013. Branlin did not pay any of the claim or serve a payment schedule under the Vic Act. Totaro made an adjudication application and on 20 January 2014 the adjudicator awarded Totaro an adjudicated amount of $120,248. Branlin made application for judicial review of the adjudication determination.

The construction contract in question included clause 1(d) which provided that 'in the event of any contractual disagreements arising regarding any aspect of the works all efforts are required to be taken to resolve such disputes fairly and amicably. For resolution of contractual matters reference may be made to 'Australian Standard 4905-2002 (sic) Minor Works Contract Conditions (Superintendent Administered) for Guidance and Intent'.

Clause 27 of the Australian Standard 4905-2002 includes a dispute resolution clause which includes a binding arbitration agreement.

Decision

Vickery J held that the adjudicator did not appear to turn his mind to the issue of whether there was a method of resolving disputes in the contract before considering whether variations were 'claimable variations'.

Previously the only decision on the meaning of a 'method of resolving disputes' in section 10A(3)(d) was the decision in the County Court of Shelton J in AC Hall Air Conditioning Pty Ltd v Schiavello (Vic) Pty Ltd [2008] VCC 1490.

In that case Judge Shelton held that what was required was a binding dispute resolution mechanism separate from the Court system. Vickery J held that what is required under section 10A(3)(d)(ii) is at least a method of resolving disputes as opposed to a method which merely provides an opportunity for the parties to negotiate a resolution of their differences. Unless the method identified in the contract is capable of resulting in a binding resolution of a dispute, it will not satisfy section 10A(3)(d)(ii).

His Honour held that had the procedure described in AS4905-2002 been prescribed in the contract as the procedure to be followed in the event of a dispute arising under the contract, then clearly there would have been a 'method of resolving disputes' provided for. However, he held that clause 1(d) did not do this. He held that the contractual method for resolving disputes must be at the very least a process which the contract makes it a binding obligation for the parties to enter upon and participate in.

Unfortunately, his Honour did not indicate whether the method of resolving disputes needed to be separate from the court system. Branlin's application for review was dismissed.

Hallmarc Construction v Saville [2014] VSC 491

Significance

In relation to an issue of jurisdictional error, breach of procedure fairness or fraud, a superior court entertaining an application for certiorari may, subject to applicable procedural and evidentiary rules, take account of any relevant material including new material placed before it. In this case the court received new material relevant to the issue of whether the payment claims were made out of time.

Facts

Hallmarc Construction Pty Ltd (**Hallmarc**) entered into a construction contract with Saville for the supply and installation of joinery for 134 residential apartments known as Kingston Park Apartments being constructed at 1148 Nepean Highway, Highett. The construction contract did not provide for a number of matters including the calculation of reference dates under the Act, rectification of defects, a defect liability period, final claims or the time for payment of Saville's payment claims.

Saville served two separate payment claims, each couched as a final claim. The first claim was made on 21 February 2014 and the second claim was made on 16 May 2014.

The first claim was referred to adjudication. In relation to the first claim the adjudicator rejected Hallmarc's submission that it was final claim and determined that he had jurisdiction.

Hallmarc made an application to the Supreme Court for declarations that the first and second claims were invalid payment claims in that they were issued out of time, and that the adjudication determination was void.

Decision

On the hearing of the application for review, Vickery J received further evidence on behalf of Hallmarc as to the dates that goods were last dispatched and delivered to the project site and the date that Saville ceased performing work.

On the basis of that evidence Vickery J found that Saville last undertook construction work or provided related goods and services under the construction contract on 30 September 2013.

Given the construction contract did not provide for calculation of reference dates, Vickery J held that the various default provisions covering such matters under the Vic Act applied.

Section 14(5) of the Vic Act required a final payment claim to be made within three months after the reference date referred to in section 9(2). His Honour found that given the construction contract did not provide for the calculation of reference dates, the reference dates were to be calculated under section 9(2)(d) of the Vic Act. Thus the reference date for the final claim was the date when construction work was last carried out under the contract or when related goods and services were last supplied under the contract.

As a result of the new evidence received, Vickery J found that Mr Saville last undertook construction work or provided related goods and services on 30 September 2013 which meant that a payment claim in respect of a final payment could be served only within three months of 1 October 2013, which was 1 January 2014.

Accordingly, he found that both the first payment claim served on 21 February 2014 and the second payment claim served on 16 May 2014 were both hopelessly out of time and it followed that the adjudication determination was void.

WESTERN AUSTRALIA

◄ CONTENTS ►

WA CASE INDEX

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

WA OVERVIEW

Developments

2014 saw continued development of security of payment law in Western Australia in a number of key areas, including:

- the scope of the powers of an adjudicator hearing an adjudication application under the WA Act;
- the circumstances in which the clauses set out in Schedule 1 of the WA Act will be implied into a construction contract;
- the use of a statutory demand to recover the sum of an adjudication determination;
- what constitutes a 'payment dispute' under the WA Act; and
- the powers of the State Administrative Tribunal when reviewing a determination.

One issue, which prior to 2014 had not been considered, is the rigidity of the procedural requirements of section 26(2) of the WA Act. Section 26(2) requires an application to contain the information prescribed by the *Construction Contracts Regulations 2004* (WA) (**Regulations**). By regulations 4 and 5(a), an application must contain the ABN of the appointer, if the applicant knows it. In *WQube Port of Dampier v Philip Loots of Kahlia Nominees Ltd* [2014] WASC 331, Chaney J rejected an argument that the applicant could have obtained the appointer's ABN through a company search because regulation 4 required actual, not constructive, knowledge. However, in the subsequent case of *Marine & Civil Pty Ltd v WQube Port of Dampier Pty Ltd* [2014] WASAT 167, the Tribunal held that the failure of the applicant to include the appointer's ABN on its application amounted to non-compliance with the Regulations. This latter, somewhat concerning, decision emphasises the need to pay careful attention to the procedural requirements of the WA Act when preparing and serving an adjudication application.

The case of *Alliance Contracting Pty Ltd v James* [2014] WASC 212 notably contributed to the body of law relating to an adjudicator's powers. Although an adjudicator is required by the WA Act to determine "whether any party to the payment dispute is liable to make a payment", the Supreme Court held that he or she does not have the power to order a party to pay a related payment claim that is not the subject of an adjudication.

Emerging trends

The number of adjudication applications in Western Australia is increasing significantly each year with the majority of those applications being made by large commercial companies.

In 2014, the Tribunal and the Courts drew our attention to the importance of constructing individual provisions of the WA Act in the context of related provision and the act as a whole. The above-mentioned *Alliance* decision and the related decision in *Alliance Contracting Pty Ltd and Tenix SDR Pty Ltd* [2014] WASAT 136 are examples of this approach to construction.

A number of decisions, including *Field Deployment Solutions Pty Ltd and SC Projects Australia Pty Ltd* [2014] WASAT 101 and *MRCN Pty Ltd t/as Westforce Constructions v ABB Australia Pty Ltd* [2014] WASAT 59, demonstrate a broad interpretation by the Tribunal of its discretionary powers in a review of an adjudicator's determination.

Future

In its *Report on Security of Payment* in June 2014, the Society of Construction Law Australia (**SOCLA**) stated that "the evaluative security of payment models of Western Australia and the Northern Territory "have plainly been working much better than the East Coast Model". Notwithstanding SOCLA's findings, Building Commissioner Peter Gow announced in June 2014 that WA Act would be reviewed to ensure it offers the best possible protection to contractors, subcontractors and building owners. Professor Philip Evans of Curtin University was appointed to undertake the review. In October 2014 he released a discussion paper inviting submissions about:

- whether the 28 day period in which an adjudication application can be made is too short;
- whether there should be alternative dispute resolution mechanisms for small claims; and
- whether adjudicators should be subject to additional regulation such as auditing and the need for continuing professional development,

in addition to a number of other concerns raised. If the suggested changes are adopted, WA is likely to see a marked increase in the number of applications by small businesses and fewer reviews by the Tribunal.

Alliance Contracting Pty Ltd v James [2014] WASC 212

Significance

An adjudicator does not have a power under the WA Act to order a party to pay a related payment claim that is not the subject of that adjudication. Where it is necessary for an adjudicator to have regard to a related payment claim in order to make his or her determination on the payment dispute, that practical reality does not entitle or enable the adjudicator to make a determination in relation to that claim.

Facts

Tenix SDR Pty Ltd (**Tenix**) engaged Alliance Contracting Pty Ltd (**Alliance**) to work under a lump sum contract. The contract required Alliance to submit a 'final claim' that included all outstanding claims for payment from Tenix. Tenix had to then issue a final certificate, specifying the amount which it considered due to Alliance.

Alliance gave Tenix its final claim. Tenix rejected the claim in its final certificate, contending that Alliance actually owed Tenix money. Tenix applied for adjudication of the payment dispute. The adjudicator found that there was a balance of $6,242,232.90 in favour of Alliance, but said it was not possible to make a determination on that application that Tenix pay Alliance.

Alliance commenced proceedings for judicial review of the determination, arguing that the adjudicator had been wrong to conclude that he had no power to make an order that Tenix pay the sum of $6,242,232.90 to Alliance. Specifically, Alliance contended that, under section 31(2)(b) of the WA Act, the adjudicator could have made a determination that Tenix make a payment to Alliance.

Decision

Beech J found that the adjudicator's determination was correct and dismissed the application.

The primary issue for his Honour was the proper construction of section 31(2)(b) of the Act. That section provides that an adjudicator must determine "whether any party to the payment dispute is liable to make a payment". Beech J held that:

- section 31(2)(b) must be construed in the context of the WA Act as a whole;
- the fact that the recipient of a payment claim may apply for adjudication explains the language of 'any party' in section 31(2)(b); and
- the WA Act confines the adjudicator's power of enquiry, and the power to order payments, to the particular payment dispute before him or her.

His Honour said that Alliance's final claim was a payment claim that had given rise to a payment dispute when the respondent rejected it. However, his Honour agreed with the adjudicator that Tenix' final certificate was a separate payment claim, which, after being rejected by Alliance, had given rise to the dispute which was brought before the adjudicator. Although the disputes were intertwined, the latter only concerned whether Alliance was liable to pay Tenix the amount claimed in the final certificate.

His Honour added that the purpose of legislation should be derived from what the legislation says, and not from any assumption about the desired operation of the relevant provision. The function of an adjudicator is to determine the merits of the payment claim that is before him and not other issues arising between the parties. Therefore, the adjudicator had no power to determine that Tenix was liable to make a payment to Alliance even if that was the outcome of his decision.

Alliance Contracting Pty Ltd and Tenix SDR Pty Ltd [2014] WASAT 136

Significance

The adjudicator of a payment dispute can only determine whether a party is liable to make a payment or return of security which falls within the definition of 'payment dispute' in section 6 of the WA Act. Prior to applying for adjudication, an applicant's legal representatives should take care to ensure that the determination sought by the applicant is such a payment or return of security. In this case, rather than seeking redress for a guarantee which the applicant alleged had been called wrongly, the applicant should have applied for adjudication of whether liquidated damages were owing and, if so, what amount.

Facts

This decision of the State Administrative Tribunal involved the same parties as the earlier reported decision of the Supreme Court in Alliance Contracting Pty Ltd v James [2014] WASC 212 and provides further insight on the meaning of section 31(2)(b) of the WA Act.

Tenix SDR Pty Ltd (**Tenix**) contracted Alliance Contracting Pty Ltd (**Alliance**) to upgrade a wastewater treatment plant (**Contract**). Alliance provided bank guarantees as security for its performance (**Guarantees**). Tenix sent Alliance a letter alleging that Alliance had failed to achieve practical completion by the due date, and that Tenix had called the Guarantees to recover liquidated damages owed to it by Alliance. Alliance sent a letter to Tenix opposing its entitlement to the Guarantees. Alliance gave a notice of dispute to Tenix and applied for adjudication seeking payment of the equivalent of the Guarantees or the return of the Guarantees from Tenix (**Application**).

The adjudicator dismissed the Application under section 31(2)(a) of the Act on the basis that the dispute was not a 'payment dispute' for the purposes of the Act.

Alliance applied to the tribunal for a review of the decision.

Decision

The tribunal affirmed the adjudicator's decision to dismiss the Application.

The tribunal found that the assertion in Tenix's letter—that the applicant was liable to pay liquidated damages—was a payment claim. The notice of dispute, which clearly disputed the claim, had given rise to a payment dispute.

Alliance argued that, under section 31(2)(b) of the WA Act, the adjudicator was empowered to determine 'whether any party to the payment dispute is liable... to return any security'. According to Alliance, once the dispute had arisen in respect of the liquidated damages claim, it could apply for adjudication and the adjudicator could determine by section 31(2)(b) of the WA Act that Tenix pay to it the equivalent value of the Guarantees or return the Guarantees.

The tribunal said that Alliance had misconstrued the meaning of section 31(2)(b). That section must be construed in the context of the definition of 'payment dispute' in section 6 of the WA Act. An adjudicator may only determine whether a party is liable to make a payment which falls within section 6(a) or 6(b) of the WA Act, or to return a security which falls within section 6(c) of the WA Act. Neither the payment sought by the applicant, being the payment of the value of the Guarantees, nor the 'return' of the Guarantees fitted within section 6 of the WA Act.

The tribunal explained that section 6(c) of the WA Act deals with a situation where a security held by a party is not returned by the time it is due. However, here, Tenix had had recourse to the Guarantees before the release date. Therefore, neither the payment sought by Alliance, nor the return of the Guarantees, could be a subject of determination under section 31(2)(b).

Croker Construction (WA) Pty Ltd and Stonewest Pty Ltd [2014] WASAT 19

Significance

The State Administrative Tribunal (SAT) found that a letter with an invoice attached constituted a payment claim. There were no terms in the contract addressing the question of time limits, so WA Act implied terms allowing 28 days for payment of the claim.

Facts

Croker Construction (WA) Pty Ltd (**Applicant**) and Stonewest Pty Ltd (**Respondent**) had a contract for construction works on a residential property (**Contract**). The Respondent failed to complete the works within the time specified. Accordingly, the Applicant made a claim for liquidated damages against the Respondent.

The dispute over payment of liquidated damages was referred to adjudication, where it was dismissed because it was not served in accordance with s 26 of the WA Act. The adjudicator stated that there were no other grounds upon which he was required to dismiss the adjudication application under s 31(2)(a) of the WA Act.

The Applicant sought orders that the adjudicator's dismissal of the application under s 31(2)(a) be reversed and that the application be referred back to the adjudicator.

Decision

The SAT found that even if the invoice constituted a payment certificate, it was not necessarily a payment claim. However, the letter and invoice together constituted a payment claim by the Applicant because it asserted a claim to payment of liquidated damages and the author performed the functions of the main contractor's representatives under the Contract.

There was no provision in the Contract governing how the Applicant was to make a claim for liquidated damages or the time limits which were to apply. As a result, terms were implied into the Contract by the WA Act.

This meant payment of the claim was due 28 days after receipt of the payment claim, rather than 14 days as held by the adjudicator. The payment dispute arose on either the earlier of the rejection of the claim or failure to pay on the due date. The application had to be served 28 days after the payment dispute arose.

Digdeep Investments Pty Ltd and NW Constructions Pty Ltd [2014] WASAT 147

Significance

In the absence of a written provision in a construction contract specifying the time for payment of a payment claim, Schedule 1 Division 5 of the WA Act implies a 28 day payment period into a construction contract. If a contractual provision does specify a payment period, a party cannot unilaterally modify that period by stating a different time for payment on a payment claim.

Facts

NW Constructions Pty Ltd (**NW**) contracted Digdeep Investments Pty Ltd (**Digdeep**) to undertake earthworks (**Contract**). Clause 3(xi) of the Contract, headed 'Payment Periods', stated that each invoice issued under the Contract would be 'dealt with' in 14 days.

On 19 December 2013, Digdeep emailed a payment claim for $110,574.36 to NW (**Payment Claim**). The Payment Claim stated that the amount claimed was due not later than 28 days from receipt.

On 23 January 2014, NW provided Digdeep with a notice that it disputed the amount claimed. On 13 February 2014, Digdeep served an adjudication application on NW.

The adjudicator found that, pursuant to the Contract, payment of the Payment Claim was to be made within 14 days. Digdeep applied for adjudication more than 28 days after the payment dispute arose, and accordingly, the adjudicator was required to dismiss the application under section 31(2)(a) of the WA Act.

Digdeep applied to the State Administrative Tribunal for a review of the adjudicator's decision, alleging that the payment dispute arose on 16 January 2014 when NW failed to pay the Payment Claim within 28 days of receiving it. Accordingly, it contended that its application had been made in time.

Decision

The Tribunal held that the adjudicator had correctly determined that the adjudication application had been made out of time.

The Tribunal was required to determine the date on which the payment dispute arose, which turned on the reference by the Payment Claim to "payment not later than 28 days" and the effect of section 18 of the WA Act.

The Tribunal held that Digdeep's purported unilateral offer to NW to extend the time for payment did not vary the contractual terms. The time for payment was 14 days, as specified in the Contract.

The Tribunal then turned to consider whether clause 7(3) of the WA Act applied to the Contract. Clause 7(3) of Schedule 1 provides that within 28 days after a party receives a payment claim, unless that party rejects or wholly disputes that claim, it must pay the claim, or that part of the claim that is not disputed. Pursuant to section 18 of the WA Act, however, clause 7(3) will only be implied in a construction contract "that does not have a written provision about that matter". The Contract included a written provision setting out the payment period agreed by the parties. The Tribunal was therefore satisfied that, pursuant to section 18, clause 7(3) was not implied in the Contract.

The Tribunal held that when payment was not made within 14 days on 2 January 2014 as was required by the Contract, a payment dispute had arisen on 3 January 2014. The 28 day period within which Digdeep was entitled to apply for adjudication of the payment dispute had expired on 30 January 2014. The application served on 13 February 2014 had therefore been made out of time.

Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd [2014] WASCA 91

Significance

Section 43(2) of the WA Act allows a person with the benefit of an adjudication determination to enforce it in the same manner as a judgment – via the service of a statutory demand under section 459E(1) of the *Corporations Act 2001* (Cth) (Corporations Act).

In an application to set aside a demand, the affidavit in support of a statement of claim for an offsetting claim needs to contain material from which a court can estimate the amount of the claim.

Facts

Two payment disputes between Diploma Construction (WA) Pty Ltd (**Diploma**) and KPA Architects Pty Ltd (**KPA**) were adjudicated and decided in favour of KPA. Diploma did not pay KPA. With leave of the District Court, KPA entered judgment in terms of the determinations. KPA then issued a statutory demand. Diploma applied to the Supreme Court to set aside the statutory demand.

In Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd [2013] WASC 407 (summarised in Roundup 2013), Master Sanderson dismissed Diploma's application to set aside the statutory demand. Diploma appealed to the Court of Appeal, alleging that the Master had erred in finding that:

- there was no genuine dispute about the amounts payable as a result of the two determinations and the District Court judgment;
- there was no offsetting claim within the meaning of section 459(1)(b) of the Corporations Act;
- there was not 'some other reason' under section 459(1)(b) to set aside the statutory demand; and
- the failure to calculate the amount of interest in the statutory demand was not so serious as to warrant setting aside under section 459(1)(b).

Decision

The court dismissed the appeal on all four grounds.

The court said that Diploma's claim that the debt was not due and payable, and for a declaration that the sum involved 'be repaid', was spurious, without legal merit and contrary to the WA Act. The fact that the adjudicator's determination might be of interim nature did not mean that the debt was not presently due and payable. The court also noted that the sum could not be repaid, as Diploma had not actually made any payment.

As to ground 2, the court said that the recipient of a statutory demand may apply to set aside the demand if it has a 'genuine' and quantifiable offsetting claim for an amount greater than the judgment debt. Diploma's mere allegation that it was not indebted was not sufficient to constitute a genuine offsetting claim for the purposes of section 459H(1)(b).

Ground 3 relied solely on Diploma's assertions in grounds 1 and 2. As such, the court held that there was not 'some other reason' under section 459(1)(b) of the Corporations Act to set aside the statutory demand.

The court said that section 459J(1)(a) conferred a discretion on the court to determine whether a defect in the statutory demand would result in a substantial injustice, and on that basis set aside the demand. However, the $3 discrepancy in the statutory demand was not so ambiguous as to cause Diploma any substantial injustice or uncertainty about the debt. Accordingly, the court dismissed ground 4.

Field Deployment Solutions Pty Ltd and SC Projects Australia Pty Ltd [2014] WASAT 101

Significance

The powers to review the decision of an adjudicator to dismiss an application conferred by section 46 of the WA Act on the State Administrative Tribunal entitle it to consider any other ground for dismissal under section 31(2)(a) of the WA Act that were not raised before the adjudicator, and not only the ground(s) raised in the adjudication

Facts

SC Projects Australia Pty Ltd (**SCPA**) contracted Field Development Solutions Pty Ltd (**FDS**) to supply vehicles to haul material for rehabilitating a right of way (**Contract**) with payment due on milestones. FDS invoiced SCPA for the supply of four vehicles prior to the relevant milestone. When three vehicles were ready, FDS emailed SCPA notifying that payment of the referrable portion of the invoiced amount was due immediately.

FDS contended that the email required the respondent to pay immediately and a payment dispute had therefore arisen when the respondent did not pay. FDS applied for adjudication. The adjudicator determined that the application had not been made within time and dismissed the application.

FDS sought review of the tribunal's decision. Although not raised before the adjudicator, SCPA relied on an additional ground that the Contract was not a 'construction contract'. FDS argued that section 46 of the WA Act did not empower the tribunal to hear any argument based on a fresh ground of dismissal; instead, following a finding that the adjudicator made a mistake, the tribunal has to remit the matter back to the adjudicator under section 31(2)(b).

Decision

The tribunal dismissed FDS' application and affirmed the adjudicator's decision.

Adopting Murphy JA's reasoning in Perrinepod Pty Ltd v Georgiou Building Pty Ltd [2011] WASCA 217 (summarised in Roundup 2011), the tribunal said that under section 31(2)(a) of the WA Act, an adjudicator's function is to 'dismiss an application' when it fails to meet any ground, rather than to dismiss on a particular ground. The adjudicator's decision should not be conflated with the basis for that decision.

The tribunal said that the review of an adjudicator's decision to dismiss an application is by way of a 'hearing de novo' (afresh) – during which the tribunal may consider material that was not before the adjudicator – and the purpose is to produce the correct and preferable decision. Here, this required the tribunal to consider whether the Contract was a construction contract within the meaning of the WA Act. The tribunal held that the haulage of fill was not for:

- 'civil works';
- the extension of 'civil works' to 'any works, apparatus, fittings, machinery or plant associated with any [works constructing a road]'; or
- 'construction work'.

Furthermore, the email was not a 30 day invoice as required by the Contract terms. Consequently, no payment dispute had even arisen, and accordingly the adjudication application had been made prematurely. As such, the application was not properly prepared and served in accordance with section 26 of the WA Act.

Kellogg Brown & Root Pty Ltd v Doric Contractors Pty Ltd [2014] WASC 206

Significance

It is essential to obtain the leave of the court prior to seeking to enforce a determination by a statutory demand. In determining whether to grant leave to enforce a determination, the court will consider the existence of any judicial review proceedings

Facts

Doric Contractors Pty Ltd (**Doric**) was engaged to carry out design and construction works in relation to two buildings on the Jimblebar iron ore project in the Pilbara.

Doric entered into a subcontract with Kellogg Brown & Root Pty Ltd (**KBR**) to provide engineering services to Doric in relation to the construction of the two buildings.

Both buildings were completed in July 2013 and KBR issued its final invoice on 24 July 2013.

In October 2014, Doric issued two invoices to KBR by which Doric sought payment for expenses it had incurred as a result of poor performance or non-performance by KBR in the provision of its services under the contract.

KBR refused to pay the invoices disputing any liability to make payment.

Doric applied for adjudication in relation to each invoice and succeeded against KBR in respect of both adjudications.

KBR filed an application for judicial review of the determinations in the Supreme Court.

Subsequently, Doric served a statutory demand for the total of the two debts that arose out of the determinations. Doric did not obtain the leave of the court before issuing the statutory demand.

KBR commenced proceedings in the Supreme Court to set aside the statutory demand.

Decision

Acting Master Gething held, relying on the earlier decision of the Western Australia Supreme Court of Appeal, Diploma Constructions (WA) Pty Ltd v KPA Architects [2014] WASCA 91, that the statutory demand should be set aside as:

- Doric had not obtained the court's leave, prior to serving the statutory demand, to enforce the determinations in accordance with section 43(2) of the WA Act;
- a failure to obtain leave to enforce a determination prior to issuing a statutory demand constituted 'some other reason' for setting aside the statutory demand under section 459J(1)(b) of the *Corporations Act 2001* (Cth) (**Corporations Act**); and
- Doric's failure to comply with section 43(2) of the WA Act, which permits a person with leave of the court to enter judgment in terms of a determination, meant that the statutory demand procedure was being improperly used for the purpose of compelling a solvent company to pay a disputed debt and amounts to an abuse of process.

The existence of judicial review proceedings

In the event that the Acting Master was wrong in his finding that leave must be sought to enforce an adjudication determination, his Honour also considered the impact of existing judicial proceedings on the statutory demand.

His Honour held that the existence of arguable judicial review proceedings in relation to the determinations the subject of a statutory demand constitutes 'some other reason' to set aside the statutory demand under section s 459J(1)(b) of the Corporations Act. His Honour would have set aside the demand on this basis.

Marine & Civil Pty Ltd v WQube Port of Dampier Pty Ltd [2014] WASAT 167

Significance

This decision highlights the need to pay careful attention to the procedural requirements of the WA Act and the *Construction Contracts Regulations 2004* (WA) (Regulations) when preparing an adjudication application. If an applicant has actual knowledge of the appointor's ABN and fails to include that detail in its application, the appointed adjudicator must dismiss the application. This decision records a stricter interpretation of 'actual knowledge' than that of the court in the recent Loots decision. Given the object of the WA Act to resolve payment disputes quickly and informally and the triviality of the omitted ABN, the decision creates cause for concern.

Facts

WQube Port of Dampier Pty Ltd (**WQube**) contracted Marine & Civil Pty Ltd (**M&C**) to undertake work forming part of the Dampier barge berth. M&C made a payment claim, which WQube disputed, giving rise to a payment dispute.

M&C applied to the Institute of Arbitrators and Mediators Australia (**IAMA**) for adjudication of the payment dispute. The application stated the ABNs of the parties, but not IAMA.

The adjudicator dismissed the application without making a determination on the merits on the ground that the failure to state IAMA's ABN meant that the application had not been prepared in accordance with section 26(2) of the WA Act.

M&C applied to the State Administrative Tribunal for a review of the decision, contending that it had not known IAMA's ABN and therefore, had not been required to provide that detail.

Decision

The tribunal affirmed the adjudicator's decision and dismissed the review application.

The question of compliance with section 26 of the WA Act turned on whether or not the failure to provide IAMA's ABN amounted to non-compliance with the Regulations.

The tribunal held that:

- section 26(2)(a) of the WA Act requires an application to contain the information prescribed by the Regulations;
- regulation 5(a) requires that an application include the appointor's contact details; and
- regulation 4 provides that the contact details of a person include the ABN of the person, to the extent to which the person knows it.

In support of its contention that it had not known the ABN, the M&C said that neither IAMA's website, nor its receipt of lodgment referenced the ABN. The tribunal considered comments made by Chaney J in Loots. His Honour rejected an argument that the applicant in that case could have obtained IAMA's ABN through a company search on the basis that Regulation 4 required actual, rather than constructive, knowledge. The tribunal noted, however, that the ABN had been stated in the foot of three letters received by the parties from IAMA in earlier payment disputes. On that basis, the tribunal found that M&C had been 'aware of, or acquainted with' the ABN and had not complied with the Regulations.

MRCN Pty Ltd t/as Westforce Constructions v ABB Australia Pty Ltd [2014] WASAT 59

Significance

The discretion of the State Administrative Tribunal of Western Australia (Tribunal) to consider additional material in a 'de novo' review of an adjudicator's decision must be exercised with caution in light of the unique nature of the WA Act.

Facts

MRCN Pty Ltd (**Westforce**) claimed progress payments from ABB Australia Pty Ltd (**ABB**).

On 10 December 2013, Westforce and ABB met to discuss issues over payments, but did not resolve them.

On 23 January 2014, Westforce commenced an adjudication against ABB.

ABB contended that the payment dispute had arisen at the meeting on 10 December 2013. Westforce's application was therefore out of time as more than 28 days had lapsed since the payment dispute had arisen. The adjudicator agreed with this.

Westforce referred the adjudicator's decision to the Tribunal. It sought to adduce new evidence to show that the payment dispute had not arisen on 10 December 2013 and the application had been made within time.

Decision

The Tribunal held that, in this instance, allowance should be made for additional material to be filed to enable the Tribunal to determine, on the balance of probabilities, the date on which the payment dispute arose.

The Tribunal said that under Section 27 of the State Administrative Tribunal Act 2004 (WA) (**SAT Act**) the Tribunal could consider new material when reviewing adjudication determinations in a hearing 'de novo' (hearing afresh).

Westforce contended that the Tribunal should exercise its discretion to consider new evidence in its favour as the payment dispute had not been declared on 10 December 2013 and the adjudicator had not given Westforce an opportunity to reply to ABB's allegations on that issue.

ABB argued that, due to the special nature of the adjudication process under the WA Act and the fact that an adjudication does not produce a final result, the Tribunal's discretion to allow additional evidence should be read down to the extent that no new material may ever be considered on review other than submissions. ABB also argued that Westforce was attempting to change its case by way of review.

The Tribunal noted that section 27 of the SAT Act could not be read down to a point where the Tribunal's discretion was effectively removed. If the legislature had intended the discretion to be removed, it would have expressly stated so in the SAT Act.

The Tribunal held that the evidence that had been before the adjudicator was inadequate for it to be able to determine whether the payment dispute had arisen on 10 December 2013. Westforce was not attempting to change its case through the review process. It could not have reasonably foreseen that the meeting of 10 December 2013 would be identified as the date the payment dispute was declared and ABB would be at an unfair advantage if Westforce was not given the opportunity to respond on that point. The Tribunal therefore allowed additional evidence to be submitted on that issue.

The decision would not open the floodgates for adjudicated matters to be re-litigated in the Tribunal. This was a special circumstance where the exercise of discretion was justified.

MRCN Pty Ltd t/as Westforce Constructions and ABB Australia Pty Ltd [2014] WASAT 135

Significance

A party to a construction contract purporting to finally reject a payment or variation claim so as to give rise to a payment dispute should make a clear statement to that effect. A request by the recipient that the contractor provide material to support a claim, failing which the claim will be rejected, is not such an unequivocal statement, but an ultimatum which does not commence a payment dispute.

Facts

MRCN Pty Ltd (**Westforce**) sought the Tribunal's review of a decision made by an adjudicator that a payment dispute with ABB Australia Pty Ltd (**ABB**) had arisen on 10 December 2013 and that, accordingly, Westforce's adjudication application had been made out of time.

In MRCN Pty Ltd t/as Westforce Construction and ABB Australia Pty Ltd [2014] WASAT 59 (also summarised in this edition), the Tribunal determined the preliminary questions as to whether additional material could be taken into account in order to determine when the relevant payment dispute arose. The Tribunal held that Westforce could adduce additional material to support Westforce's contention that no payment dispute had been declared on 10 December 2013.

The Tribunal gave both parties the opportunity to submit additional material and submissions, to call witnesses and to arrange for witnesses who had already provided statements to make themselves available for cross-examination.

Decision

The Tribunal held that the payment dispute had arisen on 2 January 2014 when ABB failed to pay the invoice. The matter was remitted to the adjudicator to determine the merits of the dispute.

Westforce contended that the payment dispute had arisen on 2 January 2014, 30 days after the invoice had been issued and ABB failed to pay; or, in the alternative on 21 January, when ABB rejected the variation claim in writing. ABB said that, prior to the meeting of 10 December 2013, the parties had disputed the variation claim. At the meeting, which was called specifically to try to resolve the dispute, ABB rejected the variation claim, giving rise to the payment dispute.

After considering the additional material adduced by the parties, the Tribunal found that there was insufficient evidence that the meeting was intended to be the final meeting to conclude discussions on the variation claim. At the meeting, the parties had only briefly discussed the variation claim and spent the majority of the time discussing other assessment claims. ABB had not rejected the claim, but issued an ultimatum that if Westforce did not provide additional material to support the claim, the claim might be rejected.

The Tribunal said that if ABB intended to reject the claim, it should have made a clear statement to that effect, followed it up in writing or made reference to it in subsequent meetings – which it did not.

The Tribunal held that the dispute had arisen on 2 January 2014 because the variation claim had not been paid in full within 30 days of receipt. The adjudication application, which was lodged on 24 January 2014, was therefore in time.

R & D Building Pty Ltd and Jackson [2014] WASAT 141

Significance

This case demonstrates the importance of having regard to the nature of the money claimed in an adjudication as this can affect the time limits. In this case, there was an effective variation of a payment which changed its nature under the WA Act and meant the application was out of time.

Facts

R & D Building Pty Ltd (**Applicant**) entered into a contract with Mr Jackson (**Respondent**), pursuant to which the applicant would construct a residence for $2,260,008 plus GST. The contract provided for a retention. In October 2013, the parties agreed that the balance outstanding on the retention would be considered to be a 'deferred payment' payable on 21 December 2013 (**Variation**). The parties also exchanged emails during December 2013 (**December Emails**) which the applicant contended was a further agreement to defer payment beyond 21 December 2013. Practical completion of the residence was achieved on 21 June 2013.

The Applicant applied for adjudication under the WA Act on 28 February 2014 requiring payment of the deferred payment negotiated by the parties. The Applicant contended that the payment dispute arose when its invoice for the balance of the deferred payment was rejected on 24 February 2014.

The adjudicator found that the deferred payment was in the nature of security or retention money and was due on 21 December 2013, which meant that the application was out of time. Under the WA Act, whether and when a payment dispute arises depends on the type of money claimed such that different time periods apply to payments and the releases of retentions and security.

The applicant sought a review of the adjudicator's decision.

Decision

The State Administrative Tribunal affirmed the adjudicator's decision and dismissed the applicant's application.

The Member found that the effect of the Variation was to change the character of the payment from retention money to a deferred payment of money otherwise payable under the contract. The time limit in section 6(a) of the WA Act applied and the final payment was due on 21 December 2013. A payment dispute arose on that date when it was not paid and the adjudication application was therefore out of time.

The Tribunal also held that the December emails did not vary the contract, primarily because the respondent's alleged acceptance of a change in payment terms—which constituted of a statement that he would '...revisit towards to end of January'—was not clear and unequivocal. It merely indicated the respondent's intention to reconsider his position at a later time. The alleged variation also failed because, while the respondent would receive a benefit in postponing payment, the applicant received no consideration.

Re Scott Johnson; ex parte Decmil Australia Pty Ltd [2014] WASC 348

Significance

A principal's request to the claimant for reconciliation of, or further information regarding, works done may constitute a conditional rejection of the payment claim. If the claimant plainly indicates that it will not provide any reconciliation, the conditional rejection may convert into an unequivocal rejection, at which point a payment dispute arises.

Facts

Decmil Australia Pty Ltd (**Decmil**) engaged Infra Tech Pty Ltd (**Infra Tech**) to carry out earthworks under a construction contract. After Infra Tech submitted a progress claim (**Payment Claim**), Decmil sent an email on 12 May 2014, with a payment notice, alleging over-claiming and requested Infra Tech to 'reconcile the works undertaken' (**Progress Certificate**). On 21 May 2014, Infra Tech requested that the applicant 'revalidate' the Payment Claim, to which Decmil emailed back a rejection. Infra Tech issued a notice of dispute (**Dispute Notice**) on 23 May 2014 and applied for adjudication on 17 June 2014. Decmil asserted that the payment dispute had arisen on 12 May 2014 and the application was served out of time. The adjudicator disagreed and determined that the dispute had arisen on 23 May 2014 and, on the merits of the dispute, in favour of Infra Tech.

Decmil applied for a writ of certiorari quashing the adjudication, arguing that the adjudicator made jurisdictional errors in not finding that the payment dispute arose when the Progress Certificate was issued and, in any event, finding that the payment dispute arose upon the issue of the Dispute Notice.

Decision

The court dismissed Decmil's application and granted leave to the respondent to enforce the adjudication.

Beech J held that the focal question was whether the adjudicator's reasons revealed any jurisdictional error in rejecting the contention that the payment dispute arose when the Progress Certificate was issued. His Honour also:

- stated that it was not useful to focus on Decmil's second proposition in isolation from the first; and
- approved of the adjudicator's focus on the relevant contractual provisions and the precise terms of the Progress Certificate, and reasoning that the Progress Certificate did not constitute a disputation of the Payment Claim, but a request for further information, in the absence of which the Payment Claim would be rejected.

His Honour also found that the adjudicator's determination that the dispute had arisen on 23 May 2014 was not material to rejecting the contention that the application had been filed out of time. Surprising as it may seem that the Dispute Notice could give rise to a payment dispute—as only the recipient of a payment claim can dispute or reject it—it was the Dispute Notice which ultimately made it clear that the respondent would not accede to the applicant's request for reconciliation. The adjudicator was entitled to conclude that the applicant's conditional rejection of the Payment Claim had become an unequivocal rejection that triggered a payment dispute.

Red Ink Homes Pty Ltd v Court [2014] WASC 52

Significance

A decision made by an adjudicator can be overturned upon application for judicial review to the Supreme Court. If a jurisdictional error has been made, the Court has a discretion to grant prerogative relief (for example, to quash the decision).

Facts

The Applicants (together, the **Red Ink Homes Group**) sought orders for prerogative writs to quash three adjudication determinations of the first respondent, who was acting as an adjudicator under the WA Act.

In each determination, as well as paying the claimant particular amounts, the Red Ink Homes Group had been ordered to pay a sum to set off part of what the claimant had paid as security for costs, with the effect that costs were borne equally.

Decision

Kenneth Martin J noted that often adjudicators do not have legal training and expertise, and consequently any court scrutinising an adjudicator's reasons must make allowances to respect the informality of the WA Act relief regime.

However, the following features meant the relevant adjudication determinations were fatally infected with jurisdictional error. The adjudicator:

- found there was a wholly oral agreement in each determination without finding the essential elements of a contract (eg an offer, counter offer, or acceptance), or even any discussion of the remuneration terms;
- adopted a backwards reasoning approach from the conclusion that there was a binding wholly oral construction contract;
- came to an irrational conclusion that there were no express terms in the contracts;
- demonstrated problematic reasoning in contractual interpretation as to timing of payment;
- failed to make the essential determination as to which of the two potential entities was to be exposed to the ultimate payment obligation; and
- found an oral contract had been made by an entity that did not exist at the relevant time.

The errors were 'too grave and fundamental' not to require the court's intervention. Accordingly, Kenneth Martin J quashed the decision by orders absolute by certiorari.

WQube Port of Dampier v Philip Loots of Kahlia Nominees Ltd [2014] WASC 331

Significance

A decision made by an adjudicator can be overturned upon application for judicial review pursuant to s 31 of the WA Act. However, this particular application was dismissed.

Facts

The case involved a review of two adjudication decisions made by separate adjudicators who were said to have made mostly the same errors. A ground of review was raised in relation to a decision one of the adjudicators made about security of payment.

That ground alleged that the adjudicator made an error of law in determining that a progress certificate issued on 14 March 2014 was 'invalid' for the purposes of clause 37.2 of the contract, by reason of a misapprehension of his functions or powers, and also by failing to accord procedural fairness to the parties in relation to his intention to make a determination on an alternative basis that the progress certificate was invalid.

Decision

The contract provided that if the superintendent did not issue a progress certificate within 14 days of receiving a progress claim, then the progress claim was deemed to be the relevant progress certificate.

Chaney J found that the adjudicator made an error in relation to the calculation of the time that the superintendent had to issue a progress certificate. The error was based on calculations of time periods and the application of those time periods to provisions of the contract.

Chaney J found that, even though the calculation was wrong, the adjudicator had simply engaged in contractual construction without any misunderstanding of the limits of his functions under s 31 of the WA Act. The adjudicator's reasoning process could not be described as astonishing, inconsistent, illogical or irrational, which was the test applied in Red Ink Homes Pty Ltd v Court [2014] WASC 52. Furthermore, the adjudicator's conclusion on this particular issue was not the basis upon which he found liability for payment.

Procedural fairness did not require the adjudicator to provide a further opportunity to the parties to be heard as to his conclusions on those questions simply because his construction of the clause was not one suggested by either party.

Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd [2014] WASC 39

Significance

A judicial review of an adjudicator's decision must not amount to merits review. The adjudicator must carry out the adjudication rationally and provide logical reasons to avoid falling into jurisdictional error.

Facts

Brookfield Multiplex Engineering and Infrastructure Pty Ltd (**Brookfield**) was the contractor for the design, supply and installation of the accommodation village at the Roy Hill Iron Project. Brookfield entered into a contract with Zurich Bay Holdings Pty Ltd (**Zurich Bay**) under which Zurich Bay would carry out the earthworks, drainage and roadwork requirements for the accommodation village (**Contract**).

A dispute arose over the provision of water at the site that ended in Brookfield giving the remaining work to another contractor.

Zurich Bay submitted a progress claim for work completed. In response, Brookfield exercised its right to set off amounts under the Contract (incurred by engaging an alternative contractor) and issued a Payment Schedule which assessed Zurich Bay's claims at nil. Zurich Bay applied for adjudication.

The adjudicator found that the Contract was a construction contract under the WA Act and a direction given by Brookfield to Zurich Bay to continue work was unlawful. Brookfield applied to quash the determination and Zurich Bay applied for leave to enforce it.

Decision

Brookfield argued that the adjudicator made a jurisdictional error by failing to take into account the scope of work in determining whether the Contract was a construction contract, by failing to have regard to particular clauses and Brookfield's claim for set-off. They also argued that the adjudicator did not give adequate reasons.

The reasons an adjudicator is required to give must show that the adjudicator has engaged actively with the dispute and dealt with it in a way that is reasoned, not perverse, arbitrary or capricious. However, during review the court must be careful not to adopt a narrow approach by using a fine appellate tooth-comb.

In this case, even if the adjudicator had made errors, they were not jurisdictional errors. Whether the adjudicator made errors in the course of his reasoning was not the point. He carried out the adjudication rationally and gave logical reasons for his conclusion. Brookfield's application was dismissed, and Zurich Bay was granted leave to enforce the adjudicator's determination.

Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd [2014] WASC 40

Significance

An adjudicator cannot make a decision under s 32(1)(a) of the WA Act without giving the parties an opportunity to make submissions on an issue that affects the ultimate outcome.

Facts

Zurich Bay Holdings Pty Ltd (**Zurich Bay**) applied for adjudication under the WA Act of a payment dispute arising out of a subcontract under which Brookfield Multiplex Engineering and Infrastructure Pty Ltd (**Brookfield**) engaged Zurich to construct earthworks, drainage and roads for the Roy Hill Iron Ore accommodation village. The adjudicator determined that Brookfield should pay Zurich $1,191,402.84 with interest.

Zurich applied to the Supreme Court for leave to enforce the determination pursuant to s 43 of the CC Act. Brookfield applied for a writ of certiorari to quash the determination.

The adjudicator made findings that a particular clause in the subcontract was void pursuant to s 53 of the WA Act because it purported to exclude, modify or restrict the operation of the Act. The clause purported to contract out of the WA Act.

Decision

Brookfield claimed that it was denied natural justice because the adjudicator reached the conclusion on contracting out when the issue had not been raised by the parties and parties had not been able to make submissions on it.

Brookfield also argued that the adjudicator was outside his jurisdiction because the issue had not been raised by either party, and s 32(1)(a) of the WA Act required him to make the determination on the basis of the application and the response.

Le Meire J found that it could not reasonably be anticipated by Brookfield that the adjudicator would conclude that the clause was void on that ground because Zurich Bay had not submitted it was void. The adjudicator failed to afford procedural fairness to Brookfield by failing to draw the issue to its attention and by failing to give it an opportunity to make submissions on the issue.

The adjudicator's decision was ultimately quashed because the contracting out issue could have made a difference to the ultimate result. Brookfield only needed to show that the denial of procedural fairness deprived it of the possibility of a successful outcome.

AUSTRALIAN CAPITAL TERRITORY

◄ CONTENTS ►

ACT CASE INDEX

Andara Homes Pty Ltd v Matish Pty Ltd / Andara Homes Pty Ltd v Magistrates Court of the Australian Capital Territory and Matish Pty Ltd [2013] ACTSC 265

Denham Constructions Project Company 810 Pty Ltd v Smithies & Anor; Denham Constructions Project Company 810 Pty Ltd v Risgalla & Anor [2014] ACTSC 169

Steel Contracts Pty Limited v Ricky William Simons Trading as Little Lifter, Richard Poiner and Adjudicate Today Pty Limited [2014] ACTSC 146

Walton Construction Pty Ltd v Pines Living Pty Ltd [2013] ACTSC 237

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

Following the first judicial consideration of the ACT Act in 2013, 2014 saw a number of court decisions handed down in the ACT. Despite a review of the ACT Act in 2013, and the changes to the NSW legislation, no substantive amendments have been made to the ACT Act.

The Supreme Court has set limitations on the use of bank guarantees to provide unconditional security. A Master of the Supreme Court held that a construction contract must give the guarantee holder a positive entitlement to call on the security where a genuine dispute exists. In effect, the contract must prescribe that the risk during a dispute should be worn by the guarantor, not the guarantee holder (*Walton Construction Pty Ltd v Pines Living Pty Ltd* [2013] ACTSC 237).

In determining whether a genuine dispute exists in relation to a statutory demand, the court must consider the evidence led by either party. Where the party issuing the demand leads no evidence to contrast the evidence of a dispute, the court may set aside the demand (*Andara Homes Pty Ltd v Matish Pty Ltd and Andara Homes Pty Ltd v Magistrates Court of the Australian Capital Territory and Matish Pty Ltd* [2013] ACTSC 265).

The decision by the Registry to register an adjudication determination as a judgment is not a reviewable decision (*Denham Constructions Project Company 810 Pty Ltd v Smithies & Anor; Denham Constructions Project company 810 Pty Ltd v Risgalla & Anor* [2014] ACTSC 169).

Judgments registered with the court give a right to enforce a debt, but do not create issue estoppel (*Denham Constructions Project Company 810 Pty Ltd v Smithies & Anor; Denham Constructions Project Company 810 Pty Ltd v Risgalla & Anor* [2014] ACTSC 169).

Emerging Trends

As observed last year, the court is receptive to considering claims for orders in the nature of certiorari or potential appeals from an adjudicator's decision, but requires strict compliance with the ACT Act and any applicable timeframes. This is consistent with the court's view that where a prescribed right of appeal exists, the ACT Act must be strictly followed in order to access that right (*Denham Constructions Project Company 810 Pty Ltd v Smithies & Anor; Denham Constructions Project company 810 Pty Ltd v Risgalla & Anor* [2014] ACTSC 169).

Future

Having been in operation for more than four years, the ACT Act is now well utilised throughout the industry, and we can expect to see increasing judicial consideration of the ACT Act in years to come.

It remains to be seen whether the amendments introduced in NSW will be introduced in the ACT where the industry is much smaller. However, it is likely ACT-based contractors who work in NSW will find it difficult to grapple with two systems of compliance, and given the proximity of the jurisdictions, amendments to create consistency may be necessary.

Andara Homes Pty Ltd v Matish Pty Ltd / Andara Homes Pty Ltd v Magistrates Court of the Australian Capital Territory and Matish Pty Ltd [2013] ACTSC 265

Significance

Discusses the importance of compliance with the statutory timeframes under the ACT Act and what will constitute a 'genuine dispute' when a party is seeking to set aside a statutory demand issued in reliance on an adjudication determination. Evidence that defective works were rectified at the cost of the builder will be sufficient to set aside a statutory demand by the subcontractor.

Facts

Matish Pty Ltd (**Matish**), a concreting contractor, entered into an agreement with Andara Homes Pty Ltd (**Andara**), a residential builder, to install concrete at various locations in the ACT. Matish issued a payment claim and Andara did not provide a payment schedule. Matish applied for adjudication but the adjudicator failed to make a decision. Matish withdrew the application and resubmitted it in accordance with the requirements of the ACT Act. Andara did not submit an adjudication response and the adjudicator decided in favour of Matish. Matish then had the determination registered as a judgment in the ACT Magistrates Court. Once the judgment was served, Matish issued a statutory demand to Andara for payment of the judgment debt, in reliance of the now registered decision. Andara then applied to the Supreme Court for orders that the statutory demand be set aside, and an order in the nature of certiorari to quash the decision to register the adjudicator's determination as a judgment. Andara alleged the adjudicator had made a jurisdictional error as Matish had failed to comply with the timeframes in the ACT Act when resubmitting the application for determination.

Decision

Master Mossop dismissed Andara's application seeking orders in the nature of certiorari and set aside the statutory demand issued by Matish.

Mastor Mossop discussed the basic principles surrounding each legal issue:

Setting aside a statutory demand

- The principles surrounding what circumstances allow a court to set aside a statutory demand are well established.
- The party seeking to set aside a demand must use evidence to demonstrate that there is a genuine dispute on the amount being demanded.
- Andara led evidence that it had rectified defective works of Matish and that the cost to do same was greater than the value of the demand.
- In circumstances where Matish did not lead evidence to counter Andara's evidence, it was open to the court to decide that a genuine dispute existed.

Is non-compliance with the ACT Act timeframes a jurisdictional error?

- Both parties accepted that failure to comply with the mandatory procedures and timeframes of the ACT Act would constitute a jurisdictional error.
- Master Mossop found that, in accordance with sections 22 and 28 of the ACT Act, Matish had the longer of five or seven business days from when it was entitled to re-submit the application to do so, and had resubmitted within time.
- There was no jurisdictional error on the part of the adjudicator in accepting the application and making a determination. Therefore there were no grounds to support a decision to grant the order sought by Andara.
- Master Mossop commented that the effect of the order sought by Andara was to review the decision by the Magistrates Court to register the judgment, and not the decision made by the adjudicator. Master Mossop determined that the registration of the judgment by the registry does not involve a decision which can be reviewed, but declined to address the issue in these proceedings as the Master had already dismissed them for failure to demonstrate jurisdictional error.

Denham Constructions Project Company 810 Pty Ltd v Smithies & Anor; Denham Constructions Project Company 810 Pty Ltd v Risgalla & Anor [2014] ACTSC 169

Significance

Discusses the significance of an adjudication determination and that it does not attract all the protection of a court judgment. The decision confirms that the requirement to pay the adjudicated amount into court prior to an appeal only exists where it is an application to set aside.

Facts

The second defendant in the proceedings, Stowe Australia Pty Ltd (**Stowe**), an electrical services provider, was successful in two adjudication applications (February and March) against Denham Constructions Project Company (**Denham**). Some of the amounts claimed in the March application were also claimed in February. Stowe enforced the March decision by registering the adjudication certificate as a judgment.

Denham then filed three applications; one to set aside the judgment registered by the court, and two to seek an order in the nature of certiorari (an order to quash each determination and resubmit it to the adjudicator). Denham did not pay either of the adjudicated amounts into court prior to filing the applications. Before hearing Denham dropped the application to set aside the registration of the March decision, which was then dismissed with costs.

Stowe applied for orders that the applications be stayed or dismissed because of the principle of issue estoppel (which prevents a person from submitting the same decision for determination twice) or because continuing the proceedings without Denham being ordered to pay the adjudicated amount into court was an abuse of process. Stowe further submitted that it would not enforce the earlier decision until the issues were decided, and sought that the application related to that determination be stayed.

Decision

The decision relates only to Stowe's applications to stay/dismiss Denham's applications. Master Mossop dismissed both applications before the final hearing.

Master Mossop discussed three main questions in this application:

How powerful is an adjudication certificate registered with the court?

- A judgment registered with the court following a determination is a judgment for a debt but does not attract the other ordinary traits of a court judgment in terms of issue estoppel.
- The ACT Act expressly sets out the intention not to interfere with common law rights, and creating issue estoppel would be inconsistent with the ACT Act.
- An administrative action by the court Registry (in sealing the certificate of determination) cannot create issue estoppel, and an adjudicator's determination is not a recognised exercise of judicial power.

Do you always have to pay the adjudicated amount into court?

- Stowe argued that the application for an order in the nature or certiorari was actually a creative way of seeking to have the decision set aside without the need to pay the adjudicated amount into court.
- The 'creative' use of court process by Denham was not an abuse of process when Denham's application did not prevent Stowe from enforcing the decision.

Should the proceedings challenging the earlier adjudication be stayed?

- Stowe wanted the application related to the earlier determination stayed until the court decided whether or not the later determination was valid.
- The court agreed that proceedings without utility should not be determined, but found that it was a matter for case management.
- The court determined there was more to lose if the proceedings were dismissed and subsequently had to be re-opened, and there was overlap in the applications which meant hearing them together was a better use of court time.

Steel Contracts Pty Limited v Ricky William Simons Trading as Little Lifter, Richard Poiner and Adjudicate Today Pty Limited [2014] ACTSC 146

Significance

This case confirms the threshold to grant leave to appeal adjudications under the ACT Act is very high. Applications for an extension of time will only be successful where special circumstances exist. The extent of a perceived error by an adjudicator is relevant, but not determinative of whether special circumstances exist. A party seeking an extension must have unusual or uncommon reasons to justify the failure to comply.

Facts

Ricky William Simons (**Simons**), a crane supplier, issued a payment claim to Steel Contracts Pty Limited (**Steel**), then known as Mass Steel Pty Limited (**Mass**), a metal fabrication contractor. Steel responded to the claim with a payment schedule scheduling 'nil' on the basis that Simons contracted with another entity, Mass (Australia) Pty Limited.

Simons applied for adjudication and the adjudicator ordered Mass to pay the full amount of the claim and interest. The adjudicator subsequently amended the determination to reflect the name change, making Steel liable to pay the adjudicated amount.

Steel sought an extension of time to seek leave to appeal the determination under the ACT Act and an extension of time of the period to apply for an order in the nature of certiorari (an order which quashes the determination and resubmit it to the adjudicator).

Steel's grounds for appeal were that there was no construction contract between Simons and Steel, and that Simons had contracted with an associated entity of Steel.

The application for leave to appeal was outside the 28 day period prescribed by the ACT Act, and outside the 60 day period to apply for orders in the nature of certiorari.

Decision

The court dismissed Steel's applications for an extension of time to seek leave to appeal under the ACT Act and an extension of time to seek an order in the nature of certiorari. Justice Refshauge held:

Appeal under ACT Act

- Steel had an opportunity to make submissions at adjudication, and again when the determination was adjusted to reflect the name change and therefore, there was no miscarriage of justice.
- Had Steel filed the application for leave within time, there was a likelihood that the leave could have been granted as some evidence indicated that it was not clear that Steel was a party to the construction contract.
- The bar to grant leave to appeal under section 43 of the ACT Act is very high. To grant leave to appeal, the applicant must demonstrate that a party's rights will be substantially affected, and that there is either a manifest error of law, or strong evidence of an error of law, which, if corrected, would add certainty to this area of law. Steel did not meet that threshold.

Order in the nature of certiorari

- Steel demonstrated that there were reasonable prospects of succeeding in the application for an order in the nature of certiorari, but special circumstances must exist to justify granting an extension of time.
- Steel did not demonstrate that special circumstances existed which justified granting an extension of time. There were reasonable prospects of establishing an error of law by the adjudicator, but that factor alone was not determinative.
- Special circumstances need not be exceptional or extraordinary, but should be unusual or uncommon.
- The party seeking the extension of time must lead sufficient evidence to establish unusual or uncommon circumstances, and not simply that it was slow to act.

Walton Construction Pty Ltd v Pines Living Pty Ltd [2013] ACTSC 237

Significance

This case examined unconditional security and in what circumstances that security can be called upon. It determined that each contract will be different and requires an examination of the facts. In this case, a positive contractual entitlement did not exist to allow the builder to call on the bank guarantee when there was a genuine dispute between the parties which had not been resolved.

Facts

Walton Construction Pty Ltd (**Walton**) entered into a contract with Pines Living Pty Ltd (**Pines**), a builder developing retirement villages. Two bank guarantees were issued in favour of Pines to secure performance by Walton.

The parties had been in dispute since approximately 2013, including a number of ACT Act adjudications and proceedings. Walton wrote to Pines in April 2013 setting out the reasons it said prevented Pines from calling on the security. Pines responded by indicating it would only call on the security in accordance with the contract. In June 2013, Walton alleged that Pines had acted in a way that indicated it did not intend to be bound by the contract and that it was repudiated.

Pines subsequently put Walton on notice that it intended to call on the security. Walton sought an injunction to restrain Pines from calling on the bank guarantees. Pines then issued a notice of completion setting out the list of defects to be completed and administrators were appointed to Walton. Pines wrote to Walton terminating the contract because appointment of an administrator was an insolvency event.

The parties disputed Pines' entitlement to call on the security.

Decision

Master Mossop decided that the injunction to prevent Pines from calling on the bank guarantee would continue until further order. Walton was successful in arguing that while there was a general right to call on the bank guarantee, there was no positive allocation of the risk in relation to pending disputes, and Pines could not call on the guarantees

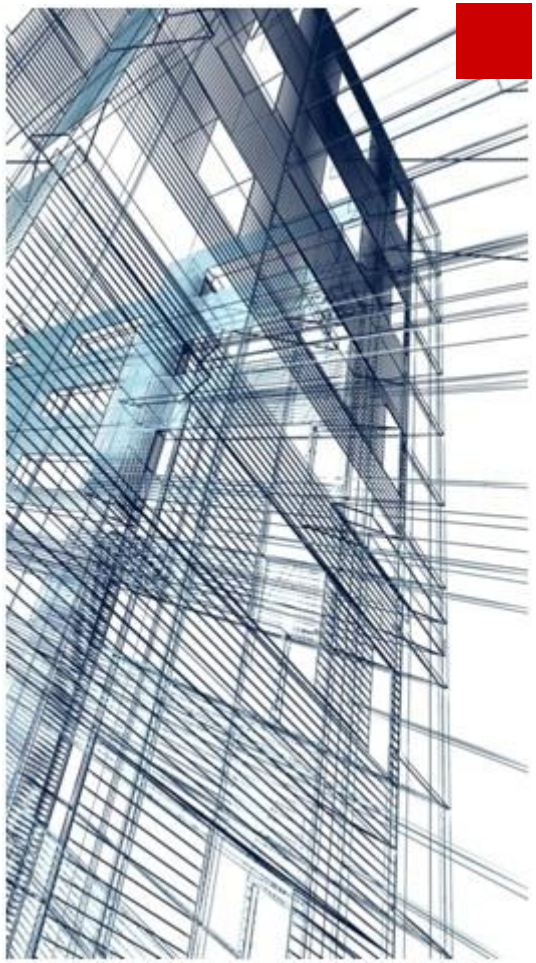
There were three main issues contested between the parties, but Master Mossop only elected to deal the issue of whether Pines was entitled to call on the bank guarantee at that point in time. Deciding this question in favour of Walton meant there was no need to consider the other questions.

Was the bank guarantee unconditional?

- Mossop decided that, notwithstanding the terms of the guarantee, the terms of the contract meant that the guarantee was not 'unconditional'.
- The operation of a bank guarantee is determined by the terms of the guarantee itself and the contract between the parties.
- Pines' claim for damages for delay and compensation costs were genuine claims, the value of which exceeded the amount of the bank guarantees.
- Whether Pines was entitled to call on the security depended on whether the contract allowed it to do so when Pines' claim for damages was disputed, as opposed to absolutely determined or agreed between the parties.
- Performance guarantees serve two purposes: to provide security for a valid claim, and to allocate risk between the parties as to who will be out of pocket pending resolution of a dispute. The contract will determine whether the security serves one or both purposes, and will be decided on a case by case basis.
- Mossop examined the nature of the contract between the parties and the 'unconditional' bank guarantee. He determined that to be entitled to call on an unconditional bank guarantee when a dispute has not be determined, the construction contract must give the builder a positive right to do so. A general contractual right to call on the security is not sufficient even where the claim is bona fide (eg genuine and made in good faith).

NORTHERN TERRITORY

◄ CONTENTS ►



NT CASE INDEX

Axis Plumbing N.T. Pty Ltd v Option Group (NT) Pty Ltd and Anor [2014] NTSC 22
Brierty Limited v Gwelo Developments Pty Ltd [2014] NTCA 7 and *Gwelo Developments Pty Ltd v Brierty Limited* [2014] NTSC 44
Gwelo Developments Pty Ltd v Brierty Limited [2014] NTSC *44*
Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor [2014] NTSC 20
M & P Builders Pty Limited v Norblast Industrial Solutions Pty Ltd & Anor [2014] NTSC 25

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

NT OVERVIEW

Developments

This year saw continued judicial consideration of the NT Act in the Supreme Court.

The NT Supreme Court heard three major cases this year relating to the NT Act. Two of the cases dealt with the issue of multiple payment claims within the one adjudication application. The third case considered the existence of a construction contract as a prerequisite to a payment dispute under the NT Act.

There have been no significant amendments to the NT Act in 2014.

Future

The NT is developing its own body of case law in relation to the NT Act. The case law in respect of the NT Act is developing as practitioners test parts of the NT Act.

The NT Act is modelled on the WA Act and WA case law will continue to be used as persuasive precedents where appropriate.

Axis Plumbing N.T. Pty Ltd v Option Group (NT) Pty Ltd and Anor [2014] NTSC 22

Significance

In determining whether a dispute concerns a 'construction contract' under section 33(1)(a) of the NT Act, an adjudicator must determine whether a contract exists at all, which will depend on their factual findings. Judicial review of an adjudicator's satisfaction under section 33(1)(a) of the NT Act is only available where that satisfaction is unreasonable or legally erroneous.

Facts

Axis Plumbing NT Pty Ltd (**Axis**) was sub-contracted to provide plumbing works by JKC Australia LNG Pty Ltd (**JKC**).

Axis provided a purchase order to the Option Group (NT) Pty Ltd (**Option Group**) for the hire of four dump trucks to Axis which included a number of conditions but did not say anything about a requirement for prior approval of the vehicles by JKC.

After Option Group had received the purchase order, Axis sent an email stating that the hire period would commence once the vehicles were approved and enabled by JKC. Option Group denied ever receiving that email and alleged that it had fulfilled all pre-conditions for hiring to commence.

Some time later Axis informed Option Group that its vehicles were not able to be used by Axis as they had not been approved by JKC.

Option Group issued a payment claim for $141,900 for the hire of the vehicles.

Axis rejected the payment claim on the basis that the conditions of its offer, namely approval of the vehicles by JKC, had not been met and the hire period had effectively never commenced.

Decision

The court upheld the adjudicator's conclusions in relation to the criteria prescribed in section 33(1)(a)(i) and (ii) of the NT Act - in particular as to the existence and terms of the contract, were reasonable and founded upon a correct understanding of the law, and the adjudicator acted reasonably and in good faith in determining those issues

The court was not persuaded that the adjudicator reached the wrong conclusion in finding that there was a contract and that it did not contain a condition precedence of approval of the vehicles by JKC. This was even if the existence and terms of an alleged contract are in fact jurisdictional facts in the objective sense and thus examinable by the court.

In coming to this decision the court noted that:

- Section 31(1)(a) of the NT Act expressly confers on adjudicators the power to determine whether a contract is a construction contract and whether the application has been prepared and served in accordance with section 28 of the NT Act. This includes a requirement to determine whether a contract exists at all. If there was no such power, a respondent could simply deny the existence of the contract and leave the applicant with no satisfactory remedy, undermining the objectives of the NT Act.
- An adjudicator's positive determination of the matters in section 33(1)(a) of the NT Act are not jurisdictional facts that can be challenged on an objective basis. A right of appeal under section 48(1) of the NT Act is only available in respect of matters where an error of law is made (affirming the decision of Southwood J in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009] NTSC 48 with the agreement of Riley J).
- A mere error of fact will not invalidate a determination unless it is demonstrated that the adjudicator's satisfaction in relation to that fact was unreasonable.

Brierty Limited v Gwelo Developments Pty Ltd [2014] NTCA 7 and *Gwelo Developments Pty Ltd v Brierty Limited* [2014] NTSC 44

Significance

The Northern Territory Court of Appeal confirmed that section 27 of the NT Act prevents a party from applying to have a payment dispute adjudicated if an application for adjudication has already been made by a party (whether or not a determination has been made) subject to two requirements under the NT Act which were irrelevant in this case.

Facts

In October 2014, a single judge of the NT Supreme Court in Gwelo Developments Pty Ltd v Brierty Limited [2014] NTSC 44 determined that section 27 of the Act precluded Brierty Limited (Brierty) from bringing two fresh adjudication applications after withdrawing its first adjudication application (which had combined both payment disputes).

Brierty appealed the decision of the single judge to the Northern Territory Court of Appeal.

On appeal, Brierty submitted that on a proper grammatical construction, section 27(a) of the NT Act refers only to applications which remain in existence or have been determined already by an adjudicator '*at the time the subsequent application is made*'.

Decision

The Court of Appeal upheld the decision of the single judge.

The Northern Territory Court of Appeal found that Brierty's construction is 'neither consistent with the text of section 27 of the NT Act nor the objectives of the legislative scheme.' The court found that 'section 27 of the NT Act permits a party to a construction contract to apply to have a payment dispute adjudicated unless, relevantly, an application for adjudication has already been made by a party, whether or not a determination has been made'.

Gwelo Developments Pty Ltd v Brierty Limited [2014] NTSC 44

Significance

Both parties must provide consent if two or more payment disputes are to be adjudicated within the one adjudication application.

Section 27 of the NT Act prevents a party from applying to have a payment dispute adjudicated if an application for adjudication has already been made by a party (whether or not a determination has been made) subject to two requirements under the NT Act which were irrelevant in this case.

Facts

Gwelo Developments Pty Ltd (**Gwelo**) contracted with Brierty Limited (**Brierty**) for the performance of civil works at a new shopping centre development in outer Darwin.

Brierty served an adjudication application on Gwelo containing two payment disputes. The first payment dispute related to an invoice dated 30 June 2014 and the second to an invoice dated 31 July 2014.

Gwelo advised Brierty that it would not consent to the simultaneous adjudication of the two payment disputes within the one adjudication application and invited Brierty to withdraw its adjudication application. Brierty did so and days later, submitted two fresh adjudication applications which dealt with each payment dispute separately.

Before the timeframe for its responses to the two fresh adjudication applications were due, Gwelo applied to the NT Supreme Court seeking urgent declaratory relief and an order that Brierty withdraw its two adjudication applications.

Gwelo argued that section 27 of the NT Act precluded Brierty from bringing fresh adjudication applications for the same payment disputes, after withdrawing its first adjudication application.

Decision

The court held that the two fresh adjudication applications were held to have had not been validly made and were of no effect under the NT Act.

Section 27 of the NT Act did apply to preclude Brierty from making the two fresh applications (given they contained payment disputes which had previously been the subject of an adjudication application).

The court also noted that a failure to adjudicate a payment dispute under the NT Act does not entail the loss of any substantive rights.

Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor [2014] NTSC 20

Significance

Denial of natural justice occurs if an adjudicator denies an applicant the opportunity to be heard on a significant matter, which is not in its application, and on which the adjudicator intended to base its decision.

Facts

Hall Contracting Pty Ltd (**Hall**) and Macmahon Contractors Pty Ltd (**McMahon**) were parties to a contract for dredging and disposal of seabed materials for a marine project (**Contract**).

The dredge remained at the site during the Darwin wet season of 2012/2013 . Hall made progress claims for standby costs for two periods (the first dredge claim and the second dredge claim respectively), interpreting a letter from McMahon of 29 October 2012 (**Letter**) as constituted a direction under the contract to maintain a dredge on standby.

McMahon did not ever dispute that the dredge remained on site and idle through the periods but rejected both dredge claims as it disagreed with Hall's interpretation and that Hall was entitled to standby costs.

In the adjudication of the first dredge claim, the adjudicator agreed with Hall's interpretation and found that Hall was entitled to standby costs.

In the adjudication of the second dredge claim, Hall submitted that the adjudicator should also be bound by the determination of the first adjudication and that the only matter in dispute was the valuation of the standby costs claimed in relation to the same entitlement. Although the adjudicator found that the letter constituted a direction under the contract, he found that Hall had not provided any relevant evidence nor had it established or proven that the dredge was idle on site during the second period (idleness issue) and determined that Hall was entitled to any standby costs.

Decision

The court quashed the adjudicator's determination on the ground of denial of procedural fairness. The court held that there had been a substantial denial of natural justice as the adjudicator failed to inform the parties of his intention to determine the dispute on the idleness issue not contended for by either party which was highly significant in the determination and by not giving them a proper opportunity to be heard further.

The court:

- rejected Hall's submission that Macmahon had in effect conceded that only the valuation was in dispute;
- was satisfied that there was apparently sufficient evidence before the adjudicator that the dredge was on site and idle throughout the second period
- held that Hall did not succeed in demonstrating that the error of the adjudicator—in failing to consider the relevant evidence that the dredge was in fact on site and idle—was anything other than an error within jurisdiction.

The court also noted:

- a dispute in of itself is not required for a 'payment dispute' under the NT Act to arise – simple non-payment in whole or in part of a payment claim, non-payment of retention monies due to be paid under a contract, failure to return security will result in a 'payment dispute';
- any party to a construction contract has the right to apply for adjudication of a payment dispute under the NT Act;
- where the application is not dismissed, the adjudicator's function is then to determine on a balance of probabilities whether any party to the payment dispute is liable to make a payment and, if so, the amount to be paid and if any interest on it is payable and the date before which the amount must be paid.

M & P Builders Pty Limited v Norblast Industrial Solutions Pty Ltd & Anor [2014] NTSC 25

Significance

An adjudicator will not infringe procedural fairness if it does not seek further submissions from an applicant on an issue which should have been 'obvious' to the applicant and is later raised in the respondent's response.

An adjudication application which seeks adjudication of multiple payment claims is not invalid in its entirety if one of the payment claims is infected by jurisdictional error.

Facts

M & P Builders Pty Ltd (**MPB**) was sub contracted by Spotless Facility Services Pty Ltd to provide corrosion prevention services at the RAAF Traffic Control Tower in Darwin. Norblast Industrial Solutions Pty Ltd (**Norblast**) was subcontracted to MPB to provide scaffolding and blasting of steelwork services.

The works were delayed due to work health and safety issues and a cyclone threat. The site was also shut down over the Christmas period. Norblast issued three invoices to MPB for 'stand-down' during these periods.

Solicitors for MPB informed Norblast that there was no contractual basis for Norblast to claim stand-down costs. MPB applied for adjudication under the NT Act seeking a determination on whether or not Norblast's three invoices were due and payable.

Norblast filed a response, within time, arguing that it did not receive a notice of dispute within the time prescribed by the implied provision, Division 5(6)(2.3) of the NT Act, disputing payment of the three invoices.

The adjudicator, after seeking an extension of time for his determination, found in favour of MPB and determined that the three invoices were payable by MPB.

MPB appealed the determination in the NT Supreme Court on a number of grounds, including that the adjudicator committed a jurisdictional error and failed to provide procedural fairness.

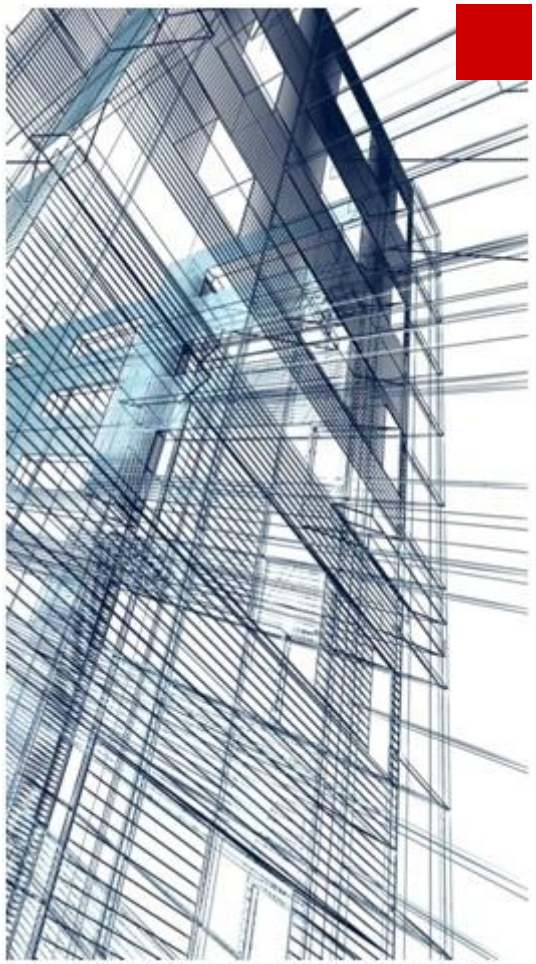
Decision

The court found two of the three invoices were payable and quashed the adjudicator's determination in respect of the third invoice and in doing so made the following four findings:

- The adjudicator had validly sought extensions of time for the delivery of his determination and the time for his determination had not expired.
- The adjudicator was not obligated to undertake merits review of MPB's adjudication application and was entitled to rely on the implied provision regarding the time for disputing invoices.
- There was no denial of procedural fairness by the adjudicator when he did not ask MPB to submit further submissions on the implied provision; it was within the reasonable anticipation of MPB that Norblast would raise the implied provision in its response.
- The third invoice was not due and payable at the time the adjudication application was served. The adjudicator fell into jurisdictional error when he determined that the invoice was payable. There is nothing in the NT Act that precludes two or more payment disputes from being joined together in the one adjudication application. They remain discrete disputes. If a jurisdictional error occurs in relation to one payment dispute, the jurisdictional error does not affect the other payment disputes contained in the same application.

SOUTH AUSTRALIA

◄ CONTENTS ►



SA CASE INDEX

Kennett Pty Ltd v Janssen & Anor [2014] SASC 164

Linke Developments Pty Ltd v 21st Century Developments Pty Ltd [2014] SASC 203

Mykra Pty Ltd v All State Maintenance Pty Ltd [2014] SADC 149

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

This year saw continued judicial consideration of the SA Act in the District Court and Supreme Court.

Before suspending work for failure to pay a progress claim, it was highlighted that subcontractors should consider whether they are objectively entitled to do so under the relevant subcontract or the SA Act, otherwise such conduct may amount to repudiation (*Kennett Pty Ltd v Janssen & Anor* [2014] SASC 164).

The District Court has confirmed that a valid response to a payment claim can be relatively brief, abbreviated and incorporate previous communication by reference, so long as the response sufficiently indicates what the respondent disputes and why, and how much (if any) they are willing to pay (*Mykra Pty Ltd v All State Maintenance Ltd* [2014] SADC 149).

In the Supreme Court, it was held that a payment schedule will be sufficient if it achieves the basic objective of putting the claiming party on notice as to how much the party making payment intends to pay and the reasons why (*Linke Development Pty Ltd v 21st Century Developments Pty Ltd* [2014] SASC 203).

In addition, the SA Act does not prohibit a respondent making a defence and cross-claim where one set of proceedings bring a claim under the SA Act and a more general claim for breach of contract (*Linke Development Pty Ltd v 21st Century Developments Pty Ltd* [2014] SASC 203).

Future

Given that the NSW Act is in large part identical to the SA Act, NSW cases have continued to be used as guidance in understanding the rights and obligations of parties under the SA Act.

Kennett Pty Ltd v Janssen & Anor [2014] SASC 164

Significance

Before suspending work for failure to pay a progress claim, subcontractors should consider whether they are objectively entitled to do so under the relevant contract or the SA Act, otherwise such conduct may amount to repudiation.

Facts

On 30 July 2012, Kennett Pty Ltd (**Kennett**) subcontracted with J & S Janssen Bricklayers (**Janssen**) for the construction of block work and brickwork for a new aged care facility. Disagreements subsequently arose between the parties concerning progress and variation claims, progress prices and the level of work provided, culminating in Kennett paying the balance of the most recent progress and variation claim, after rejecting certain amounts.

On 25 February 2013, Janssen wrote to Kennett requiring it to agree to pay its most recent progress and variation claim in full and other various matters otherwise it would have to cease trading from 28 February 2014. .

On 26 February 2013, Janssen suspended work and did not return to the site.

On 4 March 2014, Janssen wrote to Kennett alleging it was in breach of contract for not paying progress and variation claims and other matters, and stated that Janssen had suspended work and would only resume after all invoices were paid and agreement on a revised scope of works and variations is reached. Later that day Kennett responded by issuing a notice terminating the subcontract for repudiation.

Kennett sued Janssen for damages for breach of contract. Janssen denied it had repudiated the contract and counterclaimed that Kennett had repudiated the contract and it was entitled to payment in quantum meruit.

Decision

Justice Blue held that Janssen's conduct was repudiatory and awarded Kennett $225,212.22 in damages for breach of contract together with interest.

Janssen had conceded was not entitled to suspend work under the contract or the SA Act as it had not used the independent adjudication process provided under the SA Act in respect of its progress payments. His Honour held that, considered objectively from the perspective of a observer in Kennett's position, this conduct was repudiatory and allowed Kennett to terminate the subcontract.

In coming to this decision, Blue J held that:

- acts or omissions in breach of contract or of a statement of intention as to future acts or omissions may comprise repudiatory conduct, provided that the conduct evinces an unwillingness or inability to render substantial performance of the contract;
- the adoption by one party of an erroneous view as to the construction of a contract or another relevant matter that would be apparent to an objective observer in the position of that party is one factor to be taken into account in assessing whether a party's conduct is repudiatory and
- in assessing whether a party's conduct is repudiatory, and the effect of the adoption of an erroneous view, it will be highly relevant whether the party is in present breach of contract or merely stating an intention to engage in acts or omissions in the future which would be in breach of the contract.

Linke Developments Pty Ltd v 21st Century Developments Pty Ltd [2014] SASC 203

Significance

A payment schedule will be sufficient if it achieves the basic objective of putting the claiming party on notice as to how much the party making payment intends to pay and the reasons why.

The SA Act does not prohibit a respondent making a defence and cross-claim where one set of proceedings bring a claim under the SA Act and a more general claim for breach of contract.

Facts

Linke Developments Pty Ltd (**Linke**) was engaged by 21st Century Developments Pty Ltd (**21st Century**) to undertake building work on a shopping centre site.

Under the contract, Linke was entitled to make progress claims for completed work. On 20 April 2013, Linke submitted a progress claim for $40,826.70 to the appointed construction manager who, as the independent certifier, determined that $42,548.62 was due and payable.

On or about 9 August 2013, the parties met to discuss the unresolved progress claim and other issues. Following the meeting, 21st Century sent Linke a letter setting out the unresolved claims which included the progress claim, variation claims and claims for completed and uncompleted rectification work. 21st Century denied liability for the variation claims and offered to pay $31,911.62 for the progress claim less an amount for completed rectification work. It also advised it would hold retention monies until uncompleted rectification works were completed.

Linke did not accept the offer and on 10 September 2013 served a payment claim on 21st Century pursuant to the SA Act. The letter addressed each of the unresolved claims and disputed the need for both the completed and uncompleted rectification work.

On 16 September 2013, 21st Century replied, repeating its position with regard to the claims and enclosing a cheque for $31,966 in satisfaction of the payment claim.

On 12 November 2013, Linke issued proceedings in the Magistrates Court against 21st Century claiming $56,766.15 (for the balance of the payment claim amount being $88,217.21 less the amount already paid by cheque $31,966 plus accrued interest). In the alternative, Linke sought to recover the amount pursuant to its rights under the contract.

21st Century then filed a defence challenging Linke's contractual entitlement to payment and counterclaiming an amount of $34,027.78.

The Magistrate dismissed the application and Linke appealed. The issues on appeal were whether the 16 September letter comprised a valid payment schedule and whether 21st Century's defence and cross-claim was prohibited by s15(4)(b) of the SA Act.

Decision

Justice Nicholson dismissed the appeal finding the 16 September letter constituted a valid payment schedule and 21st Century was not precluded from pleading its defence and cross-claim in the circumstances.

A payment schedule only needs to have a sufficient level of particularity to enable the claimant to decide whether to pursue its progress claim in full or not. Although the 16 September letter could have been clearer, it achieved this basic objective, bearing in mind the history of the parties' dealings.

The prohibition of a respondent's cross-claim under section 15(4)(b) is intended to operate only where a claimant's statutory right can be adjudicated independently of the parties' wider contractual rights. The Magistrates Court proceedings combined a claim by way of statutory entitlement and a more general claim for breach of contract. Therefore, the prohibition under section 15(4)(b) did not apply.

Mykra Pty Ltd v All State Maintenance Pty Ltd [2014] SADC 149

Significance

A valid response to a payment claim can be relatively brief, abbreviated and incorporate previous communication by reference, so long as the response sufficiently indicates what the respondent disputes and why, and how much (if any) they are willing to pay.

Facts

In late 2013, Mykra Pty Ltd (**Mykra**) subcontracted with All State Maintenance Pty Ltd (**ASM**) to carry out various electrical installation works at Adelaide Airport.

On 31 January 2014, Mykra issued a formal payment claim to ASM seeking progress payments for certain quoted works pursuant to the SA Act. Later that day, ASM responded to the payment claim by email acknowledging but rejecting the claim, standing by a schedule it had issued to Mykra earlier that day.

The schedule outlined the items quoted and proposed 'Revised Contract Figures' for some items, indicating ASM would pay significantly less for those items on the basis that Mykra's work was of poor value, inadequate or not yet performed. The schedule was, however, 'somewhat cryptic' and 'badly drawn' with 'few identifiably complete sentences'.

Mykra claimed ASM did not dispute the claim pursuant to the SA Act by serving a 'payment schedule'; therefore ASM was liable to pay the payment claim and Mykra was entitled to summary judgement for the amount claimed under the SA Act.

This gave rise to the question of whether ASM's response, which included reference to the poorly drafted schedule, amounted to a valid payment schedule under the SA.

Decision

The court held that ASM's response amounted to a valid payment schedule.

There was no reason in principle why a response could not identify a schedule sent earlier in the day as part or all of a payment schedule, and the schedule need not be perfectly drafted and may be relatively brief and in short form, so long as it indicates what the respondent disputes and why, and how much (if any) they are willing to pay.

Despite ASM's schedule being far from perfect, relatively brief, abbreviated and in short form, the court was satisfied it identified the work to which the claim related and set out exactly what ASM proposed to pay in relation to each part of the work. Where the reasons given were 'sparse and illiterate', they were supplanted to some degree by earlier email correspondence, and where the schedule failed to indicate why certain items would not be paid, these items had nonetheless been identified and the schedule gave an overall basic idea of why ASM would not pay for the majority of the items.

CONTACT US

EMAIL firstname.lastname@minterellison.com

NSW

RICHARD CRAWFORD
Partner
T +61 2 9921 8507

PAMELA JACK
Partner
T +61 2 9921 8700

VICTORIA

PETER WOOD
Partner
T +61 3 8608 2537

CAMERON ROSS
Partner
T +61 3 8608 2383

QLD

MICHAEL CREEDON
Partner
T +61 73119 6146

JENNIFER MCVEIGH
Consultant
T +61 73119 6519

DAVID PEARCE
Special Counsel
T +61 73119 6386

SA and NT

JAMES KEARNEY
Partner
T +61 8 8233 5685

ACT

ANDREW GILL
Partner
T +61 2 6225 3260

GEOFF SHAW
Senior Associate
T +61 2 6225 3246

WA

MIKE HALES
Partner
T +61 8 6189 7825

MinterEllison

Minter Ellison Offices

AUSTRALIA

BRISBANE LEVEL 22 WATERFRONT PLACE 1 EAGLE STREET BRISBANE QLD 4000 • T +61 7 3119 6000

CANBERRA LEVEL 3 MINTER ELLISON BUILDING 25 NATIONAL CIRCUIT FORREST CANBERRA ACT 2603 • T +61 2 6225 3000

MELBOURNE LEVEL 23 RIALTO TOWERS 525 COLLINS STREET MELBOURNE VIC 3000 • T + 61 3 8608 2000

PERTH LEVEL 4 ALLENDALE SQUARE 77 ST GEORGES TERRACE PERTH WA 6000 • T +61 8 6189 7800

SYDNEY LEVEL 19 AURORA PLACE 88 PHILLIP STREET SYDNEY NSW 2000 • T +61 2 9921 8888

ASIA

BEIJING UNIT 1022 LEVEL 10 CHINA WORLD TOWER ONE 1 JIANGUOMENWAI AVENUE BEIJING 100004
PEOPLE'S REPUBLIC OF CHINA • T +86 10 6535 3400

HONG KONG LEVEL 25 ONE PACIFIC PLACE 88 QUEENSWAY HONG KONG SAR • T +852 2841 6888

SHANGHAI SUITE 4006-4007 40th FLOOR CITIC SQUARE 1168 NANJING ROAD WEST SHANGHAI 200041
PEOPLE'S REPUBLIC OF CHINA • T +86 21 2223 1000

ULAANBAATAR SUITE 612 LEVEL 6 CENTRAL TOWER 2 SUKHBAATAR SQUARE 2 SBD-8 ULAANBAATAR 14200
MONGOLIA • T +976 7700 7780

UK

LONDON 10 DOMINION STREET LONDON EC2M 2EE • T +44 20 7448 4800

Minter Ellison Legal Group Associated Offices

AUSTRALIA

ADELAIDE LEVEL 10 GRENFELL CENTRE 25 GRENFELL STREET ADELAIDE SA 5000 • T +61 8 8233 5555

DARWIN LEVEL 1 60 SMITH STREET DARWIN NT 0800 • T +61 8 8901 5900

GOLD COAST GROUND FLOOR 165 VARSITY PARADE VARSITY LAKES QLD 4227 • T +61 7 5553 9400

NZ

AUCKLAND MINTER ELLISON RUDD WATTS LEVEL 20 LUMLEY CENTRE 88 SHORTLAND STREET AUCKLAND 1010 • T +64 9 353 9700

WELLINGTON MINTER ELLISON RUDD WATTS LEVEL 17 125 THE TERRACE WELLINGTON 6140 • T +64 4 498 5000

www.minterellison.com

MinterEllison