Security of Payment Roundup

A comprehensive review of cases in 2015

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National overview

You can go your own way – Another year – Further divergence in the jurisdictions

While the number of security of payment decisions in NSW was steady, Victorians finally found their Act with a 36% increase in adjudications and a corresponding rise in judgements in the courts and Western Australian adjudication applications were up by a similar percentage. At the same time there has been a dramatic drop off in the number of cases making their way to the courts in Queensland. This may have something to do with the 'complex claims' procedure amendments that came into play in 2015.

As the NSW decisions were unspectacular the major NSW development was the release by Fair Trading of a Discussion Paper seeking further comments on and review of the Act. Submissions are due by the 29 February 2016.

Victoria continues to diverge from the other states with the decision in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2015] VSC 233 where judicial review is available for error of law on the face of the adjudication determination compared with the limited grounds of appeal in NSW and Queensland. The curious decision of *SSC Plenty Road v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631 which held that a mediation process was not a method for resolving disputes within the meaning of section 10A(3)(d)(ii) of the Vic Act so as to engage the excluded amount provisions is going to mean that most construction contracts in Victoria will either have an arbitration agreement or a binding expert determination process as dispute resolution mechanisms to avoid claims in adjudication for unagreed variations.

In Western Australia there was a steady flow of decisions further defining the operation of the Act. An interesting decision was that of *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2015] WASC 237 where the Supreme Court held that the adjudicator had fallen into jurisdictional error by failing to resolve the payment dispute by reference to the terms of the contract from which the dispute arose. This case demonstrates that an adjudicator's misinterpretation of a construction contract will amount to a jurisdictional error in circumstances where the error is such that adjudicator failed to exercise or understand his adjudicative function.

In the ACT we saw the first case dealing with the express right of appeal from determinations in the ACT Act in *Fulton Hogan Construction Pty Ltd v Brady Marine and Civil Pty Ltd* [2015] ACTSC 384. The express right of appeal is very similar to that under the various Commercial Arbitration Acts and in this case the court allowed the appeal even though the question of law was not raised in the adjudication. As is evidenced by this brief overview the Australian jurisdictions continue to develop their own law in respect of their own Acts with no opportunity in sight to provide any unity among the various jurisdictions.

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

NSW overview

EMERGING TRENDS

While there were not really any notable decisions this year there was a steady stream of cases indicating that the finer points of the NSW Act continue to be debated in the courts.

One worrying point that did emerge from the publicity surrounding the *Denham Constructions* decisions was the use by Denham Constructions Pty Ltd of 'project specific' contracting vehicles (**project company**) by which Denham Constructions contracted with its subcontractors to deliver various projects. Denham Constructions appears to set up a new company for each project and this company contracts with the subcontractors, while the owner contracts with Denham Constructions Pty Ltd for delivery of the project. There is presumably a contract between Denham Constructions Pty Ltd and the project company where the project company undertakes to perform the whole of Denham Constructions Pty Ltd's obligations to the Owner.

This structure is worrying because if a particular project goes bad the subcontractors are exposed to the solvency risk of a project company rather than Denham Constructions Pty Ltd and the subcontractors cannot use the 'notice of withholding' mechanism in the NSW Act to get the owner to withhold because of the interposing of the other Denham Constructions entity in the contracting chain. While a notice of withholding can be given to Denham Constructions Pty Ltd it will no doubt argue that it does not owe the project company anything. We hope this is not a trend in the industry.

DEVELOPMENTS

A large proportion of cases considered the issue of whether reference dates continued to arise after the work has stopped. The decisions this year supported the position of *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* (2004) 61 NSWLR 421 that unless the contract provides otherwise a reference date will continue arise each month until the 12 month period after completion of the works. As a result we are regularly seeing drafting in contracts providing for one reference date after practical completion and one final reference date after the expiry of the defects liability period. Additionally contracts now provide that there is no reference date after termination of the construction contract.

A further development was confirmation that a judgement debt will not be able to support a successful statutory demand application where the debtor shows it has a genuine offsetting claim – even where the adjudicator determined that offsetting claim.

FUTURE

The future holds a further review for the NSW Act. Late in 2015, NSW Fair Trading released a Discussion Paper intended to facilitate, guide and inform a thorough evaluation and review of the NSW Act. Every aspect of the NSW Act is open to comment and possible reform as the Discussion Paper seeks feedback on whether the NSW Act meets its objectives of ensuring prompt payment for parties carrying out construction work and the quick and fair resolution of disputes. Five key topics are outlined in the Discussion Paper including:

- application and enforcement;
- progress payments;
- adjudication of disputes under the NSW Act;
- uniform application of the legislation to all disputes; and
- supporting statements and retention money trust accounts.

Industry participants are encouraged to make submissions in response to the topics outlined in the Discussion Paper by 26 February 2016. After the close of submissions the next step will be the preparation of a report by NSW Fair Trading for Government's consideration.

Broadview Windows Pty Ltd v Architectural Project Specialists Pty Ltd [2015] NSWSC 955

This decision confirms that reference dates for payment claims under the NSW Act will continue to accrue after the relevant construction work has been completed.

FACTS

Broadview Windows (**Broadview**) contracted with Architectural Project Specialists (**installer**) for the installer to install windows and doors on a building site. Broadview and the installer disagreed on when the work under the contract was completed, with Broadview arguing 26 August 2014 and the installer asserting 31 August 2014.

On 21 October 2014, the installer provided Broadview with invoices rendered on 10 and 12 August 2014. Broadview did not pay these invoices. On 24 November 2014, the installer served Broadview with a payment claim again attaching the 10 and 12 August 2014 invoices (**first payment claim**). Broadview did not respond to this payment claim. Although the installer sought to have the payment claim adjudicated. However, the adjudication did not go ahead. Instead on 23 February 2015, the installer served Broadview with another payment claim (**second payment claim**). The second payment claim attached copies of the same invoices as the first payment claim.

The second payment claim went to adjudication, whereby Broadview challenged the adjudicator's jurisdiction under section 13(5) of the NSW Act. The adjudicator decided that he had jurisdiction and found in favour of the installer.

Broadview appealed the adjudicator's decision on the basis that the installer had served two payment claims referable to the same reference date which breached section 13(5) of the NSW Act.

DECISION

The court dismissed Broadview's appeal.

Following the decisions of Hodgson JA in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* (2004) 61 NSWLR 421 and *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2006) 23 BCLR 292 as to the proper construction of 'reference date' under section 8(2)(b) of the NSW Act, McDougall J determined that the first and second payment claims had different reference dates.

His Honour approved of the reasoning of Hodgson JA—that reference dates do not necessarily cease 'on termination of a contract or cessation of work', but continue up to the twelve month time limit provided under section 13(4)(b) of the NSW Act. Therefore, even though no work was undertaken by the installer after 31 August 2014 (at the latest), McDougall J took the view that reference dates continued to accrue under section 8(2)(b) of the NSW Act because the limit in section 13(4)(b) of the NSW Act did not arise in this case.

Consequently, as the first payment claim nominated its reference date as 31 October 2014 and the second payment claim nominated its reference date as 31 January 2015, his Honour noted that, on the face of them, both payment claims were not referable to the same reference date.

Ceerose Pty Ltd v Building Products Australia Pty Ltd [2015] NSWSC 1886

This decision demonstrates that a party may recover for double compensation where a payment made in accordance with an adjudication determination covers loss for which compensation is claimed regardless of the fact that part payment of the alleged double compensation was made under a separate bona fide contract with a third party.

FACTS

On 8 December 2015, Ceerose Pty Ltd (**contractor**) appealed a judgment of the Local Court dismissing proceedings brought by the contractor seeking to recover the amount that it had paid to Building Producers Australia Pty Ltd trading as Cemac Doors and Hardware (**supplier**). The money was paid in satisfaction of two adjudication certificates filed as judgment debts pursuant to section 25(1) of the NSW Act.

ZVI Construction Co LLC (**ZVI**) engaged the contractor to construct student accommodation at a particular site in August 2013. The contractor engaged the supplier to supply and install doors at that site for a fixed price (**First Contract**) in November 2013. On 3 April 2014, the First Contract was terminated at which point the supplier had three unpaid progress claims worth $97,646 plus GST. ZVI then contracted directly with the supplier to provide the same services for a fixed price (**Second Contract**).

The supplier applied for and obtained two adjudication certificates in respect of the three unpaid progress claims. At a time after it received payment of $153,262 plus GST under the Second Contract, the supplier applied for judgment debts based on the adjudication certificates and judgment was entered on 12 July 2014. The contractor paid those amounts on 5 December 2014 and 24 April 2015.

The magistrate in the Local Court determined that the supplier had not received double compensation for the work it contracted to perform for the contractor as these were payments due under two separate contracts and the contractor was not a party to the Second Contract.

DECISION

The court allowed the appeal and ordered that the supplier pay the contractor the amount paid in satisfaction of the two adjudication certificates.

In relation to the question of whether there had been double compensation, Beech-Jones J held that the magistrate had made two legal errors.

The first error was to assume that it was necessary for the contractor to demonstrate that the payments made by ZVI either were intended to discharge or had the effect of discharging the contractor's indebtedness to the supplier.

The second error was to assume that there was a necessary inconsistency between the supplier being able to recover for double compensation and the fact that one part of the double compensation was payable under a bona fide contract with a third party. His Honour relied on the case of *Law Society of New South Wales v Glenorcy Pty Ltd* [2006] NSWCA 250 to find that it was not necessary for the contractor to demonstrate either matter. It was enough that the payments covered 'the loss for which compensation is claimed' and it was irrelevant that the compensation was paid by a third party under a separate contract with different legal duties.

Illawarra Retirement Trust v Denham Constructions Pty Ltd [2015] NSWSC 823

Reference dates for payment claims under the NSW Act will continue to accrue after the relevant construction work has been completed.

FACTS

On 27 March 2013, Illawarra Retirement Trust (**IRT**) and Denham Constructions Pty Ltd (**builder**) entered into a contract for Denham to construct a residential aged care facility.

On 29 May 2015, IRT terminated the contract for convenience. IRT's notice of termination did not specify a time for termination, only that the notice was "with effect from Friday, 29 May 2015". IRT argued that the contract had terminated on 28 May 2015, while the builder argued the contract had terminated on 29 May 2015.

The builder served IRT with a payment claim on 29 May 2015. Given that IRT believed that the contract terminated on 28 May 2015, it commenced proceedings seeking interlocutory and final injunctive relief restraining the builder from acting upon this payment claim as the payment claim's reference date was invalid.

DECISION

The summons was dismissed.

Darke J determined on an objective understanding of the notice of termination that the contract was terminated on 28 May 2015. However, his Honour considered the correspondence between IRT and the builder after the notice of termination was issued. This correspondence indicated that the builder's work, obligations and insurances would conclude on 29 May 2015.

Accordingly, his Honour found that following the issue of the notice of termination the parties agreed that the termination would not take effect until the end of 29 May 2015.

Consequently, the builder's payment claim was valid as it could refer to the reference date of 29 May 2015.

In the matter of J Group Constructions Pty Ltd [2015] NSWSC 1607

This decision confirms that the recipient of a statutory demand based on an adjudicator's determination may successfully apply to set aside or vary a statutory demand if it accepts the validity of the debt but has a genuine offsetting claim. An offsetting claim dismissed by an adjudicator in making a determination does not bind the court on an application to set aside a statutory demand.

FACTS

In July 2015, J Group Constructions (**J Group**) sought orders to set aside a statutory demand served on it by PGA Rendering Group Pty Ltd (**subcontractor**). The statutory demand claimed payment of $174,009.96 for a judgment debt entered in the District Court of New South Wales. The judgment debt was based on an adjudication certificate obtained by the subcontractor under the NSW Act in respect of building working it had performed for J Group.

In separate proceedings and notwithstanding that the subcontractor had obtained an adjudication certificate, J Group claimed that the subcontractor had breached the relevant contract by using a paint product that was not to the requisite standard or fit for purpose. J Group claimed that the paint product was defectively applied by the subcontractor so that certain remedial work was necessary to repair the defective application.

The adjudicator dismissed this point and did not made an allowance for J Group's offsetting claim for rectification costs for the subcontractor's defective works when issuing the adjudication certificate.

DECISION

The court found that J Group had a genuine offsetting claim against the subcontractor that it was seriously prosecuting in its District Court proceedings. Accordingly, Robb J made an order varying the amount of the statutory demand to take into account of J Group's offsetting claim.

J Group initially contended that there was a genuine dispute about the existence of the debt upon which the statutory demand was based, for the purposes of section 459(1)(a) of the *Corporations Act 2001* (Cth). However, J Group ultimately accepted that the court should follow the decision of Brereton J in *In the matter of Douglas Aerospace Pty Ltd* [2015] NSWSC 167. Brereton J held in that case that where a party serves a statutory demand based upon a judgment obtained by filing an adjudication certificate, the company served with the statutory demand cannot claim that it has a genuine dispute as to the existence of the debt where the company's only right is to assert that the underlying debt the subject of the adjudication certificate has not arisen under the contract.

However, Robb J held in the present case that a debtor company may make an offsetting claim under section 459H(1)(b) of the *Corporations Act 2001* (Cth) if it has a counterclaim, set off or cross demand that does not deny the debt, but asserts a countervailing liability.

His Honour stated that the apparent determination by the adjudicator that J Group was not entitled to succeed on its offsetting claims did not bind the court on an application to set aside a statutory demand and that the offsetting claims remained available for the purposes of J Group's application to have the statutory demand set aside or varied.

Khouzame v All Seasons Air Pty Ltd [2015] FCAFC 28

An adjudication certificate cannot be filed, and be enforceable as, a judgment under section 25(1) of the NSW Act unless it is accompanied by an affidavit that complies with the requirements in section 25(2) of the NSW Act.

FACTS

Mr Khouzame retained All Seasons Air Pty Ltd (**subcontractor**) to install mechanical ventilation and air-conditioning for a building under construction. The subcontractor maintained that Mr Khouzame owed it money. The dispute resulted in an adjudication where the adjudicator determined that the subcontractor was entitled to payment. Mr Khouzame failed to pay the adjudicated amount. An adjudication certificate was then issued pursuant to section 24 of the NSW Act.

The subcontractor applied to the Bankstown Local Court to enter judgment against Mr Khouzame but did not give notice of the application to Mr Khouzame. The subcontractor also failed to comply with section 25(2) of the NSW Act which required an affidavit to be filed with the adjudication certificate, at the time of seeking judgment, that disclosed whether the whole or any part of the adjudicated amount remains unpaid. The Bankstown Local Court entered judgment in favour of the subcontractor for the adjudication amount plus interest and costs.

The subcontractor applied for a bankruptcy notice on the basis of Mr Khouzame's failure to pay the judgment debt. Mr Khouzame applied to have the bankruptcy notice set aside. The primary judge held that there was no evidence of any abuse of process on the part of the subcontractor, and dismissed Mr Khouzame's application to set aside the bankruptcy notice.

Mr Khouzame appealed. The central question on appeal was the proper construction of section 25 of the NSW Act: Whether the affidavit referred to in section 25(2) of the NSW Act was mandatory in an application to enter an adjudication certificate as a judgment under section 25(1) of the NSW Act? Did the subcontractor's failure to file the affidavit have the consequence that the judgment of the Bankstown Local Court was not a 'judgment' referred to in section 25(1) of the NSW Act and had no legal effect so as to found the bankruptcy notice.

DECISION

The court held that the Mr Khouzame's appeal should be allowed with awarded costs and set aside the bankruptcy notice obtained by the subcontractor.

Robertson, Wigney and Gleeson JJ held that the affidavit was a part of the administrative process required by the NSW Act and was, a pre-requisite to the filing and essential to the legal effectiveness of the filing under the NSW Act.

Lamio Masonry Services Pty Ltd v TP Projects Pty Ltd [2015] NSWSC 127

This case provides further guidance on the minimum standard of particularisation required in payment claims under the NSW Act.

FACTS

Lamio Masonry Services (**Lamio**) contracted TP Projects (**builder**) to undertake works on two construction projects. The builder submitted payment claims to Lamio under the NSW Act in respect of the work performed on each project. Lamio disputed the number of hours worked by the builders and issued the builder payment schedules under the NSW Act. The builder lodged an adjudication application, provided supporting evidence and received adjudication determinations in its favour.

Lamio contended that:

- the adjudication determinations were void because the payment claims on which they relied were not valid payment claims under section 13(2) of the NSW Act. In particular, Lamio relied on *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140 for its submission that the payment claims lacked the necessary precision and particularity required to respond to the claim; and
- it had also been denied natural justice as it did not have the opportunity to respond to information contained in the supporting evidence, which was not included in the payment claim.

DECISION

The court affirmed the principle in the *Multiplex Constructions* decision and held that a payment claim will meet the requirements of the NSW Act if it:

- identifies the services to which the payment claim relates in sufficient detail to allow the respondent to properly consider and respond to the claim; and
- indicates the amount of the progress payment claimed to be due.

Ball J held that the payment claims were valid because they:

- identified the job;
- gave a description of the work done;
- specified the number of men who undertook the work and the number of hours worked by each man; and
- specified the amount claimed in respect of the work.

His Honour held that natural justice had not been denied as the supporting evidence simply contained information supporting the contentions made in the payment claim and did not raise any new claims.

Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd [2015] NSWCA 288

This decision confirms that the existence of a reference date to support a payment claim is not a jurisdictional fact or an essential pre-condition for the making of a valid payment claim. Hence, if there is a dispute about this issue, it is for the adjudicator to determine.

FACTS

Lewence Construction Pty Ltd (**builder**) entered into a contract with Southern Han Breakfast Point Pty Ltd (**Southern Han**) for the construction of an apartment block. On 27 October 2014 Southern Han issued a notice purporting to take further work under the contract out of the builder's hands. The builder notified Southern Han that it regarded this as a repudiation of the contract which the builder accepted as terminating the contract. On 4 December 2014, the builder served a payment claim pursuant to the NSW Act for work done prior to termination of the contract. The payment claim was the subject of an adjudication determination made in favour of the builder.

Southern Han sought a declaration that the adjudication was void. The primary judge accepted Southern Han's argument that the adjudicator had committed a jurisdictional error because he wrongly determined that a reference date within the meaning of section 8 of the NSW Act had arisen in respect of the work. The builder appealed that decision.

DECISION

The appeal was allowed.

The NSW Court of Appeal held that the existence of a reference date to support a payment claim is not a jurisdictional fact. It is not an essential pre-condition for the making of a valid payment claim.

The NSW Court of Appeal found that the words 'on and from each reference date' in section 8(1) of the NSW Act do not purport to identify a person; rather they identify the time on and from which a person who satisfies the description in either section 8(1)(a) or section 8(1)(b) is entitled to a progress payment.

The words 'a person referred to in section 8(1)' in section 13(1) of the NSW Act refer, in their ordinary meaning, to a person falling within either sections 8(1)(a) or 8(1)(b) of the NSW Act. It does not require a claimant who satisfied either of those subsections to also be able to show that the reference date has arrived to trigger it's right to make a payment claim and hence it's right to proceed to adjudication.

The words *'or who claims to be entitled to a progress payment'* in section 13(1) of the NSW Act make clear that the existence of a dispute as to the entitlement does not preclude the making of a valid payment claim. As such, it is for the adjudicator to determine such dispute as part of the adjudication and such determination is not challengeable.

Section 13(1) of the NSW Act is contrasted with section 13(5) which provides that a claimant cannot serve more than one payment claim in respect of each reference date. Section 13(5) of the NSW Act is expressed as a prohibition on the making of a claim. There was no evidence or reason to conclude that the payment claim was a second claim in respect of the (earlier) October date when the payment claim covered work under the contract after that date, and the earlier claim was not in evidence.

Nazero Group Pty Limited v Top Quality Construction Pty Limited [2015] NSWSC 232

Courts may require respondents to payment claims under the NSW Act to pay security into court when challenging statutory obligations to pay adjudicated claims, even where judgement has not yet been entered.

FACTS

Nazero Group Pty Limited (**Nazero**) contracted with Top Quality Construction Pty Limited (**builder**) for the builder to do formwork and contracting for Nazero.

In January 2014, the builder served two progress claims under the NSW Act. Nazero asserted that these claims were in respect of the same reference date and responded with a payment schedule for nil. T he builder made an adjudication application. The adjudicator found in favour of the builder, concluding that there was only one payment claim embodied in two invoices.

Nazero sought declarative relief that the adjudicator's determination be quashed and injunctive relief in relation to the enforcement of the determination or any certificate issued in respect of it which could be filed as a judgement for debt.

The builder sought an order that the proceedings be stayed pending payment by Nazero of the unpaid amount into court as security.

DECISION

The court stayed the proceedings until Nazero paid into court the unpaid adjudicated amount.

Hammerschlag J, after finding that the court had power to make such an order as part of its inherent power to control its processes and under the *Civil Procedure Act 2005* (NSW), considered the policy aims of the NSW Act relevant to exercise of this discretionary power.

A general policy aim of the NSW Act is to give enforceable rights to progress payments. Section 23(2) of the NSW Act imposes a statutory obligation on a respondent to pay an adjudication amount. This obligation is not affected by whether or not a claimant has yet obtained judgement. Further, as reflected in section 25(4)(b) of the NSW Act, a claimant is to be given protection of payment into court when a respondent seeks, whether by injunction or otherwise, to inhibit the claimant's enforcement of an adjudication in its favour.

His Honour noted that the requirement to pay into court was not a fetter on the right of Nazero to make the challenge. It may be a practical inhibitor, in which case financial hardship (which was not a factor in this case) may be relevant to the exercise of discretion.

Reitsma Constructions Pty Ltd v Davies Engineering Pty Ltd t/as In City Steel [2015] NSWSC 343

Courts may be willing to recognise a second payment claim as a valid substitution of a prior claim where there is evidence that this substitution has been agreed between the parties.

FACTS

Reitsma Constructions Pty Ltd (**builder**) subcontracted Davies Engineering Pty Ltd t/as In City Steel (**engineer**) for the supply and installation of fabricated steel.

On 27 November 2014, the engineer served a payment claim under the NSW Act.

On 28 November 2014, the builder disputed this claim and indicated that there would be a formal response by way of a payment schedule. Managers from the builder and engineer discussed the payment claim and other claimed variations over the phone but gave different accounts of the effect of that conversation at trial.

On 5 December 2014, the engineer emailed the builder a revised invoice bearing the same date as the original payment claim, and including the above variations; the covering email said that the email was sent 'as requested'.

The builder served a payment schedule on 9 December 2014 which contested the substance of the claim but did not assert that the payment claim was invalid.

The claim went to adjudication, and the adjudicator found that the second payment claim was valid, noting that the amendments appeared to have been requested by the builder and a payment schedule was issued in response to the revised invoice.

The builder filed a summons seeking a declaration that the adjudication determination be quashed as it was a determination of a second payment served in respect of a relevant reference date.

DECISION

The court dismissed the summons.

Ball J found that the builder had agreed to the service of a substitute payment claim. It followed that the determination did not involve a jurisdictional error.

His Honour observed that the adjudicator was right to emphasise that, had the builder not agreed to the replacement claim, the builder would likely have taken issue with that claim when providing a payment schedule in response.

Samadi Developments Pty Limited v SX Projects Pty Limited [2015] NSWSC 1576

Proceedings based upon underlying contractual issues will not be stayed pending payment of a judgment debt based upon an adjudication determination. To do so would be contrary to the rights expressly reserved by section 32(2) of the NSW Act.

FACTS

SX Projects Pty Limited (**builder**), who was contracted to perform design and construction work in relation to a residential and commercial development for Samadi Developments Pty Limited (**owner**), obtained an adjudication determination in its favour when progress payment went unpaid.

On 29 May 2015 the owner then commenced proceedings against the builder for liquidated damages for delays in completion, damages for defects and damages for the cost of completing the work (damages claims proceedings). On 16 June 2015, the builder obtained judgment against the owner based upon the adjudication determination.

The builder applied for a stay of the damages claims proceedings until it had received from the owner the judgment amount plus interest. Alternatively, the builder sought security for its costs of defending the damages claims proceedings. The builder argued that:

- it was unable to enforce the judgment because it anticipated that, in any winding up proceedings, the owner would rely on the damages claims proceedings to assert that it had an offsetting claim under section 459H of the *Corporations Act 2001* (Cth); and
- the policy of the NSW Act of providing a quick and efficient recovery of progress payments would otherwise be undermined if the builder had to delay enforcing the judgment until after the conclusion of the damages claims proceedings.

DECISION

The court did not grant the builder's application for a stay of the damages claims proceedings. Ball J did order the owner to provide security for costs within 28 days and further ordered that the damages claims proceedings be stayed if that security was not provided.

His Honour did not accept that there is anything preventing the owner from enforcing the judgment it had obtained. Whilst the builder may be prevented from bringing an application to wind up the owner, if the owner was wound up before the damages claims proceedings were determined because the proceedings had been stayed, the result may be to deprive the owner of its ability to pursue its contractual rights. Those rights are expressly preserved by section 32(2) of the NSW Act.

There was no dispute that the builder was entitled to security. The only issue was its quantum. His Honour considered estimates from both parties but made his own assessment as to some of the elements included in the estimates and ordered security for the builder's party/party costs , that is the legal costs of the successful party paid by the unsuccessful party.

Southern Han Breakfast Point Pty Limited v Lewence Construction Pty Limited [2015] NSWSC 502

Following the suspension of payment under a contract or the termination of a contract, there is no date for which a claim for a progress payment can be made and therefore no 'reference date' for the purposes of the NSW Act exists. This case also serves as a reminder to carefully consider accepting a repudiation as contractual rights, such as the right to progress payments, cease on termination.

FACTS

Southern Han Breakfast Point Pty Limited (**Southern Han**) contracted Lewence (**builder**) to build an apartment building.

The construction work did not progress to schedule. Southern Han purported to exercise its right under the contract to take the works out of the hands of the builder and suspend payment. The builder treated that conduct as a repudiation and purported to accept the repudiation and terminate the contract.

The builder then served a payment claim under the NSW Act on Southern Han that claimed payment for work done by the builder up to the time the work was taken out of its hands. The claim went to adjudication and the builder was awarded some of the claimed amount.

Under section 8 of the NSW Act, a person who has undertaken to carry out construction work is entitled to a progress payment on each reference date, being the date, if any, on which a claim for a progress payment may be made under the contract.

Southern Han applied to the NSW Supreme Court to have the adjudication set aside for jurisdictional error on the basis that a reference date under the NSW Act had not arisen as payment had been suspended under the contract following the plaintiff taking the work out of the builder's hands. The builder contended that under the NSW Act it was entitled to claim for payment in respect of a reference date whether or not that reference date has actually arisen.

DECISION

The court held that, under section 8 of the NSW Act, the existence of a reference date was an essential pre-condition to an adjudicator's jurisdiction.

Ball J held that no reference date had arisen under the contract and the adjudication was void as the right to payment had:

- either been suspended (and therefore there can be no date under the contract on which a claim for a progress payment can be made and consequently no reference date); or
- the contract had been terminated.

The New South Wales Netball Association Ltd v Probuild Constructions (Aust) Pty Ltd [2015] NSWSC 408

Courts will be unwilling to consider interlocutory applications that interfere with the statutory timetable for the determination of adjudication applications under the NSW Act.

FACTS

Netball NSW sought an interlocutory injunction restraining Probuild Constructions (**builder**) from taking any further steps to prosecute an adjudication application on the basis that the payment claim was invalid and that granting an injunction early in the proceedings would spare Netball NSW from incurring costs in preparing an adjudication response.

The builder claimed that the payment claim was valid and that the balance of convenience was against granting an injunction as it would prevent the builder from proceeding in accordance with the NSW Act and cause them to lose the benefit of security under section 25 of the NSW Act (which would be required from Netball NSW in order to commence proceedings to set any judgment aside).

DECISION

The court refused the injunction sought by Netball NSW, however granted an injunction until further order restraining the builder from taking steps to file in any court any adjudication certificate obtained as a result of the adjudication process.

Ball J held that notwithstanding the validity of Netball NSW's claim, on the balance of convenience, the prejudice suffered by the builder would far outweigh the prejudice suffered by Netball NSW if the injunction sought was granted.

Highlighting the importance of the statutory timetable for the determination of adjudication applications under the NSW Act, his Honour determined that the court does not have power to adjust the statutory timetable and ought not grant an injunction where it interferes with the timetable and processes set out in the NSW Act for the determination of adjudication applications.

Considering the builder's claims regarding balance of convenience and enforcement under section 25 of the NSW Act, his Honour noted that security only applies if a respondent commences proceedings to have a judgment based on an adjudication determination set aside. His Honour therefore considered it appropriate to grant an injunction restraining the builder from taking steps to enforce any determination it obtained on the basis that the builder could make an application for the injunction to be discussed once the amount of any determination was known and Netball NSW was in a position to provide evidence of its ability to provide security for the set amount.

The New South Wales Netball Association Ltd v Probuild Constructions (Aust) Pty Ltd [2015] NSWSC 1339

This decision demonstrates that certiorari is a discretionary remedy which, for good reason, may be withheld.

FACTS

Probuild Constructions (**builder**) served on Netball NSW two payment claims - Payment Claim 23 and Payment Claim 24 - under the same reference date. Payment Claim 24 was for $10,380,083.42. This claim was adjudicated and the adjudicator determined the adjudicated amount was $124,599.23.

Netball NSW had unsuccessfully sought an interlocutory injunction restraining the builder from adjudicating Payment Claim 24 on the basis that it was invalid for breach of section 13(5) of the NSW Act, it being the second claim in respect of the reference date.

The builder resisted the application, arguing the payment claim was not void.

Following the determination which was only for a very small portion of the builder's claim, the builder joined issue with Netball NSW and sought a declaration that the determination is void. Netball NSW discontinued its claim.

In a cross-summons, Netball NSW alleged that the builder had engaged in misleading and deceptive conduct and sought damages for its costs incurred in responding to the adjudication application for Payment Claim 24.

DECISION

The court held that the Payment Claim 24 was served in contravention of section 13(5) of the NSW Act and that the adjudicator had no jurisdiction to deal with it.

It should be noted that the contract expressly provided for one further reference date after practical completion of the works and Payment Claim 23 had been served in respect of this last reference date. Stevenson J noted that where excess of jurisdiction is shown, certiorari is granted almost as a right. It is however a discretionary remedy which, for good reason, can be withheld.

Matters relevant to the granting of relief include acquiescence, delay, abandonment or bad faith, which were not shown. His Honour did however, find that the builder has sought to have it both ways; to approbate and reprobate, which is a 'powerful factor' relevant to the exercise of the court's discretion. His Honour granted relief, despite the builder's conduct, because the contract remained on foot and it is desirable that the status of the determination be resolved to prevent the re-agitation of the issues before the adjudicator. There was no alternative remedy to dispose of the case.

In dealing with Netball NSW claim for damages, Stevenson J held that a payment claim (like a pleading) is no more than a claim. It does not amount to a representation of the truth of the matters stated therein. Further, there was no evidence of reliance nor did Netball NSW suffer loss 'because of' what was stated in the payment claim. Netball NSW responded to the payment claim because of the exigencies imposed on it by the NSW Act.

Veer Build Pty Limited v TCA Electrical and Communication Pty Ltd [2015] NSWSC 864

For the purposes of the NSW Act, 'reference dates' are not confined to the months in which work is undertaken under the contract. Parties procuring the services of a contractor should seek to fix reference dates under the contract to limit post-performance claims.

FACTS

Veer Build Pty Limited (**Veer**) contracted TCA Electrical and Communication Pty Ltd (**builder**) to carry out construction work.

Following disagreements regarding invoicing in previous payment claims, the builder served in January 2015 a payment claim (**disputed claim**) under the NSW Act. Veer provided a payment schedule which indicated that, for various reasons, it did not agree to pay any part of the disputed claim. The builder sought adjudication of the disputed claim, which was determined in favour of TCA.

Veer sought a declaration that the determination was void and an order that it be quashed. It argued that the disputed claim was made contrary to the prohibition in section 13(5) of the NSW Act against serving more than one payment claim in respect of each reference date under the construction contract. Veer also asserted that the work the subject of the disputed claim was carried out in, and had been the subject of previous payment claims in respect of reference dates of, October and November 2014.

The builder claimed that the section 13(5) prohibition had not been breached, as work the subject of the disputed claim had been carried out in December 2014, and 30 November and 31 December 2014 had not been used as reference dates for payment claims.

DECISION

The court dismissed Veer's application with costs.

Although previous payment claims had been made in respect of the reference dates of 31 October and 30 November 2014, the disputed claim was validly made with a reference date of 31 December 2014. Darke J noted that section 13(5) of the NSW Act was not contravened by a payment claim for work the subject of a previous payment claim.

His Honour also considered the reasoning of Stevenson J in *Grid Projects NSW Pty Ltd v Proyalbi Organic Set Plaster Pty Ltd* [2012] NSWSC 1571 to the effect that the last reference date able to arise under a contract was the last day of the last month in which work was undertaken under that contract. However, his Honour impliedly rejected this finding. As the builder was entitled to make a claim for the work done in October and November 2014 for which it had not been paid, his Honour held that it was open to the builder to make the disputed claim regardless of whether the claim extended to work performed in the subsequent period.

Queensland

CASE INDEX

- *Agripower Australia Ltd v Queensland Engineering & Electrical Pty Ltd & Ors* [2015] QSC 268
- *BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors* [2015] QSC 218
- *BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors* [2015] QSC 222
- *Camporeale Holdings Pty Ltd v Mortimer Construction Pty Ltd & Anor* [2015] QSC 211
- *Gambaro Pty Ltd v Rohrig (Qld) Pty Ltd; Rohrig (Qld) Pty Ltd v Gambaro Pty Ltd* [2015] QCA 288
- *JAG Projects Qld Pty Ltd v Total Cool Pty Ltd & Anor* [2015] QSC 229
- *Sunshine Coast Regional Council v Earthpro Pty Ltd & Ors* [2015] QSC 168
- *Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous Engineering Pty Ltd & Ors* [2015] QSC 307

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

Qld overview

EMERGING TRENDS

A principal's insistence on an unqualified statutory declaration as a precondition to a occurrence of a reference date offends against section 99 of the Qld Act. The difference between Qld and NSW in respect of provision of a statutory declaration with a claim has been highlighted in *BRB Modular Pty Ltd v AWX Constructions Pty Ltd* [2015] QSC 218. Applegarth J held that a requirement for an unqualified statutory declaration impedes, rather than facilitates, the objects of the Qld Act.

DEVELOPMENTS

There has been a dramatic drop-off in the number of cases that made their way through to the courts in 2015. This may be a result of the significant amendments to the Qld Act that commenced on 15 December 2014, or it may simply be that the time between the making of an adjudication application in a complex claim (claim value greater than $750,000) and delivery of a decision, i.e. no less than 3 months instead of 4 weeks, has taken high value claims out of the pipeline in 2015. Alternatively, it may be that contractors seeking payment of more than $750,000 have reverted to more traditional means of recovery, having lost the tactical advantage of tight timeframes.

A single judge decided that the Qld Act inferentially precludes re-agitation of the same issue where that issue was essential to a determination in an earlier adjudication (*Sunshine Coast Regional Council v Earthpro Pty Ltd* [2015] QSC 168).

It is not necessary for a disgruntled respondent to wait for completion of a construction contract before exercising its right to seek restitution preserved by section 100 of the Qld Act, however the respondent's restitutionary claim must be based on more than the payment certificate that was the subject of the adjudication application (*Gambaro Pty Ltd v Rohrig (QLD) Pty Ltd* [2015] QCA 288).

Persons who perform electrical safety work without a licence under the *Electrical Safety Act 2002* (Qld) or who provide professional engineering services without being registered under the *Professional Engineers Act 2002* (Qld) have been added to the list of persons who cannot take advantage of the Qld Act on the basis that the protection of the Qld Act is only available to those who enter into legal contracts to perform construction work (*Agripower Australia Pty Ltd v Queensland Engineering and Electrical Pty Ltd* [2015] QSC 268).

FUTURE

Unhappy respondents wishing to contend that an adjudication determination is void for jurisdictional error will be encouraged to argue that provided they pay monies into Court as security for the unpaid portion of an adjudicated amount they should be entitled to an injunction restraining a claimant from enforcing an adjudication decision or a judgment (*BRB Modular Pty Ltd v AWX Constructions Pty Ltd* [2015] QSC 222).

Although there has long been no doubt that as a matter of public policy the risk of a claimant's insolvency rests with the principal, Bond J held that there is nothing in the Qld Act which reveals a policy to attribute the risk of insolvency to the principal in circumstances in which the claimant has conceded that there is a prima facie case that the adjudication decision is void for jurisdictional error (*BRB Modular Pty Ltd v AWX Constructions Pty Ltd* [2015] QSC 222).

Agripower Australia Ltd v Queensland Engineering & Electrical Pty Ltd & Ors [2015] QSC 268

An unlicensed contractor which performs 'electrical works' within the meaning of the *Electrical Safety Act 2002* (Qld) cannot use the Qld Act to obtain payment of unpaid progress claims

FACTS

Queensland Engineering & Electrical Pty Ltd (**service provider**) contracted with Agripower Australia Ltd (**principal**). Neither the service provider nor its director, David Dillon were licensed to carry out electrical works under the *Electrical Safety Act 2002* (Qld) (**ES Act**). Nor was Mr Dillon a registered professional engineer pursuant to the *Professional Engineers Act 2002* (Qld) (**PE Act**).

The service provider obtained an adjudication decision under the Qld Act. The principal sought a declaration that the decision was void as the contract was illegal and unenforceable because the service provider and its agents:

- carried out 'electrical work' without an electrical contractor licence, in breach of section 56(1) of the ES Act; and
- carried out 'professional engineering services', in breach of section 115(1) of the PE Act.

The service provider argued that it did not carry out 'electrical work' under the ES Act or 'professional engineering services' under the PE Act.

DECISION

The court held that the contract was illegal. As a result, the service provider was not entitled to claim progress payments against the principal under the Qld Act and the adjudication decision was void for jurisdictional error.

Douglas J found as a matter of fact that the service provider and its agents performed 'electrical work' in breach of section 56(1) of the ES Act and 'professional engineering services' in breach of section 115(1) of the PE Act.

Despite there being no express prohibition in the ES Act against a contract being entered into or performed in contravention of the ES Act, His Honour held that a breach of section 56(1) of the ES Act leads to the illegality of a contract entered into by a person not the holder of an electrical contractor licence. His Honour held that there was an implied prohibition derived from one of the objects of the ES Act, being the protection of the public.

His Honour also found that the service provider contract was illegal as contrary to section 115(1) of the PE Act.

BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors [2015] QSC 218

This case provides yet another example of an unsuccessful attempt to create a contractual precondition to prevent a contractor making a payment claim under the Qld Act.

FACTS

BRB Modular Pty Ltd (**head contractor**) engaged AWX Constructions Pty Ltd (**subcontractor**) as a subcontractor to construct a camp and accommodation village at an LNG processing facility. The contract entitled the subcontractor to make a progress claim on the 28th day of each month, subject to compliance of a precondition requiring delivery of a statutory declaration in the prescribed form. The prescribed form required a representative of the subcontractor to depose that, to the best of their knowledge, all sub-contractors it had engaged had been paid.

On 28 January 2015, the subcontractor delivered a payment claim together with a statutory declaration that departed from the prescribed form, by deposing that all sub-contractors had been paid 'other than those owed variations, payable by the head contractor'. The payment claim was endorsed under the Qld Act.

The head contractor contended that no reference date had arisen under the Qld Act by virtue of the subcontractor's non-compliance with the contractual precondition. The matter proceeded to adjudication. The adjudicator determined that the contract provided for the working out of a reference date and, by section 99 of the Qld Act, the contractual precondition did not affect a reference date from arising.

The head contractor sought a declaration that the adjudication decision was void for jurisdictional error.

DECISION

The court held that the adjudicator had jurisdiction to determine the subcontractor's payment claim and dismissed the head contractor's application.

Applegarth J held that the operation of section 99 of the Qld Act rendered the contractual precondition ineffective to prevent the subcontractor from making its payment claim.

His Honour found that the contractual precondition had no real utility in advancing the purpose of the Qld Act; it would allow parties to exclude what was otherwise a statutory entitlement to a progress payment in circumstances where the subcontractor was unable to declare that all of its own sub-contractors had been paid.

BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors [2015] QSC 222

In circumstances where it was conceded that there is a prima facie case that the adjudication decision was void for jurisdictional error, taking account of other discretionary factors, the court granted an interim interlocutory injunction restraining the issue of an adjudication certificate.

FACTS

An adjudication determination under the Qld Act required BRB Modular Pty Ltd (**head contractor**) to pay AWX Constructions Pty Ltd (**subcontractor**) $3,073,859.99 (plus costs and interest).

In its originating application, the head contractor sought a declaration that the adjudicator's decision was void for jurisdictional error (which is the subject of *BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors* [2015] QSC 218).

In these proceedings, the head contractor applied for an interlocutory injunction (pending the hearing of the originating application) to restrain the subcontractor from enforcing the adjudication decision.

For the purposes of the interlocutory application, the subcontractor conceded that the head contractor had a prima facie case that the adjudication decision was void for jurisdictional error.

The only question for consideration was whether the balance of convenience favoured the granting of an injunction.

DECISION

The court granted the injunction.

Bond J found that, in circumstances where there was a concession that there is a prima facie case that the adjudication decision is void for jurisdictional error, it could not be intended to be the policy of the Qld Act to attribute to the head contractor the risk that the builder might not be able to refund moneys.

In coming to this conclusion, His Honour disagreed with the approach of Daubney J, in *Wiggins Island Coal Export Terminal Pty Ltd v Sun Engineering (Qld) Pty Ltd* [2014] QSC 170, who held that the owner carries the risk that monies paid pursuant to an adjudicator's decision may not be refunded by a claimant, even if the adjudicator's decision is ultimately declared void.

Bond J also found compelling the argument that the policy of the Qld Act:

- as reflected in section 31(4) of the Qld Act, is that the price to be paid by a party to have a court hear and determine a challenge to an adjudication determination is to pay monies into court as security for the unpaid portion of the adjudication amount; and
- would not be any different simply because the dispute comes before the court at a stage prior to the adjudication determination being converted into a judgement debt.

Camporeale Holdings Pty Ltd v Mortimer Construction Pty Ltd & Anor [2015] QSC 211

Separate invoices served collectively with a covering email, may constitute one payment claim. A right to claim liquidated damages is not sufficient to offset a creditor's statutory demand for payment of a payment claim.

FACTS

Mortimer Constructions Pty Ltd (**subcontractor**) was sub-contracted by Camporeale Holdings Pty Ltd (**builder**) to perform construction work at Proserpine State High School. The subcontractor issued a payment claim to the applicant on 25 September 2014, in the form of a covering email that was not endorsed under the Qld Act and which referenced five attachments. Four of the five attachments were tax invoices, which were endorsed under the Qld Act and identified the work as relating to 'The Project at Proserpine State High School'. The applicant did not pay the payment claim, contending that it did not comply with the requirements of the Qld Act.

Although the subcontractor obtained an adjudication determination in its favour, the builder did not pay the amount of the payment claim. The subcontractor obtained the an adjudication certificate but it was not served or filed as a judgment. Instead the subcontractor relied on the adjudication certificate when it issued a creditor's statutory demand.

The builder applied to court and contended that:

- the adjudication decision was void or voidable for want of jurisdiction as multiple payment claims had been made in respect of a single reference date, contrary to section 17(4) of the Qld Act; or
- it had an 'offsetting claim' within the meaning of section 459H of the *Corporations Act 2001* (Cth), for the cost of rectification of the works and for liquidated damages incurred due to the delay occasioned by the rectification work.

DECISION

The court held that the payment claim was valid and dismissed the builder's application.

Henry J held that it was 'readily discernible' that the covering email and the attached tax invoices (the combined total of which amounted to the progress payment claimed) amounted to service of one payment claim. In reaching this decision, His Honour relied on *Tailored Projects Pty Ltd v Jedfire Pty Ltd* (2009) 2 Qd R 171 and the consistent New South Wales line of authority.

His Honour also held that there was sufficient evidence of an offsetting claim, but only in relation to the rectification works. To this end, the builder only had (at best) a future claim for liquidated damages, which did not meet the temporal requirement of the definition of an 'offsetting claim'.

Gambaro Pty Ltd v Rohrig (Qld) Pty Ltd; Rohrig (Qld) Pty Ltd v Gambaro Pty Ltd [2015] QCA 288

The mere fact that the adjudicated amount for a progress payment exceeds the amount certified by the superintendent for that progress payment will not be sufficient to mount a successful claim for restitution of an adjudicated amount.

FACTS

Gambaro Pty Ltd (**developer**) entered into a building contract with Rohrig (Qld) Pty Ltd (**builder**) in September 2012 to construct a hotel and refurbish parts of a building. In May 2014, the builder issued a payment claim under the Qld Act, seeking payment of more than $2 million. In its payment schedule, the developer acknowledged liability for only $57,593.08, and paid that amount.

The builder made an adjudication application. The adjudicator determined that the developer should pay the builder $956,788.25. The developer paid $913,014.23, and soon after commenced proceedings against the builder for restitution of that amount. The developer applied for summary judgment, and the builder applied to have the developer's statement of claim struck out. At first instance, each application was refused. Both parties appealed.

On appeal:

- the developer argued that it was unjust for the builder to retain so much of the adjudicated amount as exceeded the progress payment, simply because it exceeded the amount certified by the superintendent for that progress payment; and
- the builder argued that, pending a final determination about a relevant contractual entitlement, a party to a contract could not prosecute its contractual rights in respect of a progress payment in a way that would override the statutory entitlement to a progress payment.

DECISION

Fraser JA, with whom Morrison JJA and Boddice J agreed, gave the leading judgment in the appeal.

The court:

- dismissed the developer's appeal;
- allowed the builder's appeal by striking out the developer's statement of claim; and
- gave leave to the developer to file an amended statement of claim.

In striking out the developer's statement of claim, Fraser JA stated that *'the [developer's] claim must fail because it relies only upon contractual provisions concerning the amount of a progress payment to be paid on account of the contractual remuneration which do not detract from the statutory rights and liabilities created by Pt 2 and 3 of [the Qld Act], rather than upon contractual provisions which determine [the developer's] liability for and [the builder's] entitlement to the contractual remuneration on account of which the adjudicated amount of a progress payment was paid.'*

In obiter, without considering the builder's argument in detail, Fraser JA acknowledged the well settled position that, prior to the completion of a contract, a claimant could be ordered to make restitution of that part of an adjudication amount that exceeds the amount to which the claimant is contractually entitled to, but noted that was not the case pleaded by the defendant.

JAG Projects Qld Pty Ltd v Total Cool Pty Ltd & Anor [2015] QSC 229

In an ex tempore decision (i.e. straight after hearing the case) Bond J applied well known security of payment principles to the facts, dismissing an application to declare an adjudicator's decision void.

FACTS

JAG Projects Qld Pty Ltd (**principal**) was required under a decision by an adjudicator under the Qld Act to pay $88,000 to Total Cool Pty Ltd (**contractor**). The principal did not pay by the due date and the contractor issued a statutory demand under the *Corporations Act 2001* (Cth), which also went unpaid.

The principal sought a declaration that the adjudication decision was void on the following grounds:

- two payments claims had been issued for the same work contrary to section 17(4) of the Qld Act, (although, of the two invoices that had been issued, only one had been endorsed under the Qld Act);
- the adjudicator failed to give sufficient reasons; and
- the adjudicator failed to properly consider the principal's submissions.
- The principal further contended that the contractor was disentitled from using the security of payment regime as it was no longer licensed under the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**) at the time of making its payment claim, although the principal conceded that the contractor was licensed when it entered into the contract and performed the work.

DECISION

The court dismissed the applications of the principal.

Bond J held that the payment claim was valid; there was only one payment claim for the work as the contractor proceeded under the invoice which was endorsed under the Qld Act.

Although the contractor conceded that the adjudicator's reasons were 'sparse', His Honour held that as a whole, the adjudicator had demonstrated awareness of the disputes between the parties and had 'considered the material and expressed a conclusion in favour of the [contractor]'. This was not a situation where there was 'a mere indication by an adjudicator of having read the material and [expressed] a conclusion as to satisfaction'.

His Honour also rejected the principal's contention that the contractor was disentitled from using the regime established by the Qld Act, as the contractor held the relevant licence under the QBCC Act at the time it agreed to carry out, and when it carried out, the work that was the subject of the payment claim.

Sunshine Coast Regional Council v Earthpro Pty Ltd & Ors [2015] QSC 168

A declaration of partial invalidity can be made in respect of an adjudication decision if the proceedings to challenge the decision were brought before 15 December 2014.

FACTS

Sunshine Coast Regional Council (**council**) contracted Earthpro Pty Ltd (**contractor**) to carry out earthworks and construction work at a landfill site. Practical completion had not been achieved by 26 March 2014, at which time the council terminated the contract. Four months later the contractor submitted a payment claim seeking more than $3 million dollars. The council accepted liability of less than $6,500.

The contractor submitted an adjudication application in August 2014. The adjudicator determined that the council was liable for $1.4 million, of which $1.081 million comprised delay costs related to extension of time (**EOT**) claims.

The council raised the following grounds in contending that the adjudication decision was void for jurisdictional error:

- the adjudicator exceeded his jurisdiction in allowing EOT claim 10 as it was a re-agitated claim;
- there had been a denial of procedural fairness in respect of EOT claims 18 and 19, which were incorrectly noted in the adjudication decision as being made before termination; and
- the adjudicator's assessment of compensation for delay under clause 36 of the contract (claimed on a global basis) was egregiously erroneous.

DECISION

The court held that part of the adjudication decision involved jurisdictional error on the first of the three grounds as the factual foundations underpinning EOT claim 10 were fundamental to a previously determined variation claim.

Byrne SJA found that the contractor had re-agitated issues that were essential in the determination of a previous adjudication, with the result that the adjudicator had exceeded his jurisdiction.

His Honour therefore had to consider whether section 100(4) of the Qld Act, proclaimed after the application was filed, applied to permit a declaration of partial invalidity in respect of the adjudication decision.

To this end, his Honour considered that the inclusion of section 100(4) of the Qld Act as part of the transitional version of the Qld Act applying to any outstanding matters evinced a legislative intent that section 100(4) of the Qld Act applied to proceedings such as this one.

Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous Engineering Pty Ltd & Ors [2015] QSC 307

The court decided that the Qld Act applies to construction work carried out outside Queensland where the work has a relevant association with Queensland. This decision is now under appeal.

FACTS

Wiggins Island Coal Export Terminal Pty Ltd (**principal**) and Monadelphous Engineering Pty Ltd & Muhibbah Construction Pty Ltd (**contractors**) entered into an agreement for the fabrication and installation of a shiploader and an associated piece of equipment called the tripper (**contract**).

Under the contract. the shiploader and tripper would be fabricated in Malaysia and then installed on a wharf in Gladstone. The shiploader and tripper would become attached to the wharf by their confinement to rails fixed to the wharf and by water hoses and electrical cables. The shiploader and tripper would then travel back and forth along the rails on the wharf to load different hatches of a ship.

The contractors made an adjudication application under the Qld Act in relation to a portion of the fabrication work carried out in Malaysia. The adjudicator decided the principal should pay the contractors $22,132,839.35.

The principal challenged the decision on the basis that the adjudicator had no power to order that any sum be paid for the relevant fabrication work, because:

- it was construction work carried out outside Queensland; and
- it was therefore excluded from the operation of the Qld Act by section 3(4) of the Qld Act.

DECISION

The court dismissed the principal's application on the basis that the Qld Act applied and therefore the adjudicator had jurisdiction.

In characterising the fabrication work as construction work, McMurdo J disagreed with the principal's contention that the shiploader and tripper constituted distinct structures 'to form part of land' under section 10(1)(a) of the Qld Act. Rather, His Honour found that the shiploader and tripper were 'properly characterised as components of the wharf' so that the fabrication work fell under section 10(1)(e) of the Qld Act.

His Honour found it significant that the fabrication work was construction work 'only because it was an integral part of construction work undertaken inside Queensland'. In such circumstances, His Honour could not bring himself to find that the fabrication work was construction work carried out outside Queensland.

His Honour concluded that while the shiploader and tripper were fabricated outside Queensland, 'the contract was providing for part of the construction of a structure in Queensland and was, in the sense of s 3(4) of the [Qld Act], “dealing with” construction work carried out in Queensland'. Therefore, the application of the Qld Act was not displaced by section 3(4) of the Qld Act.

The principal has appealed.

Victoria

CASE INDEX

- *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2015] VSC 233
- *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd (No 2)* [2015] VSC 500
- *Baron Forge Contractors Pty Ltd v. Vaughan Constructions Pty Ltd* [2015] VCC 1424
- *Celsius Fire Services Pty Ltd v CBC Maintenance Facilities Pty Ltd* [2015] VCC 31
- *Commercial Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd and anor* [2015] VSC 426
- *Façade Treatment Engineering v Brookfield Multiplex* [2015] VSC 41
- *J G King Pty Ltd v Adiel Property Holdings Pty Ltd* [2015] VCC 1600
- *Saville v Hallmarc Construction Pty Ltd* [2015] VSCA 318
- *Scrohn Pty Ltd v Newearth Constructions Pty Ltd* [2015] VSC 254
- *SSC Plenty Road v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631
- *SSC Plenty Road v Construction Engineering (Aust) (No 2) Pty Ltd* [2015] VSC 680

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

Vic overview

EMERGING TRENDS

Notwithstanding the 'excluded amount' provisions of the Vic Act intended to limit the claims to which the Vic Act will apply, in 2015 there was a 36% increase in the number of adjudications and a corresponding increase in the number of judgments about the Vic Act. In our 2014 Roundup we commented that we expected that the independent development of the law concerning the Act in Victoria would continue. The judgments handed down in 2015 continued the divergence of the law in Victoria. We anticipate the increased utilisation of the Vic Act to continue which will highlight the practical impediments to the enforcement of adjudications under it.

DEVELOPMENTS

The significant differences to the legislation in the other states and territories introduced by the 2006 amendments to the Vic Act have necessarily resulted in the development of independent jurisprudence in Victoria. The cases in 2015 have brought into stark relief the inadequacy of the 2006 amendments in achieving the underlying policy objectives of the Vic Act in securing cash flow down the contracting chain.

- On the one hand the decision in *SSC Plenty Road v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631 held that a mediation process was not a method for resolving disputes within the meaning of section 10A(3)(d)(ii) of the Vic Act so as to engage the excluded amount provisions. It seems on the basis of that case that unless an arbitration agreement or binding expert determination agreement is included in the construction contract, claims for disputed variations may be pursued by claimants and determined under the Vic Act. This might be seen as an outcome that is unbalanced given the court's earlier decision in *Seabay Properties Pty Ltd v Galvin Constructions Pty Ltd & Anor* [2011] VSC 183 that respondents could not bring to account deductions of liquidated damages under the Vic Act.
- The court in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2015] VSC 233 held that where judgment has been entered under section 28R of the Vic Act concerning an adjudication determination, section 28R(5) prevents judicial review for error of law on the face of the record. Unlike some jurisdictions, the settled law in Victoria is that relief in the nature of certiorari is otherwise available concerning an adjudication determination that contains an error on the face of the record. This means that a party wishing to seek judicial review of an adjudication determination has a limited period of time between the issue of the determination and the entry of judgment on an adjudication certificate when certiorari will be available for an error of law on the face of the adjudication determination.

FUTURE

The problems flowing from the 2006 amendments are now being highlighted by judgments of the courts. Notwithstanding the policy of the 2006 amendments to limit variation claims being adjudicated under the Vic Act, the decision in *SSC Plenty Road v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631 will result in disputed variation claims being made under the Vic Act and further attempts to limit the operation of the other 'excluded amounts' provisions.

However, given the decision in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2015] VSC 233, whenever a party to an adjudication determination can point to an alleged error of law on the face of the determination and which amounts to a serious question to be tried, the court is likely to grant an injunction restraining enforcement of that determination without other evidence that damages are an inadequate remedy, but on terms of payment into court. Unsuccessful respondents may avoid paying the successful claimant until the review is determined and confirmed in those circumstances.

It is difficult to see how this result does not undermine the underlying policy purpose of the Vic Act.

Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd [2015] VSC 233

Section 28R(5)(a)(iii) of the Vic Act prevents a court from setting aside a judgment entered to recover a debt payable under an adjudication certificate issued under the Vic Act where there is an error on the face of the record. The relevant section does not limit the Vic courts from granting relief for a jurisdictional error. This is an inherent supervisory power of the Vic Supreme Court as a Chapter III Constitutional Court.

FACTS

Asta Developments (Aust) Pty Ltd (**contractor**) obtained an adjudication determination against Amasya Enterprises Pty Ltd (**proprietor**). Following non-payment of the adjudicated amount an adjudication certificate was issued. The contractor subsequently commenced proceedings pursuant to section 28R of the Vic Act to enter judgment for a debt in the amount of the adjudication certificate to recover as a debt the amounts that would be payable under sections 28M or 28N of the Vic Act.

The proprietors issued proceedings seeking judicial review of the adjudication determination on grounds including jurisdictional error (namely, an alleged failure by the adjudicator to afford procedural fairness and absence of a jurisdictional fact). The contractor argued that the proprietor was barred from doing so by section 28R(5)(a)(iii) of the Vic Act (**relevant section**).

DECISION

The court determined that it was open to the contractor to seek judicial review of the adjudication determination despite the relevant section. Vickery J held that:

- The relevant section is a privative provision (in contrast to its parallel in the NSW Act) and had been validly passed in accordance with the requirements of section 85 of the Victorian Constitution.
- Procedurally, the relevant section will only operate after a judgment has been entered under section 28R of the Vic Act and only in respect of a proceeding to have that judgment set aside.
- Privative provisions only operate to the extent that they do not limit the Vic Supreme Court's inherent jurisdiction as a Chapter III Constitutional Court under the Commonwealth Constitution. His Honour applied the High Court case of *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 at 581:

  > *'Legislation which would take from a State Supreme Court power to grant relief on account of* jurisdictional *error is beyond state legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power'.*

Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd (No 2) [2015] VSC 500

The re-sending of a payment claim, even if supplemented with additional material may not be in breach of the Vic Act and, in certain circumstances, an adjudicator must seek further submissions to ensure that the parties are accorded natural justice.

FACTS

On 7 October 2014, in relation to a construction contract between them, Asta Developments (Aust) Pty Ltd (**contractor**) served a payment claim on Amasya Enterprises Pty Ltd and TEK Foods Pty Ltd (**proprietors**). That document was re-sent on 10 October 2014 with the explanation that the original failed to include the trade invoices. On 23 October 2014, the proprietors sent an email to the contractor setting out the reasons why the proprietors would not pay the amount claimed (**refusal email**).

At adjudication, the contractor and the adjudicator proceeded on the basis that the refusal email did not constitute a payment schedule. Nonetheless, the adjudicator exercised his discretion under section 22(5) of the Vic Act and allowed the proprietors to make submissions which the they did by letter on 10 November 2014. The contractor then responded on 12 November 2014, when it was given the opportunity, by submitting new evidence in a new expert report and detailed submissions (**new evidence**) which the proprietors received on 13 November 2014. Service of the new evidence was deemed by the Vic Act to have occurred on 17 November 2014.

The adjudicator requested another extension on 16 November and his determination became due five days after 19 November 2014. However, on 18 November 2014, the adjudicator advised the parties that he had reached a decision and determined in favour of the contractor. At that time, the proprietors and their lawyers were considering how to respond to the new evidence.

The proprietors sought judicial review of the adjudicator's determination.

DECISION

The court issued a declaration that the adjudicator's determination was void and ordered that it was quashed.

There was a valid payment claim

Vickery J held that section 14(8) of the Vic Act, which prohibits service of more than one payment claim in respect of a single reference date, was not breached. While the payment claim was served twice, the documents read together constituted the same payment claim. Alternatively, the 10 October document substituted that served on 7 October.

Refusal email constituted a valid payment schedule

His Honour held that the refusal email met the requirements of section 23 of the Vic Act: it stated the payment claim to which it related, the amount of payment the respondent would make (no payment) and sufficient reasons for rejecting the payment claim. His Honour also stated that emails are a commonly accepted commercial means of communicating within the industry and a valid means of service under the Vic Act. By failing to consider the valid payment schedule (as he was obliged by section 23 of the Vic Act), the adjudicator's determination was in excess of jurisdiction and void.

Failure to consider expert report and call for submissions was a denial of natural justice

Vickery J found that it was clear from the determination that the adjudicator took into account the new evidence. His Honour took the view that the proprietors were entitled to think they had further time to respond to the new evidence after 17 November 2014. His Honour held that the adjudicator denied the proprietors natural justice and his determination.

Baron Forge Contractors Pty Ltd v. Vaughan Constructions Pty Ltd [2015] VCC 1424

A person who is not a party to a construction contract has no entitlement under the Vic Act to serve payment claims. A payment claim is valid although it includes work that has not yet been performed or is defective.

FACTS

Vaughan Constructions Pty Ltd (**Vaughan**) entered a construction contract, under which the contractor was to provide tiling, waterproofing, timber flooring and stone bench tops.

Baron Forge Contractors Pty Ltd (**Baron Forge**) contended that it was the contractor. It sought summary judgment under section 16(2) of the Vic Act on the basis that Vaughan had failed to provide a payment schedule in response to Baron Forge's payment claims 9 and 10 (**payment claims**) nor full payment of the claimed amounts.

Vaughan argued that:

- Baron Forge was not a party to the construction contract and was not entitled to commence the action or to serve the payment claims; and
- the payment claims were invalid, as they claimed amounts for work which had not yet been performed and for works that was defective.

DECISION

The court dismissed Baron Forge's application for summary judgment and ordered the matter to go to trial in order for Vaughan to defend the claim, finding that:

- based on the facts, Vaughan's position that Baron Forge was not a party to the contract and did not have the right to claim under the Vic Act was plainly arguable; and
- Vaughan's failure to deliver payment schedules in response to the payment claims precluded it from raising the invalidity of the payment claims on the basis that the work was incomplete or defective.

Non-party to construction contract cannot serve payment claims under the Vic Act

Cosgrave J relied upon the judgment of McDougall J in *Grave v Blazevic Holdings Pty Ltd* (2010) 79 NSWLR 132. McDougall J noted the NSW Act gives rights to the person who has undertaken to carry out the works under the construction contract to serve payment claims and receive progress payments. Having regard to the statutory context and the object of the NSW Act, McDougall J held that the NSW Act does not extend to those who are not parties to construction contracts.

His Honour held that the same principles applied to interpreting the corresponding sections of the Vic Act.

Incomplete or defective work does not invalidate payment claims

Cosgrave J held that the appropriate forum for raising any arguments that the work specified in a payment claim is outstanding or defective was in the corresponding payment schedule. His Honour also noted that the Vic Act does not specifically prohibit the submission of payment claims where the work is outstanding or defective.

Celsius Fire Services Pty Ltd v CBC Maintenance Facilities Pty Ltd [2015] VCC 31

Changes to the scope of maintenance work under a construction contract identified in a 'due diligence audit' may constitute first class claimable variations under section 10A(2) of the Vic Act.

A statement on a payment claim referring to security of payment Acts in other jurisdictions may not render a payment claim made under the Vic Act invalid

FACTS

Celsius Fire Services Pty Ltd (**subcontractor**) successfully tendered for, and carried out maintenance work on various sites (**works**) for CBC Facilities Maintenance Pty Ltd (**contractor**) . There was an annual fee for the works, which was payable by the contractor to the subcontractor in 12 monthly instalments and subject to a later 'due diligence adjustment'.

Two years after the works had commenced, the subcontractor increased the amount it claimed in monthly payments claims following increases in the scope of the works. The subcontractor claimed its costs for the increases as first class variations under section 10A(2) of the Vic Act. The contractor did not serve payment schedules in response nor pay all of the amounts claimed. The subcontractor sought summary judgment for part of its claim.

Each payment claim also stated

> 'This payment claim is made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) or the *Building and Construction Industry Security of Payment Act 2002* (Vic) or the *Building and Construction Industry [Security] of Payment Act 2004* (QLD) whichever applies' (**jurisdiction statements**).

DECISION

The court granted the subcontractor's application for summary judgment.

The variations were first class variations

Anderson J found that the increases to the scope of work were first class variations for the purposes of section 10A(2) of the Vic Act because there was 'no dispute ... that the scope of work was increased on the basis that, if the work were performed, the increased annual fee would be paid and could be claimed by equal monthly sums'. His Honour found that the 'variation' was agreed prior to the submission of the relevant progress claims. His Honour noted that, if there was a lack of agreement on an 'essential requirement', the variations would not be second class variations under section 10A(3) of the Vic Act because the contract consideration was not in excess of $150,000 and the subcontractor had not shown that the agreement lacked a 'method of resolving disputes'.

Reference to other States' legislation in the progress claims not fatal

Anderson J held that the jurisdiction statements was sufficient for the purpose of section 14(2)(e) of the Vic Act— which requires that a payment claim state that it is made under the Vic Act—and that it could not be said that the contractor would have difficulty determining which State's legislation applied.

Commercial Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd and anor [2015] VSC 426

A payment claim which is served in contravention of section 14(8) of the Vic Act is incapable of providing a jurisdictional basis for a valid adjudication. When determining the relevant reference date under the Vic Act, regard should be had to the date the work was performed under the construction contract.

FACTS

Commercial & Industrial Construction Group Pty Ltd (**principal**) sought to set aside an adjudication determination relating to a payment claim made by King Construction Group Pty Ltd (**contractor**) on 21 January 2015.

The principal argued that the payment claim was made in contravention of section 14(8) of the Vic Act and that the adjudicator's jurisdiction was therefore invalidated.

The relevant reference dates were 3 December 2014, 5 January 2015 and 3 February 2015.

The contractor had submitted an invoice to the principal on 23 December 2014 for works.

The contractor issued a payment claim on 21 January 2015 for both:

- amounts it had previously claimed which had not been paid in full (**outstanding invoices**); and
- additional amounts for work performed but not previously claimed (**additional amounts**).

No work had been completed by the contractor after 17 December 2014.

The adjudicator determined that the 23 December 2014 invoice was referable to the 5 January 2015 reference date and that the 21 January 2015 payment claim was referable to the 3 February 2015 reference date; therefore not being barred by section 14(8) of the Vic Act.

DECISION

The principal succeeded in its application to set aside the adjudicator's determination.

Justice Vickery held that the relevant reference date for both the 21 January 2015 payment claim and the 23 December 2014 invoice was 5 January 2015.

His Honour concluded that both payment claims were in respect of the same reference date on the basis that:

- no work was performed after 17 December 2014; and
- a commercial reading of the 21 January 2015 claim supported his conclusion.

Therefore, the latter claim contravened section 14(8) of the Vic Act.

His Honour further considered the application of the exemption to section 14(8) in section 14(9) of the Vic Act. He held that the exemption applied in respect of the portion of the outstanding invoices which remained unpaid but not in respect of the additional amounts.

The principal also argued that the 21 January 2015 claim invalid because no further work had been carried out between the previous reference date and the claim (i.e. 5 January 2015 and 21 January 2015). The court held that this ground could not succeed. The fact that the payment claim could have been served earlier would not bar an entitlement under the Vic Act.

Façade Treatment Engineering v Brookfield Multiplex [2015] VSC 41

Judgment will not be given under section 16 of the Vic Act where the claimant is in liquidation and the respondent intends to file a counterclaim or defence in relation to the amount claimed. The courts will not be overly technical in determining whether a purported payment schedule complies with section 15 of the Vic Act.

FACTS

Façade Treatment Engineering Limited (In Liq) (**subcontractor**) and Brookfield Multiplex Constructions Pty Ltd (**builder**) were parties to a subcontract in relation to a development in Melbourne.

The subcontractor issued two payment claims. For the first payment claim, the builder did not issue a payment schedule in response and paid only approximately 50% of the amount claimed. The builder asserted in an email to the subcontractor that the second payment claim was invalid (**October email**).

The subcontractor was subsequently placed into liquidation and then commenced proceedings under section 16 of the Vic Act to recover the amounts unpaid in relation to both payment claims on the basis that the builder had failed to provide the requisite payment schedules.

At trial, the builder argued that the October email was a payment schedule for the purposes of the Vic Act and asserted that it intended to file a defence and counterclaim in relation to the subcontractor's claim.

DECISION

The court dismissed the subcontractor's application.

Vickery J considered that a court should not be overly technical in determining whether a document satisfies the description of a payment schedule under section 15 of the Vic Act. His Honour held that:

The October email was a 'payment schedule'

As the October Email made it clear that the builder did not intend to pay anything for the second payment claim, this proposal to pay nothing is 'an amount' for the purposes of section 15(2)(b) of the Vic Act.

Also, the October Email satisfied the requirements of section 15(3) of the Vic Act as it stated that the builder considered that payment claim to be invalid and indicated why the builder intended to pay the subcontractor 'less than the claimed amount'.

Section 16 of the Vic Act was invalid to the extent that it was inconsistent with the set-off provisions under section 553C of the *Corporations Act 2001* (Cth) (Corporations Act).

As the subcontractor was in liquidation and the builder intended to file a defence and counterclaim, the prohibition against raising a cross-claim in section 16(4) of the Vic Act was inconsistent with the right of set-off established by a law of the Commonwealth Parliament in section 553C of the Corporations Act.

Since section 109 of the Australian Constitution provides that Commonwealth laws will prevail over inconsistent State laws and render them (to the extent of the inconsistency) invalid, the Vic Act was invalid to the extent of the inconsistency and judgment could not be entered in favour of the subcontractor. His Honour noted that the situation may have been different had the builder indicated an intention not to proceed with the counterclaims.

J G King Pty Ltd v Adiel Property Holdings Pty Ltd [2015] VCC 1600

The Vic Act and the corresponding right to summary judgment under the Vic Act may not be upheld in circumstances where a principal constructing residential housing can demonstrate that there is a real prospect it will establish it is not in the 'business' of building residences.

FACTS

J G King Pty Ltd (**builder**) entered into 10 contracts with Adiel Property Holdings Pty Ltd (**principal**) for the construction of residential dwellings (**residential contracts**). The principal was a trustee of the Adiel's Property Trust and was in the business of leasing residences to Ethan Residential Pty Ltd (**Ethan**), a company involved with providing affordable housing for the National Rental Affordability Scheme.

The builder sought summary judgment under section 16(4) of the Vic Act after the principal failed to provide a payment schedule in response to the final claims made by the builder for two of the residential contracts and to pay the claimed amounts.

The principal claimed that it had a 'real prospect' of successfully defending the claims on the following basis:

- the residential contracts were 'domestic building contracts';
- the principal was not 'in the business of building residences' as it did not enter into the residential contracts 'in the course of, or in connection with' the 'business of building residence'; and
- section 7(2)(b) of the Vic Act does not apply to 'domestic building contracts' and, as such, the residential contracts.

DECISION

The court dismissed the summons for summary judgment and made orders to fix the proceeding for trial. His Honour held that there was a real prospect that the principal would succeed in showing that was not involved in the business of building residences and that accordingly the Vic Act would not apply to the residential contracts.

When assessing the meaning of the exemption in section 7(2) of the Vic Act, Anderson J relied on the judgment of Vickery J in *Director of Housing v Structx Pty Ltd t/as Bizibuilders and Anor* [2011] VSC 410: that the *expression 'in the business of building residences'* connotes the construction of dwelling houses as a commercial enterprise on the basis of a going concern and describes an *'enterprise engaged in for the purpose of profit on a continuous and repetitive basis'*. Anderson J held that it was unclear on the evidence:

- the precise nature of the business operations of the principal and, specifically the extent of its operations involving the building of residences and the profitability of those activities;
- the number of properties it has purchased and the number of houses erected, apart from the 10 residential contracts;
- the rental received by the principal for the properties leased to Ethan and how that compares with market rentals; and
- whether the principal has any formal or informal involvement with the upstream entities who received government funding.

Saville v Hallmarc Construction Pty Ltd [2015] VSCA 318

The Victorian Court of Appeal has confirmed that the reference date as determined by an adjudicator under the Vic Act is reviewable by a court in an application for judicial review as a 'jurisdictional fact'.

FACTS

Hallmarc Construction Pty Ltd (**principal**) contracted with Saville, trading as China Sourcing Services – KBL Studio (**subcontractor**) for the supply and installation of joinery for a residential development (**contract**).

A payment claim that the subcontractor served on the principal one on 21 February 2014 (dated 17 February 2014) was referred to adjudication. A key issue at adjudication was whether the claim had been served within the period of three months after the relevant reference date (as required by section 14(4)(b) of the Vic Act). The adjudicator proceeded with his determination on the basis that he had jurisdiction because he found that the reference date was a date after 25 November 2013 and the claim was validly served within this three month time period.

At first instance, Vickery J held that the appropriate reference date was 1 October 2013. Therefore the adjudicator had erred in finding that the reference date was after 25 November 2013. Accordingly, the payment claim was invalid as it was served out of time and the adjudication determination was void. The subcontractor appealed Vickery J's decision on a number of grounds including the scope of the errors of an adjudicator that are reviewable by a court.

DECISION

The Vic Court of Appeal (Warren CJ and Tate J (with Kaye JA agreeing)) dismissed the appeal.

The court:

- held that the reference date as determined by an adjudicator is reviewable in an application for judicial review;
- confirmed that a reviewable jurisdictional error includes errors where a decision maker has assumed jurisdiction when the statutory conditions precedent to that jurisdiction arising have not been satisfied;
- reasoned that reviewable jurisdictional facts are not always events or circumstances that can be ascertained easily by way of a mechanical process or a straightforward calculation. Sometimes, jurisdictional facts, such as the reference date for the purposes of the Vic Act, require evaluation and assessment.

In this case, the determination of the reference date required consideration of the following factors:

- whether the work the subject of the claim was work performed under the contract;
- when the work under the contract was completed; and
- whether the claim was the final claim.

The court agreed with the findings of Vickery J on these matters.

Scrohn Pty Ltd v Newearth Constructions Pty Ltd [2015] VSC 254

An 'offsetting claim' under section 459H of the *Corporations Act 2001* (Cth):

- **may cause the setting aside of a statutory demand for payment of a court judgment;**
- **takes priority over the 'pay now, argue later' policy underlying the Vic Act.**

FACTS

Scrohn Pty Ltd (**developer**) engaged Newearth Constructions Pty Ltd (**contractor**) to carry out construction works. The developer did not pay the amount certified in a payment schedule issued to it by the contractor under the Vic Act.

The contractor obtained judgment in the Vic County Court for that certified amount (**Judgment**). Before the Judgment was issued, the developer commenced separate proceedings claiming liquidated damages and reimbursement of payments made to the contractor (**Separate Claim**).

Subsequently, the contractor issued a statutory demand in relation to the Judgment. In response, the developer applied to the Supreme Court to set aside the statutory demand on the basis that each Separate Claim was an 'offsetting claim' under section 459H of the *Corporations Act 2001* (Cth) (**section 459H**) and these exceeded the amount in the statutory demand.

Opposing the application, the contractor argued that:

- the Separate Claim arose out of the same 'transaction' which gave rise to (and was therefore an attempt to impeach) the Judgment; and
- the contract did not entitle the developer to escape its obligation to pay the contractor by making the Separate Claim.

DECISION

The court found in favour of the developer and ordered the statutory demand be set aside (as the amount claimed in the statutory demand was less than the amount of the Separate Claim) .

Different 'transaction'

Daly AsJ held that the term 'transaction' in section 459H was not to be so broadly defined as to prevent the developer raising an offsetting claim relating to the same construction project or the same contract as the Judgment. The facts or circumstances relating to the developer's submissions made in (and rejected by) the County Court that led to the Judgment were not the same as its submissions made to support the existence of the Separate Claim.

Offsetting claim not a 'disguised collateral attack'

Her Honour also held that the Separate Claim was not a 'disguised collateral attack' because the developer did not raise the Separate Claim in the County Court pleadings or submissions.

Not a surrender of rights under section 459H

Although the contract required the developer to continue to meet its payment obligations even where there was a dispute, her Honour held that there was a surrender of rights under section 459H only if there was an express term in the contract. As the contract did not contain such a term, the developer retained its rights under section 459H.

SSC Plenty Road v Construction Engineering (Aust) Pty Ltd [2015] VSC 631

Mediation is not a 'method for resolving disputes' for the purpose of section 10A of the Vic Act. Accordingly, payment for variations under contracts that provide only for mediation or another non-mandatory dispute resolution procedure may be claimed without limit.

The adjudication of a payment claim requires, a determination as to whether the claimed construction work has been performed and an assessment of the value of that work. If the question of value is unclear, the adjudicator cannot simply adopt the claimed amount. The adjudicator's task under sections 23(1) and (3) of the Vic Act is to assess a value and provide reasons demonstrating how the determined value has been assessed.

FACTS

SSC Plenty Road (**developer**) and Construction Engineering (Aust) Pty Ltd (**contractor**) were parties to a contract for the design and construction of a shopping centre for the contract sum of $35,554,985 (excluding GST). The contractor's payment claim on the developer for $4,460,815.06 (including GST) was the subject of an adjudication determination under the Vic Act. The adjudicator determined that the developer was required to pay the amounts claimed by the contractor:

- for 33 out of the 37 disputed variation claims (**disallowed variation claims**), as the developer had not demonstrated a sufficient basis for withholding payment; and
- for three out of five disputed deduction claims (**disallowed deduction claims**), as the developer had not demonstrated a sufficient basis for deducting a payment.

The developer sought judicial review of the arbitrator's determination, which it said was erroneous because the adjudicator:

- wrongly took into account variations that were not claimable variations under the Vic Act because they did not satisfy the criteria for class 2 claimable variations in section 10A(3) of the Vic Act; and
- failed to value the work in accordance with section 23(1) of the Vic Act because the adjudicator had simply adopted the contractor's values for work stated in the payment claim.

On the first point, the developer said that contract required the parties to mediate disputes and that the relevant clause was a method of resolving disputes for the purposes of section 10A(3)(d)(ii) of the Vic Act.

DECISION

The court rejected the developer's first submission and held that the dispute resolution clause as not a 'method for resolving a dispute' because mediation will not, unless agreement is achieved, result in a binding resolution of a dispute between parties.

At best, mediation provided an opportunity for resolving disputes but without additional mandatory steps being prescribed, it was not a method for resolving disputes for the purposes of section 10A(3)(d)(ii) of the Vic Act. Vickery J distinguished expert determination and arbitration, which his Honour said provided the binding resolution that mediation could not.

The court found in favour of the developer on its second submission. . His Honour described the adjudicator's approach as imposing upon the developer an onus to demonstrate that it had a sufficient basis for

- in relation to the disallowed variation claims, withholding payment; and
- in relation to the disallowed deduction claims, deducting payment.

SSC Plenty Road v Construction Engineering (Aust) (No 2) Pty Ltd [2015] VSC 680

The case illustrates the matters that a court considers when deciding whether to remit an adjudication determination for redetermination to the same or a different adjudicator for determination under the Vic Act.

FACTS

This case follows on from the second submission of the developer in *SSC Plenty Road v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631.

The developer and the contractor submitted arguments to the court as to whether the adjudication determination should be remitted for redetermination in accordance with the law - at all, back to the same adjudicator or to a different adjudicator.

DECISION

The court ordered that the valuation of the disallowed variation claims and disallowed deduction claims be remitted to the original adjudicator for redetermination.

His Honour emphasised the policy of the Vic Act to ensure the prompt recovery of progress payments through the adjudication process. His Honour noted that the content of the adjudication determination:

- indicated the adjudicator had failed to value the variation amounts in dispute based on the parties' submissions and did not indicate how the adjudicator might approach the valuation task on a remittal;
- did not suggest that the adjudicator had formed a preconceived idea of the relative merits of the arguments or developed a preference for the submissions of either party;
- did not require 'patching up' any part of the reasoning.

His Honour took the view that the adjudicator's familiarity with the material should enable redetermination in a more timely manner compared to a new adjudicator and noted that avoiding the need to find another adjudicator would advantage both parties and reduce further delay.

Western Australia

CASE INDEX

- *BGC Contracting Pty Ltd v Ralmana Pty Ltd t/as RJ Vincent & Co* [2015] WASAT 128
- *Conbrio Construction & Maintenance Pty Ltd t/a DWG Contracting v ABB Australia Pty Limited* [2015] WASAT 122
- *Delmere Holdings Pty Ltd v Green* [2015] WASC 148
- *Field Deployment Solutions Pty Ltd v Jones* [2015] WASC 136
- *Field Deployment Solutions Pty Ltd v SC Projects Australia Pty Ltd* [2015] WASC 60
- *Field Deployment Solutions Pty Ltd v SC Projects Australia Pty Ltd and Sea Trucks Australia Pty Ltd* [2015] WASAT 84
- *GRC Group Pty Ltd v Kestell* [2015] WASAT 11
- *Hamersley HMS Pty Ltd v Davis* [2015] WASC 14
- *Hamersley Iron Pty Ltd v James* [2015] WASC 10
- *Kuredale Pty Ltd v John Holland Pty Ltd* [2015] WADC 61
- *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2015] WASC 237
- *Leevilla Pty Ltd v Doric Contractors Pty Ltd* [2015] WASAT 127
- *Modular Forms Pty Ltd v Cecich* [2015] WASAT 76
- *NRW Pty Ltd v Samsung C&T Corporation* [2015] WASC 372
- *SC Projects Australia Pty Ltd and Sea Trucks Australia Pty Ltd v Field Deployment Solutions Pty Ltd* [2015] WASAT 69
- *SC Projects Australia Pty Ltd v Field Deployment Solutions Pty Ltd* [2015] WASC 339

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

WA overview

EMERGING TRENDS

The number of adjudications applications in Western Australia in 2015 increased by 35% in comparison to 2014. The value of the total claims also rose significantly by $201.75m (which is a 53% increase), signifying both growing reliance on the dispute resolution processes available, as well as an increase in the significance of the claims the subject of adjudications under the WA Act

DEVELOPMENTS

2015 saw further development of the case law relating to the WA Act in a number of key areas, including:

- the application of the rules of procedural fairness to adjudications;
- the circumstances in which a payment dispute can arise during negotiations between the parties about sums due under the contract; and
- the circumstances in which an adjudicator may fall into jurisdictional error.

Ordinarily, the existence of a counterclaim will not be sufficient reason for the court to refuse a party's application for leave to enforce a determination. However, *Hamersley Iron Pty Ltd v James* [2015] WASC 10 established a new precedent that a party with a counterclaim against an insolvent company can rely on that counterclaim to resist the insolvent company's application for leave to enforce a determination. That case and *Kuredale Pty Ltd v John Holland Pty* Ltd [2015] WADC 61, reinforce the presumption in favour of enforcing determinations.

Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation [2015] WASC 237, opens the door to further challenges to determinations. The Supreme Court held that adjudicators can fall into jurisdictional error if they so misconstrue the contract in question that they fail to exercise or understand his adjudicative function. But not every misinterpretation of a contract will amount to a jurisdictional error. The dividing line between an error which can be challenged and one that cannot is inevitably unclear.

GRC Group Pty Ltd v Kestell [2015] WASAT 11, is noteworthy. It held that the issue of whether a payment claim is bona fide is not s a jurisdictional issue which an adjudicator should consider when deciding whether to dismiss an application under section 31(2)(a) of the WA Act.

FUTURE

In our 2014 Roundup, we referred to Professor Philip Evans' ongoing review of the WA Act. In November 2015, after a 12-month review which included 51 written submissions from stakeholders, Professor Evans submitted his recommendations to the government. The government is considering the report.

The report is confidential but Professor Evans revealed at a meeting of the Economics References Committee in October 2015 that many of the submissions to him raised serious issues about inequality of bargaining power, economic duress and unconscionable conduct, with one contractor allegedly being told to 'Sign here or you will not work for me ever again'.

He also revealed that the report recommended greater protection to smaller subcontractors and more education programs to inform smaller stakeholders about their rights and obligations under the WA Act.

Beyond this, we anticipate more challenges to determinations over issues of contractual interpretation as a result of the *Laing O'Rourke* decision.

BGC Contracting Pty Ltd v Ralmana Pty Ltd t/as RJ Vincent & Co [2015] WASAT 128

A letter giving notice of intention to make a claim is not a payment claim within the meaning of section 6 of the WA Act. For an adjudicator to dismiss an application under section 31(2)(a)(iii) of the WA Act on the basis that a court has made an order about the dispute which is the subject of the application, that order must relate to the application, and not a related but separate payment claim. It is an open question as to whether an interlocutory rather than final order falls within the scope of section 31(2)(a)(iii).

FACTS

Under the contract between BGC Contracting Pty Ltd (**principal**) and Ralmana Pty Ltd t/as RJ Vincent & Co (**contractor**), the principal was entitled to set off any monies that it claimed was owing by the contractor, against any monies that the principal owed the contractor.

On 3 December 2014, the principal wrote to the contractor, referring to an intended set off by the principal which would be made when the contractor made its 'next' progress claim. The contractor sent the principal a letter in response on 5 December 2014 rejecting the principal's position.

On 4 February 2015, the contractor commenced a Supreme Court action against the principal for judgment in the sum of $33,092,991.74 as at 31 October 2014. The court made an interim directions order on 2 April 2015.

Separately, on 15 February 2015, the contractor made a progress claim for the next progress payment, claiming $65,515,054.15. In response, the principal issued a payment claim on 6 March 2015 for $11,440,496.94. This was rejected by the contractor on 13 March 2015. The principal then applied for adjudication.

The adjudicator dismissed the application under section 31(2)(a)(iii) of the WA Act holding that the payment dispute before him arose on 5 December 2014 and was time barred. Further, he determined that the Supreme Court's interim order compelled him to dismiss the application under section 31(2)(a)(iii) of the WA Act. The principal applied to the WA State Administrative Tribunal (**Tribunal**) for review of this decision.

DECISION

The Tribunal held that the adjudicator's decision should be set aside and directed the adjudicator to determine the application in accordance with the WA Act. It found that:

- The adjudicator should not have dismissed the application for adjudication pursuant to section 31(2)(a)(iii) of the WA Act.
- The payment dispute before the adjudicator was concerned with the principal's payment claim dated 6 March 2015 which was rejected by the contractor on 13 March 2015, not 5 December 2014.
- The letter of 3 December 2014 from the principal to the contractor was notice to the contractor of the principal's rights under the contract between them, but was not in itself a 'payment claim' as defined by section 6 of the WA Act. Therefore, the contractor's letter of 5 December 2014 was not a rejection of a payment claim.
- There was no evidence that the payment dispute before the adjudicator was encompassed within the Supreme Court proceedings. Therefore the adjudicator was wrong to dismiss the application pursuant to section 31(2)(a)(iii) of the WA Act as the interim order did not relate to the claim before him.

Conbrio Construction & Maintenance Pty Ltd t/a DWG Contracting v ABB Australia Pty Limited [2015] WASAT 122

Parties must be careful about informal negotiations because they may amount to a payment claim or dispute, with the result that time to initiate an application under the WA Act might start running.

FACTS

In July 2010, Conbrio Construction & Maintenance Pty Ltd trading as DWG Contracting (**builder**) and ABB Australia Pty Ltd (**ABB**) entered into a construction contract. In August 2012, the builder sent a series of emails relating to claims which ABB rejected.

On 12 December 2014, the builder made a claim for payment to ABB. On 18 December, ABB rejected the claim on the basis that the builder had already made a payment claim in August 2012, and that the defects liability period had ended in February 2012.

The builder commenced an adjudication under the WA Act, arguing that no payment claim had been made in the August 2012 emails and that the parties were only following an 'informal process' prior to initiating a formal claim.

The adjudicator found that the builder had made a payment claim on 20 August 2012 and that claim was rejected by ABB on 4 September 2012. The December 2014 claim was therefore out of time because it was not filed and served within 28 days of the payment dispute arising. The builder appealed to the WA State Administrative Tribunal (**Tribunal**).

The builder submitted that it had worked with ABB on a substantial number of projects in the last decade and, that over time, they had adopted certain informal processes including a cost conferral process. In that context, the August 2012 emails did not amount to a payment claim which meant that there could not be a payment dispute.

DECISION

The Tribunal found that the adjudicator's decision to dismiss the application was correct.

Even though the word 'claim' was not used in a particular email, when read in light of the builder's earlier emails that did refer to a 'claim', it amounted to a payment claim. The important factor was the language, which was that of a claim for payment of specific amounts rather than an informal process. The use of phrases such as 'seeking recovery' of the 'value' of works and there being 'outstanding amounts' were of particular significance.

In any event, the December 2014 payment claim was precluded by the contract between the parties which required a final payment claim within 24 days of the expiry of the defects liability period.

The Tribunal observed that the WA Act is not intended to be an alternative source of debt collection, and that to bring an application under the WA Act so long after work under the contract was completed and the defects liability period expired, was incompatible with the speedy and informal processes of the WA Act.

Delmere Holdings Pty Ltd v Green [2015] WASC 148

The WA Supreme Court described an attempt to recast a rejected variation claim as a 'payment claim' under the WA Act in order to commence an adjudication under the WA Act as 'applying lipstick to a pig' – a reminder to carefully consider what constitutes a 'payment claim' under the relevant construction contract and the WA Act before applying for adjudication.

FACTS

Delmere Pty Ltd trading as DTMT Construction (**head contractor**) subcontracted Alliance Infrastructure Pty Ltd (**subcontractor**) to supply and install piping as part of general infrastructure works at Cape Lambert. Provisions in the subcontract operated to commence a review process for increases to the scope of works and obliged the subcontractor to submit a progress payment claim for any work undertaken as a result of that increased scope.

The subcontractor submitted a 'variation claim' for approximately $870,000 referencing the review process provision. The head contractor rejected the variation claim. The subcontractor applied for adjudication, claiming that as the variation claim amounted to a 'payment claim' for the purposes of the WA Act, the head contractor's rejection gave rise to a 'payment dispute' under the WA Act.

Before the head contractor served its adjudication response, the subcontractor issued an invoice for the works that were the subject of the variation claim. The head contractor annexed the invoice to its response and argued that, because the invoice was the relevant payment claim, no dispute had arisen upon which the subcontractor could have applied for adjudication.

The adjudicator determined that the head contractor's rejection of the variation claim had triggered a payment dispute under the WA Act and found that the head contractor was required to pay the subcontractor approximately $870,000. The head contractor applied to the court for a writ of certiorari to quash the adjudicator's determination.

DECISION

The court allowed the head contractor's application for judicial review and issued orders absolute for certiorari, quashing the adjudicator's determination.

In making the above orders, Martin J made the following findings.

- The variation claim was an estimate of costs and not a claim for the payment of money and not a payment claim for the purposes of the WA Act. Therefore no payment dispute had arisen between the parties when the subcontractor applied for adjudication.
- The adjudicator, who had refused to review the Invoice because the subcontractor had not included it in the adjudication application, had failed to recognise the potential relevance of significant material put before him and its significance under the WA Act. He had proceeded on a wholly incorrect and misconceived basis and had therefore made a fundamental jurisdictional error.

His Honour also commented that the subcontractor's exercise in seeking to rebadge the variation claim as a payment claim was 'audacious' and 'something akin to an exercise in applying "lipstick to a pig"'.

Field Deployment Solutions Pty Ltd v Jones [2015] WASC 136

Where an adjudicator errs in his or her decision to dismiss an application without a consideration of its merits, an order quashing the decision would be futile because section 31(3) of the WA Act operates to substitute a decision that the application is taken to have been dismissed—which would be to the same effect.

FACTS

This application for judicial review follows the WA State Administrative Tribunal's (**Tribunal**) decision in *Field Deployment Solutions Pty Ltd v SC Projects Australia Pty Ltd* [2014] WASAT 101 (summarised in our 2014 Roundup) and the Supreme Court's determination of the appeal of that decision in *Field Deployment Solutions Pty Ltd v SC Projects Australia Pty Ltd* [2015] WASC 60.

In the latter case, Mitchell J held that the Tribunal had erred in law in concluding that the relevant contract was not a 'construction contract' for the purposes of the WA Act. In the period between the Tribunal's decision and the Supreme Court's decision, Field Deployment Solutions Pty Ltd (**FDS**) made two adjudication applications which were dismissed by adjudicators on the ground that the contract was not a construction contract for the purposes of the WA Act.

FDS applied to the court for judicial review, seeking a writ of certiorari quashing the decisions, on the ground that the adjudicators had erred by failing to consider, independently of the Tribunal's decision, whether the contract was a 'construction contract'. FDS also sought an order in the nature of mandamus compelling the relevant appointor to appoint new adjudicators to determine the disputes.

DECISION

The court dismissed the application for judicial review.

Mitchell J held that even if jurisdictional error were to have been established, it would still have been appropriate dismiss the application for the following reasons.

- Section 31(3) of the WA Act provides that if an application is not determined within the prescribed time, it is taken to have been dismissed. Citing with approval comments made by Beech J in *Alliance Contracting Pty Ltd v James* [2014] WASC 212 (see our 2014 Roundup), his Honour determined that an order quashing the decisions to dismiss the applications would be futile because section 31(3) of the WA Act would operate to deem the applications to have been dismissed.
- The adjudicators had been appointed and no order quashing the decision to appoint had been ordered. The invalidity of the determinations made by the adjudicators did not affect the validity of their appointment. Therefore, it was not appropriate to grant an order in the nature of mandamus.
- Section 46 of the WA Act allows a person to seek review of an adjudicator's decision within 14 days after the date of the decision. FDS had not exercised that right. His Honour noted that, given that the adjudicators had relied on a decision subsequently overturned on appeal, FDS might still be able to apply for an extension of time to seek review under section 46 of the WA Act.

Field Deployment Solutions Pty Ltd v SC Projects Australia Pty Ltd [2015] WASC 60

Where the court hearing an appeal from the State Administrative Tribunal of Western Australia finds that the Tribunal erred in law, it should not exercise the power conferred by section 105(9)(a) of the *State Administrative Tribunal Act 2004* (WA) to set aside the decision, unless the error of law affected the Tribunal's ultimate decision.

FACTS

In relation to the contract between SC Projects Australia Pty Ltd (**SCP**) and Field Deployment Solutions Pty Ltd (**supplier**) to supply, operate and manage vehicles to haul material for rehabilitating a right of way relating to a gas pipeline installation (**Supply Contract**), an adjudicator dismissed an adjudication application under section 31(2) of the WA Act on the grounds that the adjudication application had not been properly served in accordance with section 26 of the WA Act.

The WA State Administrative Tribunal (**Tribunal**) affirmed the adjudicator's dismissal in *Field Deployment Solutions Pty Ltd and SC Projects Australia Pty Ltd* [2014] WASAT 101 (analysed in our 2014 Roundup). In that decision, the Tribunal held, first, that the contract between the parties was not a construction contract for the purposes of the WA Act and that the adjudication application had not been prepared and served in accordance with section 26 of the WA Act.

The supplier applied for leave under section 46 of the WA Act to appeal to the WA Supreme Court on the grounds that the Tribunal had not been entitled to consider whether, or to conclude that, the Supply Contract was a construction contract.

DECISION

The court:

- granted the supplier leave to appeal the Tribunal's decision;
- declared that the Tribunal had erred in law in finding that the Supply Contract was not a construction contract for the purposes of the WA Act; and
- re-affirmed the Tribunal's decision that the adjudication application had not been properly served in accordance with the WA Act.

Tribunal may consider new material in a review of an adjudication determination

Mitchell J did not accept the supplier's argument that the Tribunal did not have jurisdiction to determine the question of whether the Supply Contract was a construction contract because that issue had not been before the adjudicator. His Honour confirmed that, pursuant to section 105(9)(a) of the *State Administrative Tribunal Act 2004* (WA), the Tribunal's review may involve the consideration of material that was not before the adjudicator.

On the facts, contract for earthmoving works is a 'construction contract'

Mitchell J disagreed with the Tribunal's findings that the haulage of fill was not for 'civil works' or 'construction work'. His Honour held that the earthmoving works were integral to the construction of the pipeline and, for that reason, the Tribunal had erred in law in concluding that the Supply Contract was not a construction contract.

However, his Honour took the view that this error did not vitiate the Tribunal's ultimate decision because the Tribunal had also correctly concluded that the adjudication application had not been served in accordance with section 26 of the WA Act.

Field Deployment Solutions Pty Ltd v SC Projects Australia Pty Ltd and Sea Trucks Australia Pty Ltd [2015] WASAT 84

This case is a good example of why parties should not delay in taking advantage of the 'speedy and informal' process' for the adjudication of progress claims under the WA Act and demonstrates the importance of moving quickly after a review of any determination.

FACTS

Field Deployment Solutions Pty Ltd (**FDS**) and a joint venture comprised of SC Projects Australia Pty Ltd and Sea Trucks Australia Pty Ltd (together, **supplier**) were party to a contract for the supply of vehicles.

FDS made two adjudication applications for payment claims under the contract. Both adjudication applications were dismissed on the basis that the contract was not a 'construction contract' within the meaning of the WA Act. The Supreme Court subsequently held that the contract was a construction contract (**Decision**).

The supplier then applied to the WA State Administrative Tribunal (**Tribunal**) for an extension of time to apply to review the Decision under the WA Act. FDS opposed this application and it was ultimately dismissed. The supplier then issued proceedings in the WA Supreme Court to formally litigate the payment dispute referred to adjudication.

FDS chose an alternative path in response to the Decision and sought judicial review of the adjudication determinations in the Supreme Court. This application was dismissed.

It was only then that FDS applied to the Tribunal under section 46(1) of the WA Act for an extension of time to apply for the determinations to be set aside and the matters referred back to one of the adjudicators to determine in the light of the Decision.

FDS' primary submission in support of its application for an extension of time was that the purpose of the WA Act is to keep the money flowing from a principal to a contractor.

DECISION

The Tribunal dismissed FDS' application for an extension of time.

The Tribunal noted that, rather than bringing an application soon after the Decision, FDS waited 32 days and even then, that application was not to the Tribunal, but to the Supreme Court for judicial review.

It also did not assist FDS' case that it had previously resisted the supplier's application for an extension.

The Tribunal noted that that the purpose of the WA Act was to provide an expedited process for the adjudication of payment claims.

Given the long delay by FDS in making an application for an extension for time, the time for the 'speedy and informal' process that the WA Act was intended to provide had long since passed.

GRC Group Pty Ltd v Kestell [2015] WASAT 11

The question of whether a payment claim is bona fide should not be imposed by an adjudicator as an additional jurisdictional issue to be decided at the time of considering whether to dismiss an application under section 31(2)(a) of the WA Act.

FACTS

Ms Kestell (**owner**) engaged GRC Group Pty Ltd (**builder**) to construct a three-storey dwelling under a cost plus-contract. In March 2014, the builder made a payment claim. The owner sent an email to the builder disputing the payment claim.

The builder applied for adjudication. In its response, the owner submitted that the builder had fraudulently inflated its labour costs and, because the payment claim was therefore not bona fide, the application should be dismissed. The adjudicator found that the payment claim was not bona fide and had therefore not been prepared and served in accordance with the requirements of section 26 of the WA Act. He therefore dismissed the application without making a determination of its merits.

The builder applied to the Tribunal for a review of the adjudicator's determination.

DECISION

The Tribunal set aside the determination and referred the matter back to the adjudicator to determine the merits of the application.

The builder relied on the Northern Territory decision of *Trans Australian Constructions Pty Ltd v Nilsen* (SA) Pty Ltd (2008) 23 NTLRJ 123. In that case, Southwood J held that it is an essential requirement of a payment claim that the claim is bona fide and not fraudulent. The owner referred to the subsequent Victorian decision of *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd & Anor* [2012] VSC 235, in which Vickery J held that there was no warrant for implying into the Vic Act an obligation of good faith in submitting a payment claim. An enquiry into the bona fides of a claimant at that stage is neither necessary nor desirable, given the objective of the Vic Act of expediting the determination of the parties' rights.

Although the NT Act is more closely aligned to the WA Act than the Vic Act, the Tribunal considered there was inherent logic in Vickery J's reasoning when they looked at the rationale behind the WA Act and its wording. The Tribunal preferred the analysis of Vickery J. The definition of 'payment claim' in the contract did not involve the criterion of 'bona fide'. The Tribunal held that the additional test should not have been imposed as a threshold jurisdictional issue to be decided at the time of deciding whether to dismiss the application under section 31(2) of the WA Act. Whether the payment claim was bona fide was a significant matter but went to the merits of the application.

Hamersley Iron Pty Ltd v James [2015] WASC 10

An adjudicator considering an application under the WA Act where one party to the application is insolvent, must give consideration to section 553C of the *Corporations Act 2001* (Cth). Parties to a contract under the WA Act can now rely on this decision to resist applications by insolvent contractors for leave to enforce adjudication awards.

FACTS

Hamersley Iron Pty Ltd (**owner**) contracted Forge Group Construction Pty Ltd (**Forge**) to design and construct fuel hubs (**contract**). Soon after Forge submitted a progress claim for $14,335,778.07, Forge appointed administrators and then receivers and managers were also appointed to it.

The owner accepted only $64,607.33 of the progress claim, and called on the security held for the contract. This gave rise to a payment dispute and Forge applied for adjudication of the payment claim. The owner defended the adjudication on the basis it was entitled to a set off. The adjudicator ultimately awarded in favour of Forge.

The owner applied to the Supreme Court to set aside the adjudication. By then, Forge was in liquidation. Forge's liquidators applied for leave to enforce the adjudication determination under section 43 of the WA Act. In response, the owner argued that, because of Forge's insolvency and that the adjudicated sum was less than the owner's claim against Forge for damages, under the section 553C of the Corporations Act 2001 (Cth) (**Corporations Act section**) the owner was entitled to pay only the difference (**counterclaim**).

The court heard this case together with *Hamersley HMS v Davis* [2015] WASC 14 (***Davis***).

DECISION

The court dismissed the owner's application and Beech J's findings on this are set out in our summary of the *Davis* case. The more interesting part of the decision of Beech J is that the liquidators' application for leave to enforce was stayed pending determination of the counterclaim.

The usual position is that the existence of a counterclaim will not be sufficient for the court to refuse leave to enforce under section 43 of the WA Act. However, his Honour found that that position is altered where the party relying on the adjudication is insolvent.

The Corporations Act section requires an insolvent company's liquidator to set off competing claims existing between it and a company with which it has been contracting.

The owner argued that it had a serious question to be tried for the counterclaim which could result in it getting judgment for an amount exceeding the adjudicator's award. His Honour accepted this argument and held that this case fell squarely within the circumstances contemplated by the Corporations Act section. It would be unfair for Forge's liquidators to recover the full amount of the debt owed by the owner in circumstances where the owner would be likely to receive only a portion (if any) of its debt as a creditor in Forge's liquidation.

Hamersley HMS Pty Ltd v Davis [2015] WASC 14

The rules of procedural fairness do not generally require an adjudicator to request comment from a party about the adjudicator's evaluation of a party's case and supporting material. An adjudicator is only required to disclose his or her contemplated grounds for rejecting the sufficiency of evidentiary material put before him when a party could not reasonably anticipate those grounds.

FACTS

Hamersley HMS Pty Ltd (**owner**) contracted Forge Group Construction Pty Ltd (**Forge**) and Pilbara Logistics (WA) Pty Ltd (together the **contractor**) to do construction work at a mine (**contract**). Soon after the contractor submitted a payment claim, Forge appointed administrators and receivers and managers were then also appointed to it. The owner had recourse to the contractor's security and terminated the contract. It also sought to set off the costs of completion and a liquidated damages claim against the contractor for failing to complete works under the contract against the payment claim (**counterclaim**).

The adjudicator considered set-off rights under the contract, but said that it was for the liquidator to determine any set-off rights that existed under section 553C of the *Corporations Act 2001* (Cth) (**Corporations Act section**). The adjudicator was not satisfied that the material relied on by the owner established a set-off and determined that the owner was liable to pay the payment claim.

The owner and Forge's liquidators made the same applications to court as they did in *Hamersley Iron Pty Ltd v James* [2015] WASC 10 (***James***) and the court heard both cases together as they shared a number of issues in common.

DECISION

The court stated that its reasoning in this case and the *James* case must be read together.

Beech J applied his own reasoning in the *James* case and stayed Forge's application pending resolution of the owner's counterclaim, whether by legal proceedings or agreement between the parties.

Beech J dismissed the owner's application and held that:

- the adjudicator had erred in finding that it was not his function to consider the set-off rights in the Corporations Act section. The adjudicator should have applied the Corporations Act section to determine what was due based on the material brought before him. However, as that material had failed to satisfy the adjudicator that any sum was due from the contractor to the owner, the adjudicator's findings would not have differed if he had applied the Corporations Act section;
- the rules of procedural fairness had not required the adjudicator to hold a hearing before determining whether the material relied on by the owner was sufficient to create a set-off. Having regard to the nature of an adjudication, it was open to the adjudicator to make a determination without holding an oral hearing; and
- procedural fairness had not required the adjudicator to invite comment on his evaluation of the owner's case unless the decision was one that could not have reasonably been anticipated. On the facts, this was not the case.

Kuredale Pty Ltd v John Holland Pty Ltd [2015] WADC 61

This decision reinforces the presumption in favour of granting leave to enforce an adjudicator's determination. The WA District Court held that neither the fact that the result of the determination was that the respondent had overpaid nor the existence of a counterclaim which would offset the amount determined by the adjudicator were sufficient reasons to refuse leave.

FACTS

John Holland Pty Ltd (**principal**) engaged Kuredale Pty Ltd (**supplier**) to supply steel for works on the Gorgon Barrow Island project. The supplier issued payment claim 34 for $699,000. This included $498,000 for 'workshop building'. The principal certified payment of the payment claim rejecting all but one item of $11,958.

The supplier subsequently issued payment claim 35 and applied for adjudication under the WA Act of payment claim 34. Prior to the determination being issued by the adjudicator, the principal assessed payment claim 35 and paid $516,721.58. The supplier asserted that $377,000 of the sum paid related to works included in payment claim 34.

The adjudicator determined that the principal pay the supplier an amount of $525,000, including $431,000 for the workshop building. The supplier applied for leave, under section 43 of the WA Act, to enforce the adjudicator's determination as a judgment of the WA District Court.

The principal argued that the determination should not be enforced because payment claim 35 duplicated work included in payment claim 34. As certificate 35 had been paid, part of the sum determined due on payment claim 34 had also been paid.

DECISION

The court allowed the supplier's application to enforce the determination.

Keen DCJ noted that, even if the result of the determination was that the principal must pay for the relevant work item twice, this unjust enrichment would not be enough to exercise the discretion against granting leave as it did not warrant a 'sufficient reason' to overcome the presumption.

His Honour adopted Pullin JA's reasoning in *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91 at [55] (reported on in our 2014 Roundup) in which the court emphasised that the applications to enforce a determination operated under a 'pay now, argue later' system and that the determination gave rise to a debt that is due and payable.

In doing so, Keen DCJ noted the interim nature of any application to enforce a determination and held that substantive matters (whether two claim certificates related to the same works) should be determined in any ultimate proceedings.

Notably, his Honour also said that *'not to grant leave pursuant to the [WA] Act would be to fly in the face of the intent and purpose of the statute and that would or could bring the administration of justice into disrepute'*.

Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation [2015] WASC 237

A payment dispute arises when a payment claim is rejected or disputed, even if the time for payment under the construction contract has not yet arisen. An adjudicator may fall into jurisdictional error by failing to resolve the payment dispute by reference to the terms of the contract from which the dispute arises.

FACTS

Samsung C & T Corporation (**head contractor**) subcontracted Laing O'Rourke Australia Construction Pty Ltd (**subcontractor**) to undertake construction work. The head contractor terminated the subcontract for convenience and entered into an 'Interim Deed', which provided for the head contractor to make certain payments to the subcontractor. The head contractor made several payments, one of which was for $45m.

Subsequently, an adjudicator appointed under the WA Act made two determinations with the combined effect that the head contractor must pay the subcontractor a total of $44,140,518.

The head contractor sought the issue of writs of certiorari to quash the adjudicator's determinations for jurisdictional error. The subcontractor sought leave to enforce the determinations as judgments of the court. There were three main issues that required resolution:

- Whether the first of the determinations should be quashed because there was no payment dispute, or alternatively because the adjudicator did not properly form an opinion that there was a payment dispute.
- Whether both determinations should be quashed because the adjudicator failed to exercise or understand his adjudicative function, adopted illogical and irrational reasoning or made an unreasonable decision.
- Whether leave to enforce the determinations should be refused because the determinations were invalid, or because the payments on account required by the determinations had already been made under the Interim Deed.

DECISION

The court granted the head contractor's application for certiorari to quash the determinations and refused the subcontractor's application.

Interpretation of the definition of 'payment dispute' in section 6(a) of the WA Act

Section 6(a) of the WA Act provides that a payment dispute arises if 'by the time when the amount claimed in a payment claim is due to be paid under the contact, the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed' [emphasis added]. Mitchell J found that section 6(a) of the WA Act should be construed as providing that a payment dispute arises when a payment claim is rejected or disputed, even if the time for payment under the construction contract had not yet arisen. This interpretation gave meaning to all of the words in section 6(a) and achieved the purpose of the legislation, which is the speedy resolution of disputes.

Jurisdictional error - adjudicator failed to exercise or understand his function

Mitchell J found that the adjudicator failed to exercise or understand his adjudicative function and so committed jurisdictional error. The adjudicator failed to resolve the payment disputes by reference to the terms of the subcontract which was before him, thereby misapprehending the nature of his function. Not every error by an adjudicator in the interpretation of a construction contract is, however, a jurisdictional error.

Pre-disposition to grant leave to enforce adjudication determination as a judgment of the court

Mitchell J held that the court ought to grant leave to enforce a determination of an adjudicator as a judgment of the court, unless it is satisfied that a valid reason exists to refuse leave. Leave to enforce the determinations as judgments was refused because they were invalid, and because the payment required by those determinations had already been made under the Interim Deed.

Leevilla Pty Ltd v Doric Contractors Pty Ltd [2015] WASAT 127

This decision serves as a reminder that the 28 day time limit for commencing an adjudication, contained in section 26 of the WA Act, will be strictly enforced. Once the 28 day period has expired, the WA Act cannot be invoked by issuing a further invoice dealing with the same payment claims.

FACTS

Doric Contractors Pty Ltd (**head contractor**) subcontracted Leevilla Pty Ltd, trading as CBH Coastings (**subcontractor**), to complete floor works at the Jimblebar Mine site.

Pursuant to clause 17 of the subcontract, the subcontractor could claim progress payments from the head contractor. An unpaid claim was deemed to be disputed.

In June 2013, the subcontractor issued an invoice claiming $59,400 from the head contractor for variations. The head contractor did not pay. The head contractor then issued a document entitled 'Final Account' to the subcontractor. The Final Account claimed four negative variations in the sum of $51,961.43 by way of set-off. The head contractor requested that the subcontractor sign and return the Final Account, but the subcontractor did not.

On 17 January 2014, the subcontractor issued a letter of demand to the head contractor claiming $47,649.99 for variations under the subcontract. The head contractor did not respond.

On 27 January 2015, the subcontractor issued an invoice for $101,750 purporting to 'claim back' the negative variations. The head contractor did not pay the invoice.

The subcontractor applied for adjudication, seeking a determination that it was entitled to $101,750 under the subcontract. The adjudicator held that the claims were time barred and dismissed the application under section 31(2)(a) of the WA Act.

The subcontractor applied to the WA State Administrative Tribunal (**Tribunal**) for review of the decision, alleging that the adjudicator had erred in determining the date when the payment dispute arose. It argued that the head contractor's negative variations had amounted to a set-off, not a rejection of a payment claim, and that the dispute had therefore not arisen until its January 2015 invoice was deemed disputed.

DECISION

The Tribunal held that the adjudicator's decision to dismiss the application without making a determination on the merits was the correct and preferable decision. The Tribunal held that the payment disputes relating to the June 2013 invoice and the Final Account had arisen in August 2013 and not in January 2015 when the subcontractor issued the further invoice. It found that:

- the head contractor's failure to pay the June 2013 invoice on time had been conflated with its subsequent claim for the negative variations. Each claim should have been analysed separately;
- the June 2013 invoice and the Final Account had both constituted payment claims which, once they were deemed disputed under the subcontract, had given rise to payment disputes which could be determined under the WA Act;
- section 26 of the WA Act (ie adjudication application must be made within 28 days after the payment dispute arises) requires strict compliance;
- there was no evidence that the parties had been engaged in ongoing negotiations before the subcontractor issued the invoice in January 2015. Accordingly, the disputes had arisen for determination in around August 2013; and
- the subcontractor's application in March 2015 was well outside of the 28 day time limit.

Modular Forms Pty Ltd v Cecich [2015] WASAT 76

An adjudicator making a determination about a payment claim has the power to dismiss part of an adjudication application without a determination on the merits. This case highlights the importance of including adequate detail in a payment claim to ensure that it complies with the requirements under the WA Act for assessment by an adjudicator.

FACTS

Mr and Mrs Cecich (**owners**) contracted Modular Forms Pty Ltd (**builder**) to construct a development in Port Hedland. The builder issued an invoice to the owners seeking payment for the stage 1 and stage 2 developments works under the contract and subsequently applied for adjudication in relation to the dispute that arose about the Invoice.

The adjudicator determined that the owners only needed to pay one item on the invoice, finding that the remainder of the invoice was not a 'payment claim' for the purposes of the WA Act because it did not identify and describe in sufficient detail the contractual obligations that the builder claimed to have performed.

The builder sought review of the determination in the WA State Administrative Tribunal (**Tribunal**) pursuant to section 46(1) of the WA Act, arguing that the adjudicator had erred in finding that the balance of the Invoice was not a payment claim under the WA Act.

The owners argued that the Tribunal's jurisdiction to review the decision had not been enlivened because the adjudicator had not dismissed any part of the claim under section 31(2)(a) of the WA Act; the adjudicator had determined the whole of the adjudication claim on its merits under section 31(2)(b) of the WA Act.

The owners argued, in the alternative, that if the adjudicator had been empowered to dismiss part of the payment claim, and had done so without consideration on the merits, the Tribunal was only entitled to remit the decision back to the adjudicator, rather than vary the decision.

DECISION

The Tribunal affirmed the adjudicators' determination.

In doing so the Tribunal confirmed that:

- the adjudicator had been empowered to dismiss parts of the application without consideration of the merits (adopting the reasoning in such other cases as *Perrinepod Pty Ltd and Georgiou Building Pty Ltd* [2010] WASAT 136 and *Silent Vector Pty Ltd T/As Sizer Builders and Squarcini* [2008] WASAT 39, 61-65);
- in this instance, the adjudicator had dismissed only part of the application, which was the correct and preferable decision;
- the disputed items of the invoice did not contain enough detail for the owners to assess whether the payment claim should be paid, partly paid, or disputed and was therefore not a payment claim for the purposes of the WA Act;
- whether the application had been dismissed without consideration on the merits could be inferred – express dismissal was not required; and
- it was well established that when a decision under section 31(2)(a) of the WA Act is set aside by the Tribunal, the Tribunal must remit the matter to the adjudicator to make the decision, and does not have the power to vary it.

NRW Pty Ltd v Samsung C&T Corporation [2015] WASC 372

The mere existence of a claim which could be set off against a determination made under the WA Act will not prevent the determination being registered as a judgment and enforced. The intention of the WA Act is to give a subcontractor the right to a prompt determination and payment. This means an indebted party, asserting a claim which could extinguish or reduce the amount of the determination made against it, can face enforcement action against it for immediate payment.

FACTS

Samsung C&T Corporation (**Samsung**) was ordered to pay NRW Pty Ltd (**NRW**) the amount of $8,478,608.57 in an adjudication conducted under the WA Act.

NRW commenced proceedings to register the adjudication as a judgment of the court in order to seek prompt payment of the amount of the determination made by the adjudicator. In defence of the enforcement proceedings, Samsung contended that NRW's application should be refused because Samsung had a substantial claim against NRW that could be set off (ie. extinguish or reduce) against the amount it was required to pay.

DECISION

The court granted NRW's application and made orders that the judgment be registered and NRW have leave to enforce the judgment.

Master Sanderson held that there was no reason for refusing to register the adjudication as a judgment for the following reasons.

- The aim of the WA Act is to give a subcontractor a right to promptly obtain a determination and payment.
- The WA Act is designed to 'keep the money flowing'. The WA Act allows for the appointment of an adjudicator, for parties to make submissions to the adjudicator, and for the adjudicator to make a decision.
- Once an adjudication is made requiring a party to make a payment, that party must pay accordingly. A dissatisfied party has the right to take the matter to court, but no right to refuse to make the payment.
- If a party does not make payment in accordance with an adjudicator's determination, then under section 43 of the WA Act, the determination may be registered as a judgment and enforced.
- Section 43 of the WA Act seems to contemplate circumstances in which registration of a judgment could be refused. However, the mere existence of a set-off against the amount of the determination is not a reason for which a court will refuse to register a judgment and grant leave to enforce.

SC Projects Australia Pty Ltd and Sea Trucks Australia Pty Ltd v Field Deployment Solutions Pty Ltd [2015] WASAT 69

Parties wishing to access the expedited processes under the WA Act should make any application to the WA State Administrative Tribunal within the prescribed 28 day period, notwithstanding that other related proceedings are on foot. The application to the Tribunal should then be stayed pending the outcome of the other proceedings, rather than later seeking an extension of time to make the application.

FACTS

Field Deployment Solutions Pty Ltd (**FDS**) contracted with an unincorporated joint venture between SC Projects Australia Pty Ltd and Sea Trucks Australia Pty Ltd, trading as the Clough Sea Trucks Joint Venture (**supplier**) to supply tipper units. FDS claimed certain payments under the contract were not met and subsequently applied for adjudication. The adjudicator dismissed FDS' application on the ground that the application was made out of time and FDS subsequently applied to the WA State Administrative Tribunal (**Tribunal**) for a review of the adjudicator's decision.

After the Tribunal had heard the review, but before it handed down its decision, the supplier applied for separate adjudication under the contract. The Tribunal upheld the adjudicator's decision to dismiss FDS' application but on the basis that the contract was not a 'construction contract' under the WA Act. Three days later, the adjudicator (who had been sent the Tribunal's decision) applied the Tribunal's reasoning and dismissed the supplier's application.

FDS appealed to the WA Supreme Court in *Field Deployment Solutions Pty Ltd v SC Projects Australia Pty Ltd* [2015] WASC 60, who held that the Tribunal had erred in finding that the contract was not a construction contract

Some five months after its original adjudication application, the supplier applied to the Tribunal for a review of the adjudicator's determination and for an extension of time to make that application. At the time of making the applications, the supplier had already filed and served a writ in the WA Supreme Court which included a claim the subject of the adjudication.

DECISION

The Tribunal dismissed both of the supplier's applications.

As to the application for an extension of time, the Tribunal found that considerations relevant to the exercise of the discretionary power to extend the time to apply for review included:

- the length of the delay
- any reason for the delay
- the prospects of the underlying application for review succeeding
- the extent of any prejudice that would be caused to the respondent if the extension were granted.

The Tribunal took the view that the delay was considerable. Although the Supreme Court appeal had been on foot, the supplier could have applied for review within time and then sought an adjournment of the review proceedings until the court had determined the appeal. If an adjudication existed concurrently with a court proceeding, FDS would incur significant expense.

Given that the supplier had already served a writ, the Tribunal held that it was more appropriate for the matter to be resolved by the Supreme Court rather than pursuant to the WA Act's informal processes.

Accordingly, the application for review was also dismissed.

SC Projects Australia Pty Ltd v Field Deployment Solutions Pty Ltd [2015] WASC 339

A party cannot make its consent to an extension of time for the adjudicator to make a determination conditional upon the adjudicator exercising his or her powers to consider and determine the dispute in a particular way.

FACTS

Issues arose in a contract between SC Projects Australia Pty Ltd (**SCP**) and Field Deployment Solutions Pty Ltd (**operator**) that required the operator to demobilise its equipment. The operator failed to do so and SCP terminated the contract, removed the equipment and then made a payment claim for the demobilisation costs. The operator did not pay the costs and SCP applied for adjudication.

The adjudicator requested for an extension of time for making the determination. SCP consented. The operator's consent stated that it objected to SCP providing further material to the adjudicator. The adjudicator subsequently requested further material from the parties and then allowed the claim for demobilisation costs.

SCP commenced proceedings in the WA Supreme Court to enforce the determination. The operator counterclaimed for a declaration that the adjudicator's determination was invalid, alleging that the adjudicator had fallen into jurisdictional error by:

- holding that contractual terms implied by the WA Act survive termination of the contract and finding that a payment claim based on an implied term in the contract could be made after the contract was terminated;
- taking into account irrelevant considerations (being the further materials provided by SCP in response to the adjudicator's request); and
- delivering determination late because he had not complied with by the condition attached to the operator's agreement to the extension.

DECISION

The court upheld the determination of the adjudicator and granted SCP leave to enforce the determination as an order of the court.

Terms implied by the WA Act survived termination

Mitchell J held that SCP's rights in respect of the operator's breach of its obligation to demobilise had accrued by the time the contract was terminated. It was therefore not unreasonable to conclude that the implied provision survived termination. His Honour also held that section 53 of the WA Act prevents parties from contracting out of the WA Act. Terms implied by the WA Act will prevail to the extent that they are inconsistent with a contract's express terms.

Submissions were not irrelevant

His Honour found that the determination was delivered within time and also held that the adjudicator's receipt of SCP's further submissions was within power and that those submissions could not be characterised as an irrelevant consideration when making a determination because:

- pursuant to section 32(3)(a) of the WA Act, the adjudicator had the power, with the consent of the parties (which was obtained), to extend the time for making a determination; and
- the operator's consent could not validly be made conditional on how the adjudicator chose to exercise his powers in considering the payment dispute.

Australian Capital Territory

CASE INDEX

- *Fulton Hogan Construction Pty Ltd v Brady Marine & Civil Pty Ltd* [2015] ACTSC 384
- *Winyu Pty Ltd v King & Anor* [2015] ACTSC 387

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

ACT overview

EMERGING TRENDS

Unlike some other jurisdictions, the ACT legislation has a prescriptive right to appeal the decision of an adjudicator. However, filing an appeal is, by its nature, a time consuming and expensive process. Proceedings filed pursuant to section 43 of the ACT Act are often protracted by multiple interlocutory proceedings for security for costs, payments into court, and orders about the application or release of security.

The delays associated with these appeals are contrary to the intention that the ACT Act allow rapid, low cost resolution. This inconsistency was discussed by Associate Justice Mossop in *Fulton Hogan Construction Pty Ltd v Brady Marine and Civil Pty Ltd* [2015] ACTSC 384. His Honour recommended the legislature revisit the inconsistency between section 43 of the ACT Act and the overarching purpose of efficiency and timely payment of progress claims. It remains to be seen whether the legislature will proactively intervene to amend the appeal right, or prescribe a process for the management of such disputes to avoid the appeal process undermining the overarching purpose of the ACT Act.

DEVELOPMENTS

2015 has seen relatively few cases brought under the ACT Act. Nevertheless the courts have provided further clarification of the operation of the ACT Act. It is continuing to be used more widely in the industry and further cases are expected.

One substantive decision was handed down in 2015, being *Fulton Hogan Construction Pty Ltd v Brady Marine and Civil Pty Ltd* [2015] ACTSC 384. This case considered whether an adjudicator had erred in his consideration of a claim in estoppel raised by the claimant. Notably, even though neither party had raised the issue of reliance in the adjudication, Associate Justice Mossop held there was a manifest error on the face of the decision, the appeal was successful, and the decision was remitted to the adjudicator for consideration. The ACT Supreme Court has significantly improved its efficiency in determining claims under the ACT Act. In *Fulton Hogan Construction Pty Ltd v Brady Marine and Civil Pty Ltd* the relevant payment claim was served on May 2015, proceedings heard in September 2015, and judgment delivered on 8 December 2015.

Following *Denham Constructions Project company 810 Pty Ltd v Risgalla & Anor* (reviewed our 2014 Roundup), in 2015 the court revisited this dispute to consider whether the order made in relation to the legal costs of the 2014 decision could be re-examined, notwithstanding the resolution of the primary subject matter of the dispute (*Denham Constructions Project Company 810 Pty Ltd v Risgalla (No 2)* [2015] ACTSC 30). The court held that the respondent's actions in paying a claimed amount to the claimant six months after the relevant order did not constitute unreasonable behaviour and did not justify making a 'costs below' order, which would have required the respondent to pay the claimant's costs of the original proceedings.

FUTURE

Despite the 2013 review of the ACT Act and indications that 2015 would see significant changes, no substantive amendments have been introduced. We can, however, expect to see increasing judicial consideration of the ACT Act as it becomes more widely used.

With a review of the ACT's residential building legislation currently underway, we expect the operation of the ACT Act will also be reviewed and consideration given to amendments to bring the ACT Act in line with other jurisdictions such as NSW.

Fulton Hogan Construction Pty Ltd v Brady Marine & Civil Pty Ltd [2015] ACTSC 384

Application for appeal for leave under section 43 of the ACT Act due to a manifest error of law that could substantially alter the rights of the parties can succeed even if the question of law was not raised during the adjudication.

FACTS

Brady Marine & Civil Pty Ltd (**subcontractor**) made a payment claim to Fulton Hogan Construction Pty Ltd (**head contractor**) in respect of a contract between them (**contract**) that formed part of construction work on the Majura Parkway.

The matter went to adjudication. The adjudicator determined in favour of the subcontractor. He based his decision on a finding that, since the head contractor had not previously refused payment by objecting to the subcontractor's failure to comply with contract terms that prescribed procedures for variations and notice requirements for price adjustments, the head contractor was now prevented from doing so under the legal principles of 'waiver or estoppel' (**key finding**).

The head contractor applied for leave under section 43(3)(b) of the ACT Act to appeal against the adjudicator's decision. The head contractor argued that the adjudicator made a manifest error of law in the key finding when he failed to consider the legal requirement of 'reliance'–whether or not the subcontractor relied on the head contractor's previous failure to object–and the error could substantially affect the rights of the head contractor and/or the subcontractor under the ACT Act.

The subcontractor argued that even if an error had occurred, it was not 'manifest' and it could not substantially affect the parties' rights because the head contractor had misinterpreted the contract terms.

Neither party raised the issue of 'reliance' during the adjudication.

DECISION

Mossop AsJ exercised his discretion and ruled in favour of the head contractor. His Honour held that it was appropriate to remit the adjudication decision back to the adjudicator rather than to amend the decision or set it aside as the adjudicator was best placed to determine whether or not 'reliance' could be established on the material available.

Manifest error of law

The court held that a manifest error of law existed on the face of the adjudication decision because it was apparent from his reasons that the adjudicator made no finding as to 'reliance'. The court held that a person's failure to rely on a contract term (or representation that the term would not be relied upon) does not, without more, alter (or prevent the other party from relying on) the provisions of the contract.

Legal rights of the parties substantially affected

The court held that the manifest error of law could have a substantial impact on the amount adjudicated as payable under the ACT Act and therefore could have substantially affected the rights of the parties. His Honour ruled that he could make this finding despite the interim nature of adjudications under section 38 of the ACT Act; otherwise there is no use for the appeal process in section 43 of the ACT Act.

Even if the subcontractor's interpretation of the contract terms was correct, his Honour was not convinced that the adjudicator would have determined the head contractor was obligated to pay the same amount.

Winyu Pty Ltd v King & Anor [2015] ACTSC 387

This case highlights the importance of keeping thorough and accurate records of work to ensure a claim can be supported by evidence. There was not enough evidence to prove the claimant had done the work within the 12 month period required by the ACT Act, and the claimant was not entitled to be paid.

FACTS

The plaintiff, Winyu Pty Ltd (**principal**), contracted with Mr Gelonese (**contractor**), the second defendant, to complete plumbing work at Tamar House, a building being redeveloped to become part of Uni Pub, in Canberra City. The contractor issued a payment claim to the principal on 30 June 2015 and was successful in his adjudication application seeking payment of the claim.

The principal then sought a declaration from the court that the decision of the first defendant, the adjudicator, was invalid for lack of jurisdiction. Specifically, it alleged the contractor's payment claim was not for work within the 12 month period after completion of the works as required by section 15(4)(b) of the ACT Act.

The principal argued that the contractor had done no further work after 14 May 2014. In contrast, the contractor claimed he worked up until September 2014. The case turned on the facts, namely whether the contractor had carried work out on the site after 30 June 2014.

DECISION

The court held that the contractor's payment claim was invalid and declared the adjudication decision to be invalid.

Associate Justice Mossop found that the evidence did not support the contractor's claim that he had continued to work after 30 June 2014. Accordingly, his Honour held the adjudication decision in favour of the contractor was invalid for lack of jurisdiction.

Evidentiary factors to consider in a payment claim

His Honour found that there were several factors which were inconsistent with the contractor's claims:

- timesheets dated after 30 June 2014 were not prepared by the contractor, but by his wife, which was not explained and contrary to affidavit evidence;
- the site manager gave persuasive evidence that the contractor was not present during the relevant period;
- the contractor was vague in descriptions of the work, which was inconsistent with his claim that he had worked a further 360 hours after 30 June 2014;
- the contractor was most likely aware that the principal purported to terminate his contract, especially as an alternative contractor was working on the site;
- the contractor did not correspond with the principal after May 2014; and
- the amount claimed by the contractor in separate proceedings commenced in the ACT Magistrates Court was inconsistent with his evidence in these proceedings.

South Australia

CASE INDEX

- *Jamestown Operations Pty Ltd v Plympton Steel Pty Ltd* [2015] SADC 126
- *Tagara Builders P/L v AP&L Services P/L & Ors* [2015] SASC 30

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

SA overview

EMERGING TRENDS

Jurisprudence on the SA Act continues to grow, with NSW authorities still providing some guidance.

DEVELOPMENTS

This year saw further judicial consideration of the SA Act in the Supreme Court.

The Supreme Court confirmed that an adjudicator does not have jurisdiction to make a determination under the SA Act if a claimant is disentitled to payment under the contract by virtue of not holding a contractor's licence under the *Building Work Contractors Act 1995* (SA) (*Tagara Builders Pty Ltd v AP&L Services Pty Ltd & Ors* [2015] SASC 30).

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.

Jamestown Operations Pty Ltd v Plympton Steel Pty Ltd [2015] SADC 126

An interlocutory injunction restraining a defendant from registering an adjudication secured under the SA Act but pending review by a higher court will only be granted if the plaintiff's claim has sufficient prospects of success and, in the event of a successful verdict, there is a real risk that the defendant would be unable to repay the money it has received

FACTS

Jamestown Operations Pty Ltd (**principal**) entered into a contract with Plympton Steel Pty Ltd (**contractor**) to construct and build a solar array and related machinery. The contractor made a claim for progress payments pursuant to the SA Act in respect of the work it had performed. The principal responded with a payment schedule to the contractor and the matter went to adjudication. In early August 2015, the appointed adjudicator determined under the SA Act that the payment schedule was not satisfactory and the amount payable by the principal in respect of the progress payments was $161,284.80 plus GST.

The principal applied to the Supreme Court seeking judicial review of the adjudication decision on the basis of jurisdictional error on the part of the adjudicator. The principal argued that:

- contractual completion was an essential precondition to the raising of an invoice and to any liability to pay; and
- the adjudicator had failed to consider the fundamental question of whether completion under the contract had occurred and, accordingly, whether any payment should be made pursuant to it.

The principal sought an injunction to prevent the contractor from registering its adjudication decision as a judgment, pending the verdict of the Supreme Court review.

The principal claimed it was entitled to an injunction because:

- it had sufficient prospects of success in its judicial review application seeking to declare the adjudication invalid and/or sufficient prospect of success in its damages claim; and
- if no injunction was granted, the contractor would be unable to repay the money to the principal as a result of the adjudication being overturned or if damages were awarded in the judicial review decision.

DECISION

The court dismissed the principal's interlocutory injunction application.

Streeton J stated that the test for the injunction of an adjudication decision is whether the plaintiff's claim has sufficient prospects of success, and whether in the event of the successful decision, there is a real risk that the defendant will be unable to repay the monies it has received.

In applying this test, his Honour found that while there was a potentially substantial dispute as to the adequacy of the construction work – there was also an issue of whether the fault was caused by the contractor or the original designer of the work. Whilst the principal had a moderate potential claim for damages, the argument for judicial review on the basis of jurisdictional error in relation to the adjudication decision was 'arguable, but weak'. Additionally, there was no indication whatsoever on the basis of evidence provided that the contractor would have any problem repaying the adjudication amount should it be required to do so at any stage in the future.

Tagara Builders P/L v AP&L Services P/L & Ors [2015] SASC 30

An adjudicator does not have jurisdiction under the SA Act if the claimant is disentitled to payment under the contract by virtue of not holding a contractor's licence.

FACTS

Tagara Builders Pty Ltd (**head contractor**) subcontracted the installation of ceilings and linings to AP&L Services Pty Ltd (**subcontractor**).

The subcontractor was dissatisfied with the head contractor's payment schedule served in response to a progress claim and applied for adjudication under section 17 of the SA Act. On 3 December 2014 the appointed adjudicator determined under section 22 of the SA Act that the amount payable by the head contractor in respect of the progress claim was $42,963.79 plus GST.

The subcontractor was dissatisfied with the head contractor's payment schedule service in response to a subsequent progress claim and applied for a second adjudication on 10 December 2014.

On 11 December 2014, the head contractor became aware that the subcontractor did not hold a contractor's licence under section 6 of the *Building Work Contractors Act 1995* (SA) (**BWC Act**).

On 15 December 2014, the head contractor instituted action seeking to quash the determination of the second adjudication. The head contractor argued that the subcontractor was not entitled to payment under the subcontract and the adjudicator had no jurisdiction as the subcontractor did not hold a contractor's licence as required under section 6 of the BWC Act.

DECISION

The court found in favour of the head contractor and held that the adjudicator's decision — that the subcontractor was entitled to money on its claim — was void.

Blue J held that:

- the subcontractor was not entitled as a result of section 6(2) of the BWC Act to payment of the contract price or other consideration under the subcontract for performing the work;
- the subcontractor was therefore, not entitled to payment of any progress payments within the meaning of section 13 of the SA Act; and
- the adjudicator, in turn, had no jurisdiction to make a determination.

Tasmania

CASE INDEX

- *R v Pettersson; ex parte Fenshaw Pty Ltd* [2015] TASSC 33

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

R v Pettersson; ex parte Fenshaw Pty Ltd [2015] TASSC 33

Parties required to pay an amount determined by an adjudicator may be required to pay the adjudicated amount into court even if they have commenced a proceeding which, if successful, would relieve them of the requirement to pay.

FACTS

An adjudicator, Mr Pettersson, determined that Fenshaw Pty Ltd (**Fenshaw**) was to pay Water Industry Solutions Pty Ltd (**WIS**) $617,958.74 plus statutory interest (**adjudicated amount**). WIS filed the adjudication certificate in court as a judgment debt against Fenshaw but did not succeed in recovering the debt from Fenshaw.

Fenshaw then obtained a 'general order to show cause' in respect of the determination (**show cause application**), arguing:

- the adjudicator lacked jurisdiction due to WIS' failure to comply with section 17 of the Tas Act and this was a denial of natural justice; and
- the adjudicator failed to exercise, and exceeded, his jurisdiction in aspects of his determination and also erred in law.

The court set a date for a hearing at which questions about the enforceability of the determination would be decided (**hearing**).

At about the same time, WIS sought from the court a stay of the hearing until Fenshaw had paid into court as security the adjudicated amount under section 27(5) of the Tas Act which provides:

> *If the respondent commences **proceedings to have the judgement set aside**, the respondent –*
>
> *(a) is not in those proceedings, entitled – ...*
>
> *(iii) to **challenge the adjudicator's determination**; and*
>
> *(b) must pay into court as security the unpaid part of the adjudicated amount, pending the final determination of those proceedings [emphasis added].*

DECISION

The court ordered that the hearing and determination of the show cause application be stayed until Fenshaw the adjudicated amount into court. Porter J held that section 27(5)(b) of the Tas Act did not apply and exercised the court's inherent and unfettered jurisdiction to grant a stay of the hearing.

Porter J also considered whether the show cause application 'challenged the adjudicator's determination' for the purposes of section 27(5)(a)(iii) of the Tas Act or asked the court to simply set aside the determination. Applying the remarks of Basten JA in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 383, his Honour held that the show case application alleged that the power to adjudicate was not exercised correctly which was different to a challenge of the correctness of a determination.

His Honour applied *Nazero Group Pty Ltd v Top Quality Constructions Pty Ltd* [2015] NSWSC 232. In that case, Hammerschlag J stated that the policy of the NSW Act supported an order for a temporary stay of the proceeding pending payment of an adjudicated amount.

Northern Territory

CASE INDEX

- *Lend Lease Building Contractors Pty Ltd t/as Sitzler Baulderstone Joint Venture v Honeywell Limited t/as Honeywell Building Solutions & Anor* [2015] NTSC 10

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

NT overview

EMERGING TRENDS

With further judicial consideration of the NT Act in 2015, the NT is developing a significant body of case law on the NT Act.

DEVELOPMENTS

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

The Supreme Court upheld a complex determination by an adjudicator, finding that any errors made by the adjudicator were errors made within jurisdiction because:

- the adjudicator had made a bona fide attempt to determine whether money was payable, and how and when that money should be paid; and
- there was nothing on the face of the adjudicator's determination to indicate that the adjudicator had misconstrued the NT Act or gone outside his allocated role in determining whether money was owed.

(*Lend Lease Building Contractors Pty Ltd t/as Sitzler Baulderstone* [2015] NTSC 10).

FUTURE

The NT is now developing its own body of case law in relation to 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.

Lend Lease Building Contractors Pty Ltd t/as Sitzler Baulderstone Joint Venture v Honeywell Limited t/as Honeywell Building Solutions & Anor [2015] NTSC 10

This case is an example of errors made within jurisdiction by an adjudicator.

FACTS

Lend Lease Building Contractors Pty Ltd t/as Sitzler Baulderstone Joint Venture (**SBJV**) and Honeywell Limited t/as Honeywell Building Solutions (**subcontractor**) entered a subcontract for Honeywell to carry out building works on the new prison facility in Darwin.

The subcontractor applied for adjudication of two payment claims which it had served on SBJV. In its adjudication response, SBJV argued that the subcontractor was not entitled to payment because it had breached its contractual obligation by failing to replace a bank guarantee which had expired prior to the issuing of the payment claims.

The subcontractor accepted that the bank guarantee had expired but argued that the adjudicator could determine that:

- SBJV must pay the payment claims despite Honeywell's breach of the contract;
- SBJV must withhold from the payment claims an amount to the value of the outstanding bank guarantee and pay the balance to Honeywell; or
- both payment claims would not be payable until 7 days after the subcontractor replaced the expired bank guarantee.

The adjudicator dismissed the first payment claim which was not challenged on appeal. In respect of the second payment claim, the adjudicator concluded that the subcontractor was entitled to part of the adjudicated amount after the replacement of the bank guarantee and to the balance of the adjudicated amount within 7 days of his decision (**conclusion**). The adjudicator then determined that SBJV must pay the subcontractor $734,639.30 and $254,497.86 respectively.

SBJV appealed the decision on the basis that the adjudicator made a jurisdictional error under section 33(1)(b) of NT Act in coming to his conclusion. SBJV contended that the conclusion meant that they did not have a present liability to make a payment because of the absence of the bank guarantee. Consequently, the adjudicator had no jurisdiction to determine that amounts were payable by SBJV.

DECISION

The court found in favour of the subcontractor and dismissed the appeal.

Kelly J held that there is nothing on the face of the adjudicator's determination to indicate that he had misconstrued section 33(1)(b) of the NT Act or gone outside his allocated role in determining whether SBJV owed money to the subcontractor.

His Honour found that the adjudicator, having determined not to dismiss the application, made a bona fide attempt to determine whether SBJV was liable to pay money to the subcontractor, how much was payable and when it should be paid. His Honour construed the conclusion to mean a finding that SBJV was liable to pay once the bank guarantee was replaced. His Honour also took the view that it was not necessary to decide if the adjudicator made any errors in determining the merits of the application and that any such errors were made within jurisdiction and beyond the power of the court to correct.

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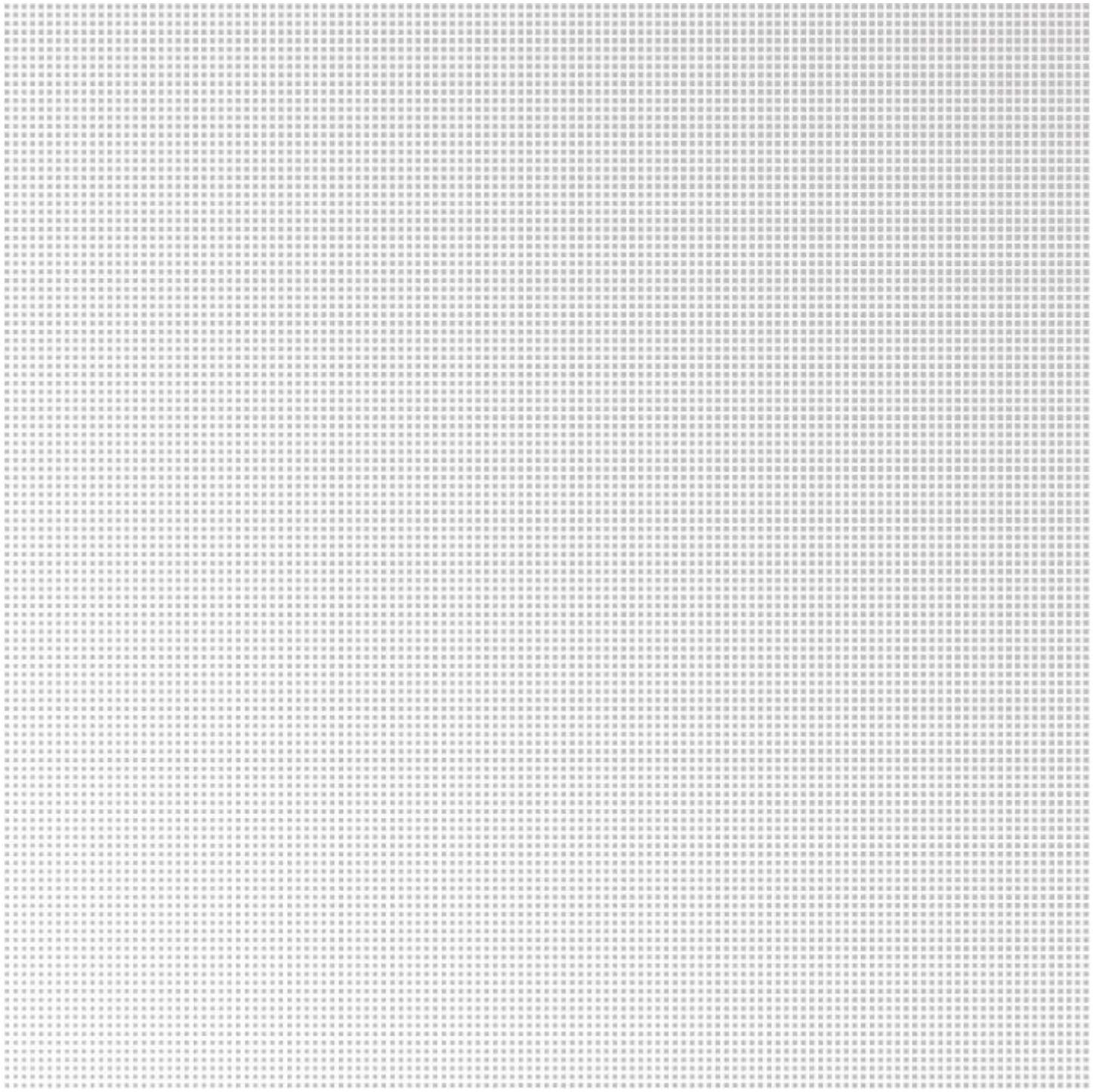

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