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National overview

High Court considers SOPA – What next?

There was great excitement (well at least among the construction legal fraternity) this year as the High Court got its first taste of security of payment. And they got it right. The High Court decided in *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd* [2016] HCA 53 that a payment claim made without a valid reference date will be liable to be quashed. NSW also received further important decisions on the jurisdiction of adjudicators and jurisdictional error while Western Australia got amendments to their *Construction Contracts Act 2004* (WA).

In Queensland the changes to the *Building and Construction Industry Payments Act 2004* (Qld) in 2014—enabling the court to sever parts of an adjudicator's decision affected by jurisdictional error from the other parts unaffected by such error—appear to have resulted in a marked drop off in applications to the court as claimants have lost the tactical advantage of a challenge on an 'all or nothing' basis.

The Victorian judgments issued by the courts in 2016, showed a willingness to grant injunctions restraining the enforcement of adjudication determinations when a party alleged an error of law on the face of the determination.

The year ended with an interesting development on the federal front with the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) – the legislation that introduced the Building Code 2016—providing for the creation of the Security of Payments Working Group to investigate harmonisation of the security of payment legislation across Australia. That could be an interesting development over the next year or so.

We hope you enjoy our comprehensive summary of the key security of payment decisions in 2016. If you have any feedback or questions we would love to hear from you.

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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**.

New South Wales overview

EMERGING TRENDS

This year seemed to be all about jurisdiction with the decisions clarifying parties rights to challenge the determinations of adjudicators for jurisdictional error.

DEVELOPMENTS

A number of cases clarified what is jurisdictional error.

The *Southern Han* decisions which traversed the NSW Supreme Court, NSW Court of Appeal and High Court swayed backward and forwards before settling that the existence of a reference date was effectively a basic and essential requirement (as laid down in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394 (***Brodyn***) so that if one doesn't exist to found a payment claim any adjudication determination based on such a payment claim will be quashed. The High Court also confirmed that a reference date did not arise after termination unless the contract provides otherwise.

The *Shade Systems v Probuild* decisions ([2016] NSWCA 379 and [2016] NSWCA 382) also followed *Brodyn* in confirming that now jurisdictional challenge lies where the adjudicator makes an error at law (no matter how bad that error is).

In line with the approach in Queensland, the NSW Supreme Court has found in *J Hutchinson v Glavcom* [2016] NSWSC 126 that a clause in a contract which requires an additional condition to be met (in this case a statutory declaration in relation to payment of workers compensation insurance premiums) for a reference date to arise and a right to obtain a progress payment is contrary to the NSW Act.

FUTURE

There does not seem to be any appetite for any more change to the NSW Act at the moment. Even if there was such an appetite the establishment of the federal Security of Payments Working Group to look at harmonisation may well have quenched the appetite for the time being.

The process and outcomes of the review by the Security of Payments Working Group will be keenly awaited as we consider this to be the next steps in the development of the security of payment legislation.

The *J Hutchinson v Glavcom* [2016] NSWSC 126 decision may provide the impetus for the next round of security of payment legislative challenges. This is because the current drafting of many construction contracts provides that the contractor's entitlement to be paid (as opposed to the right to make a payment claim) is subject to compliance with a number of conditions. A further alternate drafting that may be subject to challenge provides that the principal/superintendent is entitled to value the works at 'nil' if the contractor does not comply with a number of conditions. The jury is currently out whether these formulations are void.

Alucity Architectural Produce Supply Pty Ltd v Australian Solutions Centre; Alucity Architectural Produce Supply Pty Ltd v Paul J Hick [2016] NSWSC 608

A determination by an adjudicator that he or she has no jurisdiction is a 'determination' for which the adjudicator is entitled to his or her fees.

FACTS

Alucity Architectural Produce Supply Pty Limited (**claimant**) made a payment claim toEmpire Windows Pty Limited (**respondent**)—who was not a party to this case—under a building contract. The claim was disputed and then resolved by adjudication. The claimant then made a second payment claim to the respondent.

The respondent responded to the second payment claim with a payment schedule asserting that it was invalid under section 13(5) of the NSW Act because the second payment claim related to the same reference date as the earlier payment claim.

The claimant submitted an adjudication application (**application**).

The adjudicator determined that there was no available reference date and accepted that the second payment claim was invalid. As there was no valid payment claim, the adjudicator determined that he had no jurisdiction to determine the claim.

The claimant paid the fee of the adjudicator as well as the service fees of Australian Solutions Centre Pty Ltd (**Authority**). The claimant then commenced proceedings torecover the fees asserting that, as the adjudicator had found that he had no jurisdiction, he therefore had not made a determination and was therefore not entitled to his fee.

At the hearing, the claimant abandoned claims for misrepresentation, misleading or deceptive conduct and deceit.

DECISION

The court dismissed the remaining claims, rejecting all of the claimant's submissions as without merit or foundation and in one instance as 'eccentric', instead finding that:

- the adjudicator was entitled to his fee as he had given appropriate consideration to the application before determining that it was invalid under the NSW Act; and
- the Authority was entitled to its fee as it had dealt with the application correctly according to the NSW Act.

Hammerschlag J recorded his disapproval of 'groundless proceedings such as these' out of concern that adjudicators might otherwise be disinclined to accept appointments.

Bellevarde Constructions Pty Ltd v Cosmas Pty Ltd [2016] NSWSC 406

The Commercial List and Technology and Construction List Practice Note SC Eq 3 states that '*as a general rule applications … for summary judgment will not be entertained*', and the court was unwilling to depart from this general rule where the application involved 'complex circumstances' and conflicting lines of authority.

FACTS

Pursuant to a contract dated 29 August 2014 (**contract**), Bellevarde Constructions Pty Ltd (**claimant**) carried out work for the defendant, Cosmas Pty Ltd (**respondent**) on a property in King Street, Sydney. The respondent was the registered proprietor of the property.

Under clause 27 of the contract, the respondent charged the parcel of land on which the construction was taking place with the due payment to the claimant of all moneys that may become payable to the claimant by virtue of the contract or otherwise arising from the carrying out of the works.

In May 2015, the parties were in dispute, and the claimant ceased work in September 2015. On 17 September 2015, the respondent purported to terminate the contract and engaged another contractor.

The claimant obtained an adjudication determination in its favour under the NSW Act for some of the claimed amount. The claimant then registered the adjudication certificate and obtained judgment against the respondent in the sum of $986,703.60.

The claimant then commenced proceedings seeking, amongst other things, a declaration that the property is charged with payment to the claimant to the amount due under the adjudication and judicial sale of the property.

The respondent filed a cross-summons and cross-claim, after which numerous matters were settled out of court.

The claimant maintained its claim for a declaration and an order for judicial sale. The claimant sought summary judgment for that relief.

DECISION

The court dismissed the claimant's application for summary judgment with costs.

Stevenson J held that the claimant had not demonstrated clearly beyond argument that it was entitled to the remedy sought.

In relation to the claimant's right for an order for judicial sale, his Honour considered the authorities to be 'by no means clear', and as such it was not appropriate to seek to resolve the lines of authority on an application for summary judgment.

As to whether the court should exercise a discretion to order judicial sale, his Honour considered there were a number of factors relevant to the exercise of discretion which made it inappropriate to order summary judgment. Those factors included:

- the respondent had a claim for damages against the claimant which would not be resolved until the final hearing;
- any security the claimant had over the property arising from clause 27 of the contract was unlikely to be eroded before the hearing, and the claimant could protect its interest by lodging a caveat; and
- there were concerns regarding the claimant's financial position.

Given the conclusions reached in relation to judicial sale, his Honour did not consider it appropriate to express a view on the proper construction of clause 27 of the contract.

Duffy Kennedy Pty Ltd v Lainson Holdings Pty Ltd [2016] NSWSC 371

A payment claim served by a head contractor without a supporting statement will not be validly served under section 14(4) of the NSW Act, and the respondent will therefore not be liable to pay the claimed amount even if the respondent does not provide a payment schedule.

FACTS

Duffy Kennedy Pty Ltd (**claimant**) applied for summary judgment against Lainson Holdings Pty Ltd (**respondent**) in respect of unpaid amounts of two progress payments alleged to be due under the NSW Act (**Payment Claim 1** and **Payment Claim 2** respectively). The claimant claimed $760,943.41 (the amount of Payment Claim 2), or $411,942.85 (the amount of Payment Claim 1) in the alternative.

The claimant had issued Payment Claim 1 on 1 September 2015 without a supporting statement. An earlier iteration of Payment Claim 1 dated 17 August 2015 (**17 August Claim**) included a statutory declaration stating that the claimant had paid all subcontractors engaged in works under the contract.

On 15 September 2015 the claimant issued Payment Claim 2. Although Payment Claim 2 was issued without a supporting statement, it did include the full amount claimed in Payment Claim 1.

At the time the claimant sought leave to apply for summary judgment, the respondent admitted that the circumstances in section 15(1) of the NSW Act (including that the respondent was 'liable to pay the claimed amount') existed in relation to the claimant's claim for $760,943.41 (**Admission**).

The claimant submitted that:

- Payment Claim 1 was a revision of the 17 August Claim, which was accompanied by a statutory declaration that satisfied the requirements for a supporting statement; and
- the failure by a head contractor to serve a supporting statement with a payment claim in accordance with section 13(7) of the NSW Act did not have the consequence that the payment claim had not been served for the purposes of section 14(4) of the NSW Act.

During the hearing, Meagher JA pointed out that the Admission did not accord with the evidence that no supporting statement had accompanied Payment Claim 1 or Payment Claim 2. Unsurprisingly, the respondent then sought to withdraw the Admission.

DECISION

The court dismissed the claimant's application for summary judgment.

Meagher JA allowed the respondent to withdraw the Admission and rejected the claimant's submissions, finding that neither payment claim had been validly served under the NSW Act, on the following bases:

- the statutory declaration that accompanied the 17 August Claim was not in the form required by the *Building and Construction Industry Security of Payment Regulation 2008* (NSW);
- the 17 August Claim was served earlier than Payment Claim 1 and was for a different amount; and
- the relevant case authorities have established that service contrary to section 13(7) of the NSW Act is not service for the purposes of the NSW Act.

Hakea Holdings Pty Limited v Denham Constructions Pty Ltd; BaptistCare NSW & ACT v Denham Constructions Pty Ltd [2016] NSWSC 1120

A court may grant a stay or injunction preventing the enforcement of an adjudication determination where it can be established that the beneficiary of that determination is insolvent or at risk of going insolvent and depending on the strength of the applicant's claim against that party. If a respondent has serious concerns about the solvency (rather than an actual insolvency) of a claimant, it can now challenge adjudication determinations.

FACTS

The court examined two applications made in separate proceedings.

The first application was brought by Hakea Holdings Pty Limited (**Hakea**) in respect of an adjudication determination in favour of the contractor, Denham Constructions Pty Ltd (**Denham**), valued at $1,138,045.33 (***Hakea* proceedings**).

The second by BaptistCare NSW & ACT (**BaptistCare**) in respect of a judgment obtained in the NSW District Court for $475,322.32 relying on an adjudication certificate for that amount (***BaptistCare* proceedings**).

Both applications sought orders of a stay or injunction preventing Denham from obtaining the benefit of those adjudication determinations on the basis that Denham is insolvent or at a substantial risk of becoming insolvent.

DECISION

The court held it would continue the orders previously made in both proceedings restraining Denham from enforcing the adjudication determinations.
In determining whether to grant a stay and/or injunction, Ball J balanced two competing policies of the NSW Act:

- that contractors should be paid promptly for the work done; and
- that payment under the NSW Act is not intended to affect the rights of parties under the construction contract (and section 32 of the NSW Act provides that a court hearing a dispute may make orders as it considers appropriate for the restitution of any amount paid pursuant to the outcome of an adjudication application).

The factors that the court will consider in balancing those polices are:

- the strength and basis of the applicant's claim (including whether the applicant has challenged the debt);
- the likelihood that the contractor will be unable to repay the amount; and
- the risk that the contractor will become insolvent.

Strength of applicant's claim

In the *BaptistCare* proceedings, the court considered the parties' respective arguments as to whether BaptistCare was entitled to terminate the contract between it and Denham. BaptistCare had initially served a notice purporting to terminate the contract for convenience but later sought to exercise its right to terminate due to an insolvency event and withdraw its original notice. His Honour was of the view that it was difficult to see why BaptistCare was not entitled to enforce its termination rights as it did.

In the *Hakea* proceedings, Hakea served a show-cause notice on Denham arguing several substantial breaches of contract, including failure to bring works to practical completion by the date for practical completion. Denham argued that it had not been in substantial breach of the contract when Hakea terminated the contract between them. Ball J found that Hakea had a strong case that it was entitled to terminate its contract with Denham.

Denham's financial position

His Honour confirmed that '*the relevant question is not whether Denham is solvent or insolvent, but rather the likelihood that Hakea and BaptistCare will be able to recover the amounts paid by them if ultimately they succeed in their claims against Denham*' but recognised there was a close relationship between the two issues.

On review of Denham's financial position, his Honour concluded:

- there was a substantial risk that Denham would become insolvent in the near future which would have a significant effect on the recoverability of any amounts paid by BaptistCare and Hakea;
- Denham was likely to have 'a substantial deficiency in current assets to meet its current liabilities indefinitely' and its business prospects were unlikely to improve; and
- taken together, these considerations strongly favoured a stay and the continuation of any injunction preventing Denham from enforcing the adjudication determination and judgment in its favour.

His Honour also stated that if it had been required to decide Hakea's alternative argument regarding the right to withhold payment due to Denham's failure to provide a subcontractor's statement, his Honour would have decided that this right could not displace a judgment debt or provide a ground for granting a stay or an injunction.

J Hutchinson Pty Ltd v Glavcom Pty Ltd [2016] NSWSC 126

In line with the approach in Queensland, the NSW Supreme Court has found that a clause in a contract which requires an additional condition to be met (in this case a statutory declaration in relation to payment of workers compensation insurance premiums) for a reference date to arise and a right to obtain a progress payment is contrary to the NSW Act.

The decision also reinforces the difficultly in establishing fraud. For obvious reasons the subcontractor did not lead evidence from any of the employees who may have been responsible for preparing the statutory declaration in question and the court considered it reasonable for the director to rely on those employees in signing the declaration without investigating the matters further.

FACTS

Glavcom Pty Ltd (**claimant**), served a payment claim on J Hutchinson Pty Ltd (**respondent**) for the sum of $2,948,510 in relation to works carried out under a subcontract. The respondent served a payment schedule in response stating the amount owed as -$6,322,578.96, which included a set-off claim of over $4m in liquidated damages for delay in completing the work. The adjudicator found in favour of the claimant and awarded the claimant $1,263,399.

The subcontract contained a clause which required the submission of statutory declarations providing that:

- the claimant had paid all employees and suppliers in respect of works under the subcontract; and
- all workers compensation insurance premiums had been paid under the subcontract.

Under the subcontract, the submission of these declarations was a precondition to a reference date arising under the NSW Act and the claimant being entitled to make a payment claim under the NSW Act and the subcontract.

The respondent applied to the NSW Supreme Court to set aside the determination on a number of jurisdictional grounds:

DECISION

The court dismissed the respondent's application in favour of the claimant.

Director not required to undertake separate investigation before making statutory declaration

The respondent submitted that by swearing a false declaration and placing it before the adjudicator, the claimant obtained a determination in its favour by fraud and that determination should be set aside. The claimant argued that the director who signed the declaration had not acted fraudulently as he did not know that its contents were false nor was he recklessly indifferent to that fact.

Ball J was not satisfied that the allegation of fraud had been made out and:

- accepted the director's evidence that he was not usually responsible for administrative matters and held that he was entitled to rely upon what he was told by those others involved in those matters (and was not required to undertake his own investigation of the matter); and
- declined to draw any adverse inference from the fact that none of those responsible for administrative matters gave evidence.

Clause specifying preconditions to progress payments void under the NSW Act

Ball J held that, in any event, the validity of the declaration was irrelevant as it was only furnished pursuant to a clause in the subcontract which implemented a precondition to the occurrence of a reference date, making the clause itself void under section 34 of the NSW Act and outside the jurisdiction of the adjudicator.

His Honour noted that whilst section 8 of the NSW Act allows a contract to provide a mechanism for the fixing of a reference date, this could not be interpreted to allow preconditions to be attached to the occurrence of a reference date or the entitlement to receive a progress payment. As such, the clause sought to modify or restrict the operation of the NSW Act and was void under section 34 of the Act.

His Honour rejected the respondent's submission—in reliance on *Lewence Constructions Pty Ltd v Southern Han Breakfast Point* [2015] NSWCA 288 (which was analysed in our Roundup of 2015 cases)—that whether a reference date arises is not a jurisdictional fact and therefore for the adjudicator alone to decide. His Honour's opinion was that it does not follow that any decision taken by the adjudicator in relation to that question cannot involve jurisdictional error. In this case it was not open to the adjudicator to seek to apply a provision rendered void by section 34 of the NSW Act.

Adjudicator's decision on liquidated damages not irrational nor a denial of justice

In finding that the respondent was not entitled to liquidated damages, the respondent submitted that the adjudicator failed to consider the terms of the subcontract, reached an irrational conclusion and failed to comply with natural justice. Ball J rejected each of those submissions finding that the adjudicator:

- had set out the relevant terms and it was plain he had had regard to them; and
- accepted (albeit without analysis) a principle of law put to him by the claimant and the respondent did not take issue with the principle. In the circumstances, the adjudicator's conclusion was not irrational nor did it amount to a denial of natural justice.

Set Off

His Honour additionally commented that there was force in the claimant's interpretation of the subcontract that the respondent was not entitled to set off an amount for liquidated damages (as the valuation clause in the subcontract did not mention set off in the valuation of payment claims and there was no express set off clause) but the claimant had not raised this issue before the adjudicator and was therefore prevented from raising the submission in the proceedings.

Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd [2016] NSWSC 334

If an earlier payment claim is invalidated, a second payment claim in respect of the same reference date will be assessable; a belief that no sums are due and payable to subcontractors as a result of an agreement or arrangement to pay in the future may not invalidate a supporting statement (even where sums are due).

FACTS

Kyle Bay Removals Pty Ltd (**respondent**), applied to the NSW Supreme Court to set aside an adjudication determination in favour of Dynabuild Project Services Pty Ltd (**claimant**).

The claimant (who was the head contractor) had served a payment claim in:

- September (**September payment claim**), which was not accompanied by a supporting statement as required under section 13(7) of the NSW Act; and
- November (November payment **claim**), which was accompanied by a supporting statement.

The respondent challenged the adjudicator's determination on the basis that no valid payment claim had been made for three reasons:

- the claimant had elected under section 15(2)(a)(i) of the NSW Act to recover the claimed amount by commencing proceedings in the District Court in respect of the September payment claim;
- the November payment claim had been served in respect of the same reference date as the earlier September payment claim, contrary to section 13(5) of the NSW Act; and
- the November payment claim was served contrary to section 13(8) of the NSW Act because the 'supporting statement' which accompanied it was knowingly false as there were moneys due and owing by the claimant (as head contractor) to its two subcontractors.

DECISION

The court dismissed the respondent's application, finding in favour of the claimant on all grounds.

District Court proceedings

Meagher JA held there could be no binding election to recover the claimed amount in the District Court proceedings as the September payment claim, which was the subject of those proceedings, had not been accompanied by the required supporting statement and was therefore not validly served in accordance with section 13(7) of the NSW Act.

Reference Date

His Honour held that:

- even if the November payment claim was made in respect of the same reference date as the September payment claim, there was no contravention of the prohibition in section 13(5) of the NSW Act as no two payment claims were validly served in respect of the same reference date; and
- on the facts, the two claims had been in respect of different reference dates, given that the wording of the contract entitled the claimant to make claims on the 22nd of each month for the value of works done to that date. As a result, there was no contravention of section 13(5) of the NSW Act.

Supporting Statement

A 'payment arrangement' had been made with one of the subcontractors whereby the claimant would make its outstanding payments when its cash flow enabled it to do so.

His Honour held that, as the payment claim and supporting statement were served not knowing that the latter was false, it was not served in breach of section 13(8) of the NSW Act, despite

- the fact that there were amounts due and payable to the subcontractor at the time of the declaration; and
- the acknowledgement of his Honour that the payment 'arrangement' would not be legally enforceable.

Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd [2016] NSWSC 462

This case is a reminder that an adjudication determination can be challenged on the ground that it was made on bases neither party contended for or was notified about. However, the court will approach such challenges carefully to determine whether, in all the circumstances, the parties had a reasonable opportunity to understand and respond to the issues in dispute.

FACTS

The plaintiff, Probuild Constructions (Aust) Pty Ltd (**respondent**) was head contractor for the refurbishment of a hotel on Hunter Street, Sydney. It subcontracted the first defendant, DDI Group Pty Ltd (**claimant**), to carry out ceiling and plasterboard works. The claimant failed to complete its works by the date for practical completion under the subcontract and failed to apply for an extension of time (**EOT**). The respondent directed the claimant to complete further works after the date for practical completion, and the claimant submitted a payment claim to the respondent for these variation works. The respondent's payment schedule assessed the variation works as nil and included a counter-claim for liquidated damages.

The claimant referred the dispute to adjudication. The adjudicator, also the second defendant, denied the respondent's claim for liquidated damages on the basis that it was inconsistent and unreasonable for the respondent not to have granted the claimant an EOT particularly given that the respondent had the ability to extend time for any reason under clause 41.9 of the subcontract.

The respondent commenced proceedings claiming it was denied procedural fairness as the adjudicator had rejected its liquidated damages claim on bases neither party contended for or notified to the other.

DECISION

The court held that there had been no procedural unfairness and dismissed the respondent's application.

Meagher JA found that the adjudicator had addressed each of the claimant's variation claims and each of the respondent's set-off claims in making his determination.

His Honour considered the parties' respective submissions in the adjudication and did not consider the adjudicator's determination that the respondent was 'unreasonable' for denying the claimant an EOT to be 'any separate or freestanding reason for rejecting the liquidated damages claim'. The adjudicator determined that the claimant was entitled to an EOT under clause 41.9 of the subcontract, a matter expressly raised and denied by the respondent.

The respondent had also contended that it was denied the opportunity to put forward submissions on an alternative position in relation to unliquidated damages. His Honour noted that the respondent did not make any alternative claim for withholding payment in the payment schedule and was not therefore entitled to rely upon such reason before the adjudicator.

QC Communications NSW Pty Ltd v CivComm Pty Ltd [2016] NSWSC 1095

An adjudication determination may be void for fraud where a court finds that the works claimed for in the relevant payment claim have not been performed. A document is served in accordance with the requirements of the NSW Act if it actually comes to the attention of the person to be served. It is not necessary that it be served under the requirements of section 31 of the NSW Act.

Service by 'Dropbox' is not a reliable method of service.

There is no formal requirement under the NSW Act for a party to supply supporting material in an adjudication, and failure to do so will not constitute a jurisdictional error.

FACTS

QC Communications NSW Pty Ltd (**respondent**), as head contractor, and CivComm Pty Ltd (**claimant**), as subcontractor, were parties to a construction contract for the installation of data cables as part of the National Broadband Network rollout.

Parts of a payment claim served by the claimant were based on the amounts claimed by the claimant's subcontractors. In response, the respondent served a payment schedule in the sum of 'Nil'.

The claimant lodged an adjudication application with Adjudicate Today by way of an email containing Adjudicate Today's standard application form and a 'Dropbox' link. The same email was sent to the respondent. A hard copy of the adjudication application (including supporting materials) was then posted to Adjudicate Today but not the respondent. There was no clear evidence that the respondent ever received a complete copy of the adjudication application (including supporting materials).

The respondent argued in its adjudication response that the claimant *'has not provided the required documentation'*. The adjudicator determined the application in favour of the claimant. The respondent commenced proceedings to set aside the determination.

DECISION

The court found in favour of the respondent.

Fraud

Ball J set aside the adjudicator's determination on the basis it was induced by the claimant's fraud and that the fraud '*was so significantly significant and widespread that it had a substantial effect on the Adjudicator's determination*'. His Honour accepted evidence from the claimant's subcontractors describing significant discrepancies between the work observed and the work the subject of the invoices. His Honour found that the claimant relied upon invoices which it knew were false and included claims for work which had not been performed. Ball J also rejected the claimant's submission that the invoices simply contained 'mistakes', stating that '*it is not credible for that number of mistakes to be made, let alone for that number of mistakes to be made all in the claimant's favour*'.

Natural justice and failure to provide supporting materials to the other party

Ball J held that where supporting material is provided to the adjudicator and not served on the other party, the effect might be to deny natural justice to the person on whom the adjudication application supporting materials were not served. However, on the facts of this case, his Honour rejected the respondent's claim that the claimant's failure to serve the materials on the respondent had the practical effect of denying it natural justice as the respondent:

- provided its own submissions;
- was not 'disadvantaged' as it was clear from the nature of the dispute that the claimant would rely on the invoices the subject of the payment claim; and
- did not indicate that it would answer differently even if it had known what had been contained in the claimant's supporting material at the time of lodgement.

In effect, the respondent's adjudication response was detailed enough to indicate that the respondent was apprised of the issues in dispute despite not having the benefit of the materials on which the adjudication application rested.

Bell J found that the outcome of the adjudication would not have been any different if the respondent had the benefit of claimant's adjudication materials. His Honour said that *'although in a technical sense there was a denial of natural justice because [respondent] was denied procedural fairness, I am not satisfied that that denial had any effect on the outcome of the adjudication'*.

Adjudicator's jurisdiction where failure to serve supporting materials on the other party

The court confirmed the line of authority that an adjudicator is not deprived of jurisdiction in cases where a party fails to serve supporting material to an adjudication application.

This is because there is no legislative requirement to provide supporting material to an adjudication application and that: '*consequently, it is difficult to see how the failure to serve supporting material could deprive an adjudicator of jurisdiction*'.

Richard Crookes Constructions Pty Ltd v CES Projects (Aust) Pty Ltd [2016] NSWSC 1119

Interim injunctive relief to restrain the enforcement of an adjudicator's determination may be available in circumstances where an adjudicator fails to perform his or her statutory duty in valuing the construction work or related goods or services in accordance with the contract or otherwise as required under the NSW Act.

FACTS

A contractor, Richard Crookes Constructions Pty Ltd (**respondent**) disputed a payment claim for $966,000 submitted by its subcontractor, CES Projects (Aust) Pty Ltd (**claimant**).

The payment claim was sent to adjudication. In his determination, the adjudicator:

- rejected the respondent's analysis; and
- accepted the claimant's analysis in its entirely (despite it containing obvious errors including duplicated invoices and lack of evidence to substantiate the value of the works performed),

and the adjudicator determined that the claimant was entitled to be paid $573,000.

These proceedings relate to the respondent's application to the court for interlocutory injunctive relief to restrain the enforcement of the adjudicator's determination on the basis that the determination was void in that the adjudicator failed to perform his statutory function of assessing the amount and value of the construction work performed.

In *Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd (No.2)* [2016] NSWSC 1229 the respondent applied to the courts for a declaration that the adjudication determination is void,

DECISION

The court granted the respondent's application for an interlocutory injunction, restraining the claimant from enforcing the adjudicator's determination, on condition that the respondent pay the adjudicated amount into court.

McDougall J found that the two-pronged test for grant of an interim injunction had been satisfied: the respondent succeeded in establishing that there was a serious question to be tried, and that the balance of convenience favoured the grant.

His Honour found that there was a serious question to be tried as it was arguable the adjudicator abdicated two crucial aspects of his statutory duty:

- first, to make a reasoned affirmative finding as to the amount of work that had been done; and
- secondly, to make a reasoned affirmative finding as to the value of that work.

His Honour commented that the adjudicator's determination appeared to say no more than that the adjudicator preferred the evidence of the claimant over the respondent, which did not amount to a reasoned performance of the adjudicator's statutory function.

McDougall J found that the balance of convenience favoured the grant of the injunction on the basis that the respondent had offered undertakings as to the payment of damages and offered to pay into court the disputed amount.

Interestingly, his Honour rejected counsel's submission that, if the court found the determination to be void, the court should have remitted it to the adjudicator (as was ordered by Emmett AJA in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770 (***Probuild***). McDougall J noted it was only an interlocutory hearing and that no reasons were offered by the judge in *Probuild* as to why that course was available.

Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd (No.2) [2016] NSWSC 1229

The NSW courts may be reluctant to order remittal back to the adjudicator in instances where the original determination is quashed. Parties (in particular, the claimant) must carefully consider the risks of challenging a determination based on an error of law on the face of the record, as they may be left with nothing at all.

FACTS

The facts are set out in *Richard Crookes Constructions Pty Ltd v CES Projects (Aust) Pty Ltd* [2016] NSWSC 1119.

The respondent commenced proceedings seeking a declaration that the adjudication determination was void as the adjudicator had failed to properly determine the value of the works performed.

The claimant argued that:

- the adjudicator had discharged its statutory duty to value the works; and
- if the determination was to be quashed, the dispute should be remitted back to the adjudicator for re-determination.

DECISION

The court found in favour of the respondent and quashed the adjudication determination on the basis that the adjudicator had not discharged its statutory duties to value the construction work done. However, the court refused to order remittal back to the adjudicator for re-determination.

McDougall J made significant observations, including:

- the claimant did not seek to cross-claim against the adjudicator; and
- it was not in the interest of justice to cause prolongation of the adjudication process which is only intended to provide interim relief.

Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2) [2016] NSWCA 379

Aggrieved parties to an adjudication determination will now have less room for a successful challenge because courts will not quash adjudication determinations for non-jurisdictional errors of law.

FACTS

Shade Systems Pty Ltd (**claimant**) subcontracted to Probuild Constructions (Aust) Pty Ltd (**respondent**) for the supply and install of external louvres to a development in Chatswood.

On 23 December 2015, the claimant served a payment claim on the respondent under NSW Act in respect of which the respondent responded with a nil payment schedule. The dispute was determined by an adjudicator, allowing the claimant the bulk of the payment claim and, importantly, rejecting the respondent's set off for liquidated damages because:

- the liquidated damages could not be calculated in accordance with the subcontract;
- the respondent could not benefit from their own wrong; and
- liquidated damages are a penalty.

The primary judge (Emmett AJ sitting in the Equity Division) set aside the determination holding that the adjudicator erred in finding that the respondent was not entitled to liquidated damages (*Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770).

The claimant appealed to the NSW Court of Appeal, claiming the NSW Supreme Court had no power to quash a decision on the basis of an adjudicator's non-jurisdictional error of law, ie an error in the adjudicator's reasoning of the merits of the case.

Given that the respondent sought to reopen previously established NSW Court of Appeal authority on this issue, a five-judge bench was constituted to hear the appeal.

DECISION

The NSW Court of Appeal unanimously allowed the appeal - the adjudicator in this case had authority to determine the scope and operation of the construction contract (albeit incorrectly refusing entitlement to liquidated damages).

Notwithstanding there being no dispute on appeal that the adjudicator did indeed err in his reasoning when he denied the respondent liquidated damages and that that error was a non-jurisdiction error, the Court of Appeal held that the NSW Act did not permit review of adjudication determinations otherwise than in respect of jurisdictional error.

The Court of Appeal revisited the scope of judicial review of adjudication determinations and concluded, consistently with *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394, that relief is not available to quash an adjudicator's determination on a ground other than jurisdictional error, noting at [85] that:

> '*[the] reasoning has been accepted in numerous cases, not only [in NSW] but in other jurisdictions. No sufficient reason has been put forward to doubt its correctness.*'

Basten JA, with whom Bathurst CJ, Beazley P, Macfarlan and Leeming JJA agreed, held, after examining the prior line of authorities and the content, structure and practical operation of the NSW Act, that non-jurisdictional error of law was not amenable to judicial review, noting at [67] that:

> '*the coherent and expeditious procedure provided by the [NSW] Act would be undermined if the determination of the adjudicator were to be subject to judicial review in the supervisory jurisdiction of this Court for any error of law which might be identified in the reasons given by the adjudicator.*'

In *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 3)* [2016] NSWCA 382, Basten JA ordered that, upon the respondent undertaking to pay the sum of $314,504.72 into court by 5pm on 6 January 2017, the claimant is restrained until after the 'Relevant Date' from:

- requesting the provision of an adjudication certificate under section 24(1) of the NSW Act;
- filing an adjudication certificate as a judgment for a debt in any court under section 25 of the NSW Act; and
- serving a notice on the respondent pursuant to section 24(1)(b) of the NSW Act.

In the order, 'Relevant Date' is either 5 pm on 6 January 2017 or, if the respondent makes an application for special leave to appeal to the High Court on or before 6 January 2017:

- the date on which that application for special leave is refused; or
- if that application is granted, the date on which the appeal is determined.

Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd [2016] HCA 52

The High Court, considering the NSW Act for the first time, unanimously affirmed that the existence of a reference date under a construction contract is a precondition to a valid payment claim. A payment claim made without a valid reference date will be liable to be quashed. Unless the contract expressly provides otherwise, a reference date will not arise after a contract is terminated.

FACTS

Southern Han Breakfast Point Pty Ltd (**respondent**) entered into an amended AS4000 contract with Lewence Construction Pty Ltd (**claimant**) for the construction of units at Breakfast Point in New South Wales. The contract allowed the claimant to claim payment progressively on the 8th day of each month for work done to the 7th day of that month. In the event of a substantial breach by the claimant, the contract provided for a procedure whereby the respondent would give the claimant a notice to show cause and a right to take the work out of the claimant's hands if the claimant failed to show reasonable cause.

On 10 October 2014, the respondent gave the claimant a notice to show cause. On 27 October 2014, the respondent took the whole of the work out of the claimant's hands despite the claimant having responded to the notice. The claimant, having considered it had shown cause, terminated the contract on 28 October 2014, treating the taking of the works out of its hands as the respondent's repudiation. On 4 December 2014, the claimant served a payment claim on the respondent for works done up to 27 October 2014, including works carried out up to 7 October 2014 which had been the subject of a prior payment claim served on or after 8 October 2014. The respondent scheduled nil in respect of the 4 December 2014 payment claim.

The NSW Supreme Court granted the respondent's application and quashed the adjudication determination (*Southern Han Breakfast Point Pty Limited v Lewence Construction Pty Limited* [2015] NSWSC 502).

However, the NSW Court of Appeal unanimously overturned the NSW Supreme Court's decision (*Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288) and the respondent appealed.

(Both of these decisions were analysed in our Roundup of 2015 cases.)

DECISION

In a unanimous joint judgment of Kiefel, Bell, Gageler, Keane and Gordon JJ, the High Court allowed the appeal and held that:

- the existence of a reference date under a construction contract, within the meaning of section 8(1) of the NSW Act, is a precondition to the making of a valid payment claim under section 13(1) of the NSW Act. This statutory construction is consistent with section 13(5) of the NSW Act, which requires that each reference date supports no more than one payment claim. A claim falling foul of either of those provisions is ineffective to trigger the adjudication procedures under Part 3 the NSW Act;
- the previous line of authority, providing that a progress claim cannot include either a claim for damages for breach of contract or a claim for restitution was good law;
- where a contract expressly fixes the date for the claiming of a progress payment, section 8(2)(b) of the NSW Act, which prescribes a statutory time for claiming progress payments in the absence of an express contractual provision, can have no application; and
- as there was nothing in the contract indicating that the right to a progress payment was to survive termination, the claimant's rights under the contract were limited to those which had then already accrued prior to the date of termination. This meant that it did not have an available reference date after 28 October 2014 (the date on which the claimant terminated the contract).

The High Court set aside the orders of the NSW Court of Appeal and, in its place, ordered that the claimant's appeal to the NSW Court of Appeal be dismissed.

Suprima Bakeries Pty Ltd v Australian Weighing Equipment Pty Ltd [2016] NSWSC 998

Whether a court will consider multiple invoices to be part of one overarching contract or arrangement will depend on the facts in each case. Parties should carefully consider their existing arrangements before submitting a payment claim and proceeding to adjudication, to avoid unwanted jurisdictional challenges.

FACTS

Suprima Bakeries Pty Ltd (**respondent**) engaged Australian Weighing Equipment Pty Ltd (**claimant**) to supply plant and equipment to be used in the manufacture of frozen dough in its manufacturing facility. The claimant submitted a payment claim to the respondent for four invoices which then became the subject of an adjudication. In its payment schedule, the respondent contended that there was no construction contract and that the plant and equipment supplied to it were useless.

The adjudicator determined that:

- there was one contract varied from time to time by the addition of further items of work in separate quotations;
- the works claimed in those four invoices were construction works and the contract was therefore a construction contract;
- the claimant was entitled to be paid $535,000 for the items of construction work; and
- the respondent was not entitled to offset any sums on account of the defective works on the basis that the cost of rectifying any ongoing defects had been covered by a separate claim.

The respondent sought to challenge the adjudication determination on the grounds that:

- there was more than one contract;
- each of the contracts was not a 'construction contract' for the purposes of the NSW Act;
- the adjudicator had failed to carry out his statutory function of valuing the construction work that had been performed by the claimant; and
- the adjudicator's approach of dealing with the respondent's claim of defective work either denied natural justice to the respondent or was a failure to perform the tasks entrusted to an adjudicator under the NSW Act.

DECISION

The court determined that the adjudication determination was void as the adjudicator had erred in failing to deal in a reasoned way with a fundamental part of the respondent's case.

McDougall J held that the respondent had been denied natural justice in light of the fact that the adjudicator recognised that the equipment claimed for was defective but failed to engage with the respondent's evidence that the equipment was worthless. The adjudicator therefore failed to discharge his statutory function in properly valuing the claim.

However, his Honour found that the adjudicator had not erred in determining that the items claimed for were for construction work and the way he proceeded to value those items of construction. Although the adjudicator did not go through the quotations line by line, his Honour did not consider his approach incorrect. Even though the respondent did not assist the adjudicator by identifying the specific parts of the works in the quotations it had contended could not be regarded as construction work, his Honour found that the adjudicator dealt with the circumstances as had been put to him.

Whilst his Honour found that there were separate contracts (and the adjudicator's finding that there was only one construction contract was incorrect), this was not a factor which, in the court's view, showed that the adjudicator lacked jurisdiction to deal with the merits of the adjudication application.

Queensland

CASE INDEX

- *Annie Street JV Pty Ltd v MCC Pty Ltd & Ors* [2016] QSC 268
- *Ostwald Bros Pty Ltd v Jaylon Pacific Pty Ltd & Ors* [2016] QSC 240
- *Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd & Ors* [2016] QSC 108
- *Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd & Ors (No 2)* [2016] QSC 125
- *Tantallon Constructions Pty Ltd (in liq) v Santos GLNG & Anor* [2016] QDC 324
- *Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous & Ors* [2016] QSC 96

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

Queensland overview

EMERGING TRENDS

There has been a marked drop off in applications to the court as claimants have lost the tactical advantage of a challenge on an 'all or nothing' basis due to the ability of the court to sever parts of an adjudicator's decision affected by jurisdictional error from the other parts unaffected by such error.

DEVELOPMENTS

There can be no doubt that the consequence of significant amendments to the Qld Act at the end of 2014 has been a marked reduction in the number of cases being heard. In 2016 there were only 7 cases relevant to the Qld Act.

Jackson J observed that to deploy the concept of abuse of process seemed superfluous as a basis for an order staying the process of an adjudication decision, as the result could be achieved by the proper construction of the sections of the Qld Act (in *Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous Engineering Pty Ltd & Ors* [2016] QSC 96).

Jackson J further observed that the application of issue estoppel, a concept derived from the common law, to the administrative decision of an adjudicator under the Qld Act might seem counter intuitive, but was supported by intermediate appellate court authority. After undertaking a careful review of the relevant authorities his Honour observed that 'having regard to those cases, any issue estoppel that arises under the Payments Act is a unique species of estoppel.' For brevity, his Honour coined the term '*Dualcorp* issue estoppel' (in *Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous Engineering Pty Ltd & Ors* [2016] QSC 96).

Jackson J canvassed the extent of reasons required in an adjudicator's decision in *Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd* [2016] QSC 108. His Honour concluded that each case must depend on its own facts. His Honour listed six considerations relevant to the assessment of the adequacy of the reasons provided, before observing that:

> *'the requirement to include reasons in the decision in writing is also informed by the fact that the questions in dispute upon a payment claim served or purportedly served under the [Qld] Act may vary greatly. Therefore, there is no necessary list of matters that must be considered in the reasons. Conversely, there is no list of matters that if considered will in every case satisfy the requirements to include the reasons for the written decision.'*

FUTURE

Queensland can expect another round of reform following the release of a discussion paper Queensland Building Plan in late December 2016.

Proposed amendments to the Qld Act include:

- removing the requirement for endorsement that the payment claim is being made under the Qld Act;
- extending the timeframes to lodge an adjudication application (but not an adjudication response);
- providing, in the case if termination for convenience, that the date of termination will be a deemed reference date;
- allowing an adjudicator to direct a respondent to reimburse a claimant for the cost of the application fee; and
- giving an adjudicator discretion to order a respondent to backdate interest from the date of the payment claim.

Annie Street JV Pty Ltd v MCC Pty Ltd & Ors [2016] QSC 268

There is a distinction between:

- **a failure by an adjudicator to consider a relevant contractual provision – which *may* constitute jurisdictional error.**
- **an adjudicator's decision not to consider a time bar because of the operation of section 24(4) of the Qld Act – which if erroneous would constitute an error within jurisdiction.**

FACTS

Annie Street JV Pty Ltd (**respondent**) contracted with MCC Pty Ltd (**claimant**), to construct 18 residential units in New Farm, Brisbane.

The claimant made a standard payment claim and subsequently served an adjudication application. In its adjudication response the respondent raised a reason for withholding payment that had not been included in its payment schedule, namely a time bar for a portion of the amount claimed.

The adjudicator decided that the respondent should pay the claimant $528,505 plus interest.

The respondent applied to have part of the adjudication decision set aside on the basis that the adjudicator committed jurisdictional error.

The claimant argued that as the claim was a standard payment claim the adjudicator rightly gave paramountcy to section 24(4) of the Qld Act, which precludes the time bar argument from the adjudication response in circumstances where it was not raised in the payment schedule. The claimant argued that the respondent's time bar argument was a submission not properly made under section 26(2)(d) of the Qld Act.

The respondent argued that the adjudicator should have considered the time bar as a relevant contractual provision under section 26(2)(b) of the Qld Act despite the fact the time bar had not been raised in the payment schedule.

DECISION

The court held that there was no jurisdictional error as the adjudicator had properly exercised discretion under section 26(2)(d) of the Qld Act to determine that the submission regarding the time bar had not been properly made.

Flanagan J drew a distinction between:

- a failure to consider a relevant contractual provision, which may constitute jurisdictional error; and
- the adjudicator's decision not to consider the time bar because of the operation of section 24(4) of the Qld Act, which, if erroneous, would constitute an error within jurisdiction.

Ostwald Bros Pty Ltd v Jaylon Pacific Pty Ltd & Ors [2016] QSC 240

Where an adjudicator decides an applicant is entitled to be paid on a basis for which neither party contended, there will be a substantial denial of natural justice, unless it can be said that no submission could have been made to the adjudicator which might have produced a different result.

FACTS

A contractor, Ostwald Bros Pty Ltd (**respondent**), sought a declaration that an adjudication decision in favour of its subcontractor, Jaylon Pacific Pty Ltd (**respondent**), was void and an injunction permanently restraining the adjudication registrar from issuing an adjudication certificate based on that decision.

In its payment schedule and adjudication response, the respondent disputed much of the claimant's claim and sought to set off completely an amount for liquidated damages. In its adjudication application, the claimant challenged the respondent's claim for liquidated damages on the basis that it infringed the prevention principle.

The adjudicator rejected the respondent's claim for liquidated damages on the basis of his interpretation of the extension of time clause in the contract (**clause 5.4**) and the liquidated damages clause in the contract (**clause 5.7**), placing the burden of proof on the respondent. The adjudicator considered it unnecessary to consider the claimant's submissions in respect of the prevention principle.

The respondent argued that the parties had not been given an opportunity to make submissions about the '*stated application of [clause] 5.7 as giving rise to an onus*'.

The claimant argued that the respondent had not been denied procedural fairness because the adjudicator's construction of clause 5.4 and clause 5.7 did not have any 'substantive effect' on the adjudication decision.

DECISION

The court declared the decision void.

Burns J found that the adjudicator misconstrued the effect of clause 5.4 and clause 5.7 by casting a burden of proof on the respondent that it did not have and regarding it as necessary for the respondent to satisfy that burden as a precondition to recovery of liquidated damages.

His Honour considered that the respondent was entitled to be heard on the question whether the adjudicator's construction was correct.

His Honour concluded that there was a substantial denial of natural justice as it could not be said that no submission could have persuaded the adjudicator to change his mind or, at the very least, to reconsider the material before him in light of the proper construction of the contract.

Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd & Ors [2016] QSC 108

An adjudicator's failure to include reasons for a decision will amount to jurisdictional error.

FACTS

A developer, Sierra Property Qld Pty Ltd (**respondent**), and a builder, National Construction Management Pty Ltd (**claimant**), were parties to a construction contract.

The claimant's adjudication application included nine categories of work listed in the original contract works. The adjudicator decided that the claimant was entitled to 95% of the contract claims without referring to, or making findings in relation to, the nine contract categories of work identified in the adjudication submissions.

The respondent challenged the decision on the basis that the adjudicator failed to provide adequate reasons as required by section 26(3)(b) of the Qld Act. The respondent contended that the adjudicator's method of arriving at 95% was completely unexplained, despite the parties having made submissions as to the extent of work which had been completed in relation to each of the nine categories.

DECISION

The court found in favour of the respondent.

Jackson J held that the portion of the adjudication decision relating to the nine categories of work was affected by jurisdictional error because the adjudicator did not refer to the extent of work completed in any of the nine categories, either as claimed by the claimant or as disputed by the respondent.

His Honour considered that the statutory requirement under section 26 of the Qld Act to provide reasons is an essential element of a decision and a condition of the power of an adjudicator to decide the adjudication application. Failure to include reasons invalidates the decision.

His Honour went on to conclude that non-compliance with the requirement to provide reasons amounts to jurisdictional error. Therefore, the adjudicator's decision relating to works under the contract was affected by jurisdictional error, was invalid, and was not binding on the parties.

Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd & Ors (No 2) [2016] QSC 125

Where the adjudicator's decision is set aside due to jurisdictional error made by an adjudicator, it does not follow that one party should pay all the adjudicator's fees.

FACTS

In *Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd & Ors* [2016] QSC 108, Jackson J held that a portion of an adjudication decision was invalid as it was affected by jurisdictional error due to the adjudicator's failure to include reasons.

This case relates to the payment of the adjudicator's fees. The respondent sought orders that the adjudicator's fees be paid in full by the claimant, while the claimant contended that each party should bear half of the adjudicator's fees.

DECISION

The court held that the adjudicator's fees should be apportioned equally between the parties.

Jackson J held that while an adjudicator's decision may be liable to be set aside, it does not follow that one party or the other should bear the loss.

His Honour emphasised that the error was made by the adjudicator, not by either of the parties. Therefore, there was no reason why the claimant should pay the whole of the adjudicator's fees.

Tantallon Constructions Pty Ltd (in liq) v Santos GLNG & Anor [2016] QDC 324

This decision affirms the position that a company in liquidation cannot make or progress a claim under the Qld Act. The liquidator was ordered to pay costs on an indemnity basis.

FACTS

In November 2013, the plaintiff, Tantallon Constructions Pty Ltd (**supplier**) entered into two contracts for the supply and installation of white goods into a building at Roma and for the supply of furniture and joinery works into buildings and mines at Roma and Injune with either or both defendants, Santos GLNG and Santos Qld Upstream Developments Pty Ltd (together, **principals**). Work was subsequently performed under the contracts.

The supplier alleged it served payment claims under the Qld Act. No payment schedules were served in response. Consequently, the supplier claimed that it was entitled to judgment in the amount of the payment claims and filed an application for summary judgment for such amount. In the meantime, the supplier had gone into administration and soon after went into liquidation.

The principals extended multiple offers of settlement in the weeks leading up to the hearing, with the initial offer providing for no order as to costs against the supplier if it abandoned its summary judgment application. The principals relied on authorities which held that an insolvent party could not be a claimant under the Qld Act and encouraged the supplier to reframe its claim as one for the amount it contended was finally due and owing to it by the principals.

The Victorian Court of Appeal delivered judgment in *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 (***Façade***) only days before this application was heard. The principals brought this decision to the attention of the supplier in one of their settlement offers.

In this application the supplier sought orders dismissing its application for summary judgment and that there be no order as to costs. The principals sought orders that the application for summary judgment be dismissed, the proceedings be permanently stayed and the supplier's liquidator pay the principals' costs on an indemnity basis.

DECISION

The District Court of Queensland confirmed that a company in liquidation, such as the supplier, is unable to make and progress a claim under the Qld Act as the effect would be to turn an interim payment into an irrecoverable final payment.

Reid DCJ relied on the decision in *Façade* but rejected the supplier's contentions that it had not had time to consider the case.

His Honour held the attempts of the principals to settle the dispute were reasonable and correspondingly the failure of the supplier's liquidator to accept the offers was unreasonable, awarding costs against the liquidator on an indemnity basis.

Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous & Ors [2016] QSC 96

A contractor was restrained from advancing a claim that it could have, but had not, raised in a prior adjudication application under the Qld Act on the basis of extended *'Anshun'* estoppel (*Port of Melbourne Authority v Anshun Pty Ltd (1981)* 147 CLR 589).

FACTS

A principal, Wiggins Island Coal Export Terminal Pty Ltd (**respondent**), and a contractor, Monadelphous Engineering Pty Ltd and Muhibbah Construction Pty Ltd trading as Monadelphous Muhibbah Marine (**claimant**), entered into a contract for the construction of offshore plant and infrastructure for a coal export terminal. The project was affected by delay to the construction of the jetty which was connected to the wharf (**jetty road delay**).

On 25 August 2014, the claimant submitted Payment Claim 34, which included three claims relating to the jetty road delay. The claimant did not pursue one of the jetty road delay claims in its corresponding adjudication application under the Qld Act.

On 31 July 2015, the claimant submitted Payment Claim 38, which re-agitated the jetty road delay claim that it had not pursued in the adjudication relating to Payment Claim 34, albeit with more precise calculations, amounting to $30.7 million for increased labour, plant and costs. That Payment Claim 38 became the subject of an adjudication application.

The respondent applied for an injunction to restrain the claimant from pursuing various claims in the adjudication application on a number of grounds, including that it was unreasonable not to have included the re-agitated jetty road delay claim as part of the earlier adjudication application, and *'Anshun'* estoppel should preclude the claimant from including that claim in its further adjudication application.

DECISION

The court granted an injunction on grounds of *'Anshun'* estoppel, preventing the claimant from pursuing the re-agitated jetty road delay claim, in circumstances where it was unreasonable for the claimant not to have pursued the claim in the earlier adjudication application with the other related claims.

Jackson J said:

> *'…once it is accepted that there is a role for extended or Anshun estoppel based on a concept of unreasonableness, there must be some difficult choices as to whether one case or another raises the estoppel.'*

His Honour decided that in this case it was unreasonable for the claimant to re-agitate the claim as in this case the claims *'are and "were always", claims where to allow costs for one claim would affect the other'.*

Victoria and Tasmania

CASE INDEX

- *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247
- *Fitzroy Shopfitting and Building Pty Ltd v Solene Investments Pty Ltd* [2016] VCC 1352
- *Fulconstruction Pty Ltd v ABP Consultants Pty Ltd [2016] VCC 1732*
- *Krongold Constructions (Aust) v SR & RS Wales* [2016] VSC 94
- *Landmark Building Services Pty Ltd v Anastasia Tsekouras & Ors* [2016] VCC 501
- *Milburn Lake Pty Ltd v Andritz Pty Ltd* [2016] VSC 3
- *Promax Building Developments Pty Ltd v 167 Lower Heidelberg Road Pty Ltd* [2016] VCC 1960
- *RAW Build v JBK Industries & Anor* [2016] VSC 242
- *Raw Build Pty Ltd v JBK Industries Pty Ltd* [2016] VSC 547
- *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2016] VSCA 119
- *UBM Plastering Pty Ltd & Anor v Idevelopment Group Pty Ltd* [2016] VCC 458
- *Vinson v Neerim Property Developments Pty Ltd* [2016] VSC 321

In this section,

- the *Building and Construction Industry Security of Payment Act 2002* (Vic) is referred to as the **Vic Act;** and
- the *Building and Construction Industry Security of Payment Act 2009* (Tas) is referred to as the **Tas Act**.

Victoria and Tasmania overview

EMERGING TRENDS

In the 2015 overview (in our Roundup of 2015 cases) we predicted that problems flowing from the 2006 amendments were being highlighted by judgments of the courts and that these issues may undermine the overall policy objectives of the Vic Act. These predictions came to fruit in the judgments issues by the courts in 2016, with, in particular, courts being willing to grant injunctions restraining the enforcement of adjudication determinations when a party alleged an error of law on the face of the determination.

In addition, the Vic Court of Appeal handed down a decision on the operation of the 'excluded amount' provisions that will likely lead to an increased use of expert determination and arbitration agreements. Given the general availability of judicial review, the number of challenges to adjudication determinations will increase, which in itself will continue to highlight some of the deficiencies in the 2006 amendments to the Vic Act.

DEVELOPMENTS

In Victoria, there were two judgments of the Court of Appeal and six Supreme Court judgments concerning the Vic Act. The two judgments of the Court of Appeal are important in that:

- in *SSC Plenty Road Pty Ltd v Construction Engineering Aust (Pty Ltd)* [2016] VSCA 119 the court upheld the judgment of Vickery J that section 10A(3)(d)(ii) of the Vic Act requires a 'method of resolving disputes' that is an alternative means of securing an actual, final and binding determination of a variation claim. In practical effect the court's judgment requires a binding expert determination agreement or a binding arbitration agreement for the 'excluded amount' provisions to apply.
- in *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Pty Ltd* [2016] VSCA 247 the court determined that section 16(2)(b) does not create an entitlement to progress payments for corporations in liquidation because such companies no longer carry out construction work or supply related goods and services. The court held that a party that was not a 'going concern' could not make a payment claim under the Vic Act. These findings may be the basis of contentions by respondents in other circumstances that a claimant may not make a payment claim.

Another development that we predicted was the growing willingness of the court to enjoin a successful claimant from enforcing an adjudication determination in circumstances where it was alleged there was an error of law on the face of the record of the determination. In *Milburn Lake Pty Ltd v Andritz Pty Ltd* [2016] VSC 3, in a matter where there was no evidence that the respondent was unable to pay the determined amount, the court granted an injunction to preclude the claimant from recovering the adjudicated amount on terms that the adjudicated amount be paid into court or into an agreed managed fund. The court acknowledged that the grant of an injunction without ordering payment into court would frustrate the purposes of the Vic Act, namely to preserve cash flow and to 'pay now and argue later'. The court did not explain how the grant of an injunction on terms that the money be paid into court achieved the policy purpose.

There were no decisions of the Supreme Court of Tasmania on the Tas Act during 2016.

FUTURE

The availability of judicial review of an adjudication determination for alleged errors of law on the face of a determination remains an impediment to the achievement of the Vic Act's policy purpose. The availability of judicial review, in circumstances where a court is likely to enjoin the enforcement of the adjudication determination pending resolution of the review, provides a significant motivation for unhappy respondents to make application for review, notwithstanding the merit of the alleged review. As a result, it is likely that the number of judgments will continue to grow creating an increase workload for the courts.

The other major development is the appointment of Digby J as the judge responsible for the Technology, Engineering and Construction list. Since the 2006 amendments to the Vic Act were enacted, the vast majority of cases concerning the Vic Act have been heard and determined by Vickery J and the direction of that the jurisprudence has been largely shaped by Vickery J's judgments. It may well be that Digby J takes a different approach to some of the more controversial provisions of the Vic Act.

Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd [2016] VSCA 247

A person who is in liquidation has no entitlement under Part 3 of the Vic Act to compel payment of a payment claim. A payment schedule must have sufficient information to enable the claimant to understand why the respondent has rejected the claim.

FACTS

Façade Treatment Engineering Pty Ltd (in liq) (**claimant**) and Brookfield Multiplex Constructions Pty Ltd (**respondent**) were parties to a subcontract in relation to the Upper West Side Redevelopment in the city of Melbourne.

The respondent did not issue a payment schedule to the claimant in response to a payment claim (**claim no. 18**) and informally responded to another payment claim (**claim no. 19**) by email on 5 October 2012 by asserting that claim no. 19 was invalid. The claimant was placed into liquidation on 6 February 2013.

The claimant commenced proceedings seeking payment of $1,193,469.20 (being the sum of the unpaid amounts under claims no. 18 and claim no. 19) under section 16 of the Vic Act on the basis that the respondent had failed to issue a payment schedule.

At first instance, Vickery J held that that the claimant had no entitlement to payment because:

- 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) (**first ground of appeal**); and
- in any event, the email of 5 October 2012 was a valid payment schedule in response to claim no. 19 under the Vic Act (**second ground of appeal**).

DECISION

The Victorian Court of Appeal found in favour of the respondent on the first ground of appeal and the claimant on the second ground of appeal.

First ground of appeal

Warren CJ, Tate and McLeish JJA held that, as a winding up order had been made in respect of the claimant such that the claimant only continued to exist for the purpose of being wound up, the claimant was no longer a 'claimant' for the purposes of Part 3 of the Vic Act. In reaching this conclusion, the court determined that:

- section 16(2)(b) of the Vic Act, which relates to the suspension of work, contemplates that a claimant under the Vic Act *is 'still carrying out construction work or supplying goods or services'*;
- if Part 3 of the Vic Act compelled payment to a builder in liquidation, such a payment would become final in effect, rather than provisional as is intended by the Vic Act; and
- cash flow problems, which underpin the Vic Act, cease to be a concern when a company enters into liquidation.

Although given its conclusion on Part 3 of the Vic Act it was strictly unnecessary for the Court of Appeal to consider the other issues raised on appeal, the court upheld the finding of Vickery J on inconsistency.

Second ground of appeal

However, the Victorian Court of Appeal overturned Vickery J's decision on the 5 October 2012 email on the grounds that the email did not give the claimant an indication of the respondent's objections to the claims made in the payment claim so as to allow the claimant to determine whether or not to pursue the claim.

Fitzroy Shopfitting and Building Pty Ltd v Solene Investments Pty Ltd [2016] VCC 1352

A contracting party who has had an amount awarded against it under an adjudication determination can settle the dispute for a lesser amount than the amount awarded without breaching section 48 of the Vic Act so long as the parties have shown that their agreement was not directed to the exclusion, modification or restriction of the Vic Act, but, rather to the genuine resolution of a dispute.

FACTS

The defendant, Solene Investments Pty Ltd (**principal**), engaged the plaintiff, Fitzroy Shopfitting and Building Pty Ltd (**contractor**), to supply and fix tiles at a beauty salon.

An adjudicator determined that the principal was liable to pay the contractor the sum of $104,721.10 (**adjudicated sum**). The principal sent a cheque to the contractor for $61,680.10 (**purported settlement sum**). The letter enclosing the cheque stated that depositing the cheque would be deemed acceptance of full and final payment of the matter.

The contractor deposited the cheque.

The principal relied on the defence of 'accord and satisfaction' and argued that the contractor had accepted the purported settlement sum as full and final payment in place of the adjudicated sum.

During the proceedings, the contractor acknowledged it was aware of the wording in the letter, but it did not accept that the principal could unilaterally effect a settlement and regarded the purported settlement sum paid as part payment of the adjudicated sum.

DECISION

The court found In favour of the contractor.

Anderson J reviewed a series of cases on conditional tender of payments. In order to establish 'accord and satisfaction', his Honour concluded that a new contract had to be consensually reached on the terms of full and final settlement. His Honour held that the email from the contractor to the principal acknowledging receipt of the cheque together with the depositing of the cheque were plainly insufficient to amount to agreement that the payment of $61,680.10 would extinguish the adjudicated sum plus interest and costs. His Honour found that the cheque and associated letter offered no more than payment of a lesser sum to extinguish an existing debt.

By way of obiter, his Honour concluded that had there been 'accord and satisfaction' between the parties, it would not be a 'contract' covered by section 48 of the Vic Act if their words and conduct had shown that their agreement was not directed to the exclusion, modification or restriction of the operation of the Vic Act but rather to the genuine resolution of a dispute.

Fulconstruction Pty Ltd v ABP Consultants Pty Ltd [2016] VCC 1732

A profit sharing arrangement under a construction contract may be subject to payment claims under the Vic Act.

FACTS

A joint venture was entered into between Fulconstruction Pty Ltd (**plaintiff**) and ABP Consultants Pty Ltd (**defendant**) to construct 18 townhouses, under which the defendant was the builder and the plaintiff was the project manager.

The parties disagreed on the terms under the JV regarding the nature and timing of the profit sharing arrangement. The plaintiff stated that progress payments would be made periodically during the project but the defendant stated that any profits would be shared equally between them once the project was completed and the profit could be ascertained.

Shortly after the defendant received payment from the owners for the 'base stage', the defendant claimed that the plaintiff had approached it stating that it was 'going to need some money'. The defendant then paid the plaintiff and itself $50,000 under the JV, in response to a tax invoice for the same amount issued by the plaintiff. The books of account described the amount as a 'progress payment'. The plaintiff then proceeded to submit further invoices for 'progress payments' which the defendant refused to pay until the project was completed and the profit could be ascertained (**disputed tax invoices**).

The issue was whether the profit sharing arrangement was excluded by section 7(2)(c) of the Vic Act. This section provides that the Vic Act does not apply to a construction contract under which it is agreed that the consideration payable for construction work carried out, or for related goods and services supplied, under the contract is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.

DECISION

The court found in favour of the defendant and dismissed the proceedings commenced by the plaintiff.

Anderson J found that profit sharing arrangements may be subject to the Vic Act. This will occur only where there is the required degree of certainty, as to the method of calculation or the timing of any payment, to take the payment process outside the exclusion contained in section 7(2)(c) of the Vic Act.

In this case the payment process did not have the degree of certainty required, due partly to the inconsistent evidence given by the plaintiff on how any payment was calculated.

Further, the plaintiff's payment claim relied upon the disputed tax invoices which described the amounts claimed as '10% of frame stage' and '10% of slab stage'.

On these facts, his Honour found that the disputed tax invoices failed to sufficiently identify the work to which the claimed amounts related as required by section 14(2)(c) of the Vic Act and the claimed amounts could not be recovered under the Vic Act.

Krongold Constructions (Aust) v SR & RS Wales [2016] VSC 94

A significant onus under the Vic Act will be placed on adjudicators, and possibly in other jurisdictions, to demonstrate the valuation process adopted and to ensure that that process aligns with the requirements of the Vic Act.

FACTS

Krongold Constructions (Aust) (**respondent**) engaged Wales (**claimant**) as a civil works contractor to perform earthworks for a lump sum contract price.

On 25 August 2015 the claimant issued a payment claim for the contract balance of $44,012 and variations of $25,000. The payment claim consisted of two invoices and eight pages of attachments. The respondent did not serve a payment schedule in response. The respondent had in its possession work and delivery dockets concerning the variation claims.

The payment claim was referred to adjudication. The adjudicator was not provided with all the attachments to the payment claim. The adjudicator determined that the claimant's valuation was not 'incorrect, unreasonable or excessive' and, in the absence of any alternative valuation provided by the respondent, accepted the claimant's valuation in full. The respondent applied to the court for judicial review of the adjudication determination.

On the date of filing the originating motion for review the court granted the respondent an interlocutory injunction restraining the claimant from enforcing the adjudication determination.

DECISION

The court found in favour of the respondent.

Vickery J held that:

- the payment claim was invalid.

  His Honour was not satisfied that the invoices and supporting documentation identified the construction work with sufficient clarity as required by section 14 of the Vic Act and in light of the principles outlined in the decision in *Protectavale Pty Ltd v K2K* [2008] FCA 1248.

  This was despite the facts that:

  - the respondent's site supervisor was on site every day and therefore, in relation to the balance of work segment of the claim, the respondent was in a position to assess whether the claimant had completed its scope;
  - the continuous machinery activity in the earthworks made description of segments of the work difficult; and
  - in relation to the variations, the respondent had in its possession work and delivery dockets which described the variation work.
- the adjudicator fell into jurisdictional error in failing to demonstrate in the determination any process of assessment of the value of the work in accordance with sections 11, 22 and 23 of the Vic Act.

  The court referred to *SSC Plenty Road v Construction Engineering (Aust) & Anor* [2015] VSC 631 (which was analysed in our Roundup of 2015 cases) in which it was said that an adjudicator must demonstrate the process of assessment of the value of the claim rather than merely adopting the amount claimed by a claimant.

  The court noted that this failure was engendered by the lack of definition of the work which was the subject of the claim which rendered the task of valuation at best problematic and at worst impossible.

Landmark Building Services Pty Ltd v Anastasia Tsekouras & Ors [2016] VCC 501

Contractual pre-conditions to payment 'modify or restrict' payment claims and are void under the Vic Act.

FACTS

In 2010, Landmark Building Services Pty Ltd (**claimant**) entered into a construction contract with the Tsekourases (**respondents**) to construct apartments above retail premises located in Richmond (**contract**). The contract provided that a final claim could not be submitted by the claimant until 'completion'.

On 29 July 2015 the claimant submitted a final payment claim under the contract and the Vic Act. The respondents refused to pay the amounts under that payment claim because an occupancy permit had not been provided and because of alleged defects.

On 13 August 2015 an occupancy permit was issued. The claimant then purported to rectify the defects and, on 18 December 2015, re-issued a final payment claim. The respondents did not provide any payment schedule under the Vic Act in response to the payment claim. Instead, on 1 March 2016 the respondents issued a report listing alleged outstanding defects.

The respondents refused to make final payment to the claimant. The respondents argued that the works had not reached 'completion' and as such the claimant had served the final payment claim prematurely under the contract.

DECISION

The court found in favour of the claimant.

Anderson J determined that the final payment claim was made in accordance with the contract because the works had reached completion and ordered that there be judgment for the claimant against the respondents.

Further, his Honour confirmed that whilst a pre-condition under the contract to payment may be valid in respect of a payment claim made under contract, such a pre-condition would 'modify or restrict' the operation of the Vic Act and would therefore be void.

Milburn Lake Pty Ltd v Andritz Pty Ltd [2016] VSC 3

The likely consequence now is that 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.

FACTS

Milburn Lake Pty Ltd (trading as Irwin Stockfeeds) (**respondent**) engaged Andritz Pty Ltd (**claimant**) to construct a stockfeed mill. The claimant made two payment claims under the Vic Act and obtained adjudication determinations in respect of these payment claims.

In relation to the second of the adjudication determinations, the respondent applied for an injunction seeking to prevent the claimant from enforcing that adjudication determination under the Vic Act, in particular under Division 2B of the Vic Act.

The issue before the court was whether the balance of convenience, particularly in the context of the purposes of the Vic Act, favoured granting an injunction preventing the entry of judgment so that the respondent was not precluded from relying upon an error of law on the face of the record in judicial review proceedings.

The respondent alleged that the adjudicator made a series of errors in the course of his determination and argued that it had a claim against the claimant for defects relating to the operation of the mill. There was also no evidence that the respondent would be unable to pay.

DECISION

The court found in favour of the respondent.

J Forrest J was satisfied that several of the ground in the respondent's submissions disclosed a serious question to be tried. His Honour noted that:

- there was no evidence that the respondent would be unable to pay;
- the respondent's claim for defects relating to the operation of the mill;
- prejudice to the respondent if it was not able to argue the its grounds seeking judicial review relief; and
- an injunction would preclude the claimant from recovering approximately $600,000 within a short time through enforcing its rights under the Vic Act.

His Honour held that the balance of convenience favoured the granting of an injunction to prevent the enforcement of the adjudication determination but only on terms that the adjudication amount be paid into the court or into an agreed managed fund.

His Honour acknowledged that the grant of an injunction absolutely, without ordering payment into court, would frustrate the policy and purpose of the Vic Act—namely to preserve cash flow to contractors and to 'pay now and argue later'.

Promax Building Developments Pty Ltd v 167 Lower Heidelberg Road Pty Ltd [2016] VCC 1960

The County Court of Victoria has held that with the implied or express consent of the principal, a contractor may withdraw and re-submit a payment claim for the same reference date.

FACTS

167 Lower Heidelberg Road Pty Ltd (**respondent**) contracted Promax Building Developments Pty Ltd (**claimant**) to build an apartment building. The claimant submitted a payment claim under the Vic Act which included an invoice for $310,469.50 (**initial payment claim**).

Following an informal practice adopted by the parties, the completed works were then assessed by a quantity surveyor and discussions took place between the respondent and the claimant. As a result of these discussions the claimant issued a revised invoice for $275,214.50 (**revised payment claim**).

The respondent served its payment schedule in response to the revised payment claim. In the covering letter to the payment schedule, the respondent stated that the initial payment claim was regarded as having been withdrawn and replaced by the revised payment claim.

The issues before the court were:

whether the initial payment claim was withdrawn and replaced by the revised payment claim; or

- alternatively, whether the initial payment claim remained valid on that basis that the revised payment claim was issued contrary to section 14(8) of the Vic Act.

DECISION

The court in favour of the claimant.

Anderson J found that the initial payment claim was validly withdrawn by the claimant and replaced with the revised payment claim. His Honour held that the reasoning of McDougall J in *Kitchen Xchange v Formacon Building Services* [2014] NSWSC 1602 (analysed in our Roundup of 2014 cases) supported the substitution of payment claims where the parties had expressly or impliedly consented to the withdrawal.

In these circumstances, his Honour held that the respondent had followed the informal process established by the parties and was therefore entitled to assume the revised payment claim was intended to be a valid replacement of the initial payment claim.

RAW Build v JBK Industries & Anor [2016] VSC 242

A certified extract of a judgment for payment of an amount claimed but not paid under the Vic Act will be unenforceable if the extract does not acknowledge:

- **the issue of an adjudication certificate;**
- **the filing of an affidavit asserting that a claimed amount is unpaid; and**
- **the amount of the debt due to the claimant.**

FACTS

JBK Industries Pty Ltd (**claimant**) entered into a subcontract with RAW Build Pty Ltd (**respondent**) to provide mechanical works and services for the construction of residential apartments.

The claimant submitted a payment claim under the Vic Act, but the respondent failed to provide a payment schedule within 10 business days and failed to make a payment. The claimant lodged an adjudication application and the adjudicator determined that the claimant was entitled to an interim payment of $81,415 (including GST and adjudicator's fees).

The claimant applied under section 28R of the Vic Act to the Magistrates' Court for recovery of the adjudicated amount by filing an adjudication certificate and an affidavit stating that the whole of the amount payable had not been paid by the respondent.

A certified extract of the Magistrates' Court's orders stated:

> *'This is not the registration [sic] of an order but the filing of an adjudication certificate pursuant to the Building and Construction Industry Security of Payments Act 2002 (Vic) [sic] to become an order of the Magistrates' Court.'*

DECISION

The court found in favour of the respondent.

Vickery J held that the Magistrates' Court's judgment extract did not constitute or record a judgment made under section 28R of the Vic Act and could not be relied upon to enforce the adjudicator's determination.

His Honour found that the extract of the Magistrates' Court :

- did not state that a debt was due from the respondent to the claimant;
- did not record that an affidavit had been filed;
- 'critically', did not record anything in the nature of a judgment for a debt in favour of the claimant; and
- did no more than record that an adjudication certificate had been filed with the court.

His Honour held that:

- under section 28R(2)(b) of the Vic Act, the filing of an affidavit is an essential requirement to obtaining judgment for payment; and
- the failure to refer to the affidavit indicated that the order of the court was not a judgment as required by section 28R of the Vic Act.

Raw Build Pty Ltd v JBK Industries Pty Ltd [2016] VSC 547

A plaintiff will not be required to pay the unpaid portion of any adjudication determination into court as security before commencing proceedings to have that determination declared invalid unless there is a valid judgment for the purposes of section 28R(1) of the Vic Act.

FACTS

Raw Build Pty Ltd (**respondent**) engaged JBK Industries Pty Ltd (**claimant**) to supply mechanical works and services for the construction of a multi-storey residential development.

The claimant issued a payment claim under the Vic Act and obtained an adjudication certificate for $81,415. The claimant applied for an order to recover this amount as a debt under section 28R(1) of the Vic Act and received what purported to be an order of the Magistrates' Court of Victoria (**purported court order**).

However, in *RAW Build v JBK Industries & Anor* [2016] VSC 242, the court held that the purported court order was defective for the purposes of the Vic Act.

The respondent challenged the validity of the adjudication determination on the basis of jurisdictional error. The issue was whether section 28R(5) of the Vic Act required the respondent to pay the disputed amount into the court fund pending the final determination of the proceedings.

DECISION

The court found in favour of the respondent.

Vickery J held that section 28R of the Vic Act was not engaged on these facts. As the purported court order was defective, the claimant had not obtained a valid 'judgment' for the adjudicated amount as required by section 28R(1) of the Vic Act. Accordingly, the respondent had no obligation to pay the disputed amount into court before challenging the validity of the adjudication determination.

Additionally, by challenging the validity of the adjudication determination the respondent was not seeking to have any 'judgment' set aside as contemplated by section 28R(5) of the Vic Act. His Honour reiterated that payment could be ordered on discretionary grounds had the respondent sought an injunction in relation to the disputed amount.

SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd [2016] VSCA 119

Mediation is not a method for resolving disputes for the purpose of section 10A(3)(d)(ii) of the Vic Act.

FACTS

Construction Engineering (**claimant**) entered into a design and construct contract with SSC Plenty Road Pty Ltd (**respondent**) to build a shopping centre (**contract**). During the course of the project, the claimant claimed a progress payment which included amounts for variations which were disputed by the respondent.

The progress claim was adjudicated in favour of the claimant, the adjudicator finding that the claimant's entitlement was more than the amount assessed by the respondent in its payment schedule.

Dispute resolution

The dispute resolution provisions of the contract included a compulsory meeting following notification of a dispute, and failing resolution at that meeting, mandatory mediation.

In *SSC Plenty Road v Construction Engineering (Aust) & Anor* [2015] VSC 631 (which was analysed in our Roundup of 2015 cases), the court upheld the adjudication determination by finding that mediation was not 'a method for resolving disputes for the purposes of section 10A(3)(d)(ii) of the Vic Act so as to exclude the disputed variation claims being claimed and adjudicated under the Vic Act. That decision was appealed by the respondent.

Certification of progress payment by superintendent

Under the contract, the superintendent also had the function of issuing progress certificates which included the superintendent's opinion on the amount of progress payments.

The respondent also applied for judicial review of the determination on the ground that the adjudicator was bound to adopt the superintendent's opinion on the value of the work and in failing to do so, had erred by failing lawfully to value the work as required under sections 10 and 11 of the Vic Act.

DECISION

The Victorian Court of Appeal found in favour of the claimant.

Santamaria, Beach and McLeish JJA dismissed the respondent's appeal and upheld the decision of Vickery J in the Victorian Supreme Court at first instance that:

- the exception in section 10A(3)(d)(ii) of the Vic Act should be construed in such a way that contemplates an alternative means of securing the certainty and finality of a binding amount;
- a 'method for resolving disputes' requires a method that will result in an actual resolution of the dispute between the parties rather than just offering a forum for the discussion of the controversies between them, which may or may not lead to their resolution; and
- mediation, does not meet the above requirements.

The court separately noted that the provisions of the Vic Act prevail over contract provisions and confirmed that an adjudicator's functions in determining the amount of a progress payment under, and only the matters set out in, section 23 of the Vic Act is not limited to considering the contract pricing stipulated by the superintendent, but rather is an independent assessment made by the adjudicator under the Vic Act.

UBM Plastering Pty Ltd & Anor v Idevelopment Group Pty Ltd [2016] VCC 458

A person who is not a party to a construction contract has no entitlement under the Vic Act to serve payment claims.

FACTS

Idevelopment Group Pty Ltd (**Idevelopment**) and BQH Constructions Vic Pty Ltd (**BQH Construction**) (together, the **Developer related entities**) were related companies which were involved in a residential development project in Epping. During the project:

- UBM Plastering Pty Ltd (**UBM Plastering**) issued various payment claims to each of the Developer related entities; and
- UBM Corp Pty Ltd (**UBM Corp**) issued various payment claims to each of the Developer related entities.

There were no formal written contracts and UBM Plastering and UBM Corp relied upon written quotations and a verbal acceptance by the son of the person who was both the manager of Idevelopment and a director of Idevelopment.

UBM Plastering and UBM Corp sought summary judgment under section 16(2) of the Vic Act on the basis that the Developer related entities had each failed to provide a payment schedule in response to the payment claims.

Idevelopment argued that:

- there was a single construction contract for the project;
- UBM Corp was the only appropriate party which had been engaged to carry out 'construction work' on the project; and
- BQH Construction (now in liquidation) was the only appropriate party which had engaged UBM Corp, or any other company, to carry out construction work on the project.

DECISION

The court dismissed the application of UBM Plastering and UBM Corp's application for summary judgment and ordered the matter to go to trial in order for Idevelopment to defend the claim.

Anderson J found that, in the absence of a written contract for the construction works, it was unclear:

- which entities were parties to the construction contract; and
- whether UBM Plastering or UBM Corp had a right to claim under the Vic Act against Idevelopment.

His Honour relied upon the judgment of Cosgrave J in *Baron Forge Contractors Pty Ltd v. Vaughan Constructions Pty Ltd* [2015] VCC 1424 (which was analysed in our Roundup of 2015 cases), who had held that the assumption underlying the Vic Act and the NSW Act is that the party serving the progress payment claim must be a party to a construction contract.

Anderson J determined that the identity of the parties to the construction contract was sufficiently ambiguous to dismiss the application for summary judgment.

Vinson v Neerim Property Developments Pty Ltd [2016] VSC 321

A notice given under section 18(2) of the Vic Act will not be valid unless it states an intention to adjudicate.

FACTS

Theresa Vinson (**respondent**) engaged Neerim Property Developments Pty Ltd (**claimant**) under three separate contracts to construct three townhouses on an inherited property (**contracts**).

The claimant submitted a payment claim dated 21 January 2016 for variations, totalling an amount of $111,050.00. On 4 February 2016 the respondent rejected the payment claim, and claimed that the claimant was in breach of the contracts as the result of a failure to complete the building works in the time required by the contracts.

On 9 February 2016, the claimant emailed the respondent referring to the previous payment claim and stated *'I reserve my right to exercise rights under the Act*' (**email**). The email was purported to be a notice under section 18(2) of the Vic Act.

Between February and April 2016, the claimant made multiple failed attempts to have the claim adjudicated. In each instance, the adjudicator either declined to accept appointment, or declined to determine the matter.

The respondent sought an injunction restraining the claimant from applying for further adjudication of the payment claim.

The respondent submitted that:

- pursuant to the exclusion in section 7(2) of the Vic Act, the contracts were domestic building contracts within meaning of *Domestic Building Contracts Act 1995* (Vic), and that she was not in the business of building residences, and as such the Vic Act should not apply; and
- the purported notice did not meet the requirements of section 18(2) of the Vic Act, as it did not notify the claimant's intention to adjudicate.

DECISION

The court found in favour of the respondent.

Vickery J restrained the claimant permanently from applying for an adjudication of the payment claim:

His Honour held that the contracts were domestic building contracts, however he did not have enough facts on the papers to make a decision on the 'real issue' as to whether the respondent was in the business of building residences.

His Honour went on to determine that even if the contracts did fall under the ambit of the Vic Act, the claimant had failed to comply with essential and obligatory requirement of section 18(2) of the Vic Act to enable the respondent to be given an opportunity to provide a payment schedule to the claimant. Simply stating 'reserving his rights' in the email was not enough for the claimant to meet this requirement.

Western Australia

CASE INDEX

- *BGC Construction Pty Ltd v Citygate Properties Pty Ltd* [2016] WASC 88
- *Citygate Properties Pty Ltd v BGC Construction Pty Ltd* [2016] WASC 101
- *Cooper & Oxley Builders Pty Ltd v Steensma* [2016] WASC 386
- *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2016] WASC 119
- *Field Deployment Solutions Pty Ltd and SC Projects Australia Pty Ltd* [2016] WASAT 47
- *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130
- *MRCN Pty Ltd (Trading As West Force Construction) and Pindan Contracting Pty Ltd* [2016] WASAT 114
- *Samsung C&T Corporation v Loots* [2016] WASC 330
- *SC Projects Australia Pty Ltd v Field Deployment Solutions Pty Ltd [No 2]* [2016] WASC 51

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

Western Australia overview

EMERGING TRENDS

This year Western Australia saw parties challenging adjudication determinations on the basis of a jurisdictional error of the adjudicator. Following the decision of the Court of Appeal in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130, and the amendments to the WA Act which have shifted the balance further in favour of applicants and increased the discretion of adjudicators, it is likely that courts will be less willing to allow such challenges in 2017.

DEVELOPMENTS

2016 was a year of substantial reform for security of payment in Western Australia. On 22 November 2016, Parliament passed the *Construction Contracts Amendment Bill 2016* in response to Professor Evans' 'Report on the Operation and Effectiveness of the *Construction Contracts Act 2004* (WA)'. The amendments to the WA Act are largely procedural and are targeted at providing more time and flexibility for adjudications. The key amendments to the WA Act include:

- extending the time limit to make an adjudication application from 28 to 90 business days;
- allowing for a disputed invoice to be re-invoiced so that applicants will get a new 90 day timeframe in which to submit an adjudication application;
- reducing the implied payment term from 50 days to 42 days in all contracts entered into after 3 April 2017;
- granting a higher degree of flexibility and discretion for adjudicators when determining applications and settlements; and
- eliminating the need for adjudication determinations to be considered by a court before being enforced.

Overall the amendments to the WA Act heighten adjudication flexibility in favour of applicants.

Separately, the Government of Western Australia has taken steps to protect contractors working on Government-funded construction projects in Western Australia. The Government introduced mandatory project bank accounts to improve security of payment for subcontractors engaged on projects managed by the Building Management and Works division of the Department of Finance, as well as a Code of Conduct for contractors working on certain classes of State construction projects.

The Western Australian Court of Appeal's decision in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130 was probably the most significant decision of 2016. In this decision the Court of Appeal found that misconstruing or misapplying the terms of a contract will not constitute jurisdictional error, reversing the decision of the primary judge. This helpfully closed what promised to be a significant opportunity to challenge determinations. The Court of Appeal emphasised the objectives of the WA Act, in particular the focus on fair, inexpensive and quick resolution of disputes.

FUTURE

With the majority of the reforms to the WA Act having taken effect on 15 December 2016, WA is in for a year of change in the law on security of payment.

It remains to be seen how courts will treat the ability to 'recycle' claims. Courts and Tribunals in Western Australia have historically taken the view that facilitating timely payments under construction contracts cannot be achieved by permitting repeat claims. However, with the WA Act now expressly allowing for a disputed invoice to be re-invoiced so that the applicant has a new 90 day timeframe in which to submit an adjudication application, it will be interesting to see how the case law in this area develops. It will also be interesting to see whether adjudicators (and courts) accept applications to adjudicate recycled payment claims where the claim is based on an invoice which was first issued prior to the amendments taking effect.

BGC Construction Pty Ltd v Citygate Properties Pty Ltd [2016] WASC 88

The Supreme Court of Western Australia has confirmed that the time prescribed by section 31(2) of the WA Act for an appointed adjudicator to make a determination will be applied strictly.

The court provided valuable guidance as to the standard of reasoning that an adjudicator is required to maintain in discharging their statutory function.

FACTS

Disputes about a construction contract for the extension of a shopping centre between the builder, BGC Construction Pty Ltd (**claimant**) and Citygate Properties Pty Ltd (**respondent**) gave rise to three inter-related applications:

First application

The claimant sought leave to enter judgment against the respondent in respect of two determinations made by the same adjudicator for the sums of $402,273.21 and $392,145.00 (**First Determination** and **Second Determination** respectively).

The adjudicator sought an extension of time to determine the application and the parties consented to an extension to 26 February 2015.

On 25 and 26 February 2016, the adjudicator and the parties conferred in relation to a further extension of time; however, the claimant refused to consent to a further extension.

At 11.52pm on 26 February 2016, the adjudicator issued an email to each of the parties' solicitors containing a preliminary determination that referred to detailed variations contained in an 'Annexure B', which was not attached.

Later, at 12.53am on 27 February 2016, the adjudicator issued an identical email to each of the parties' solicitors, this time attaching Annexure B.

Second and third applications

The respondent applied for judicial review, and the quashing, of both the First and Second Determinations.

The adjudicator sought an extension of time to determine the application and the parties consented to an extension to 5 May 2015.

At 3.37pm on 5 May 2015, the adjudicator issued an email to the parties expressing that he would not deliver his determination until his fees had been paid. The claimant was unable to pay its share of the adjudicator's fees until 8 May 2015.

The adjudicator issued his determination to the parties on 8 May 2015; however, the determination was dated 5 May 2015.

The determination comprised a narrative section that recorded that the respondent was liable to pay the claimant the sum of $392,145.00 plus GST, and an annexed schedule which extended over 100 pages and dealt with 55 'variation claims' and 9 'backcharges'. The determination contained a number of deficiencies which made it impossible for the parties to understand the figure awarded by the adjudicator.

DECISION

The court quashed both Determinations and dismissed the claimant's application for leave to enforce the Determinations.

Tottle J held, amongst other things, that:

The First Determination was taken to be dismissed at midnight on 26 February 2016 pursuant to section 31(3) of the WA Act as the parties had not consented to a further extension of time.

The adjudicator was entitled to request advance payment for his fees for the Second Determination pursuant to section 44(4) of the WA Act.

The adjudicator failed to exercise the statutory jurisdiction conferred on him by the WA Act, and therefore committed jurisdictional error, by failing to give rational reasons for the Second Determination pursuant to section 36(d) of the WA Act.

In reaching his conclusion in relation to the Second Determination, his Honour commented as follows:

'*It is incumbent on an adjudicator to make it plain in the reasons that he or she has engaged with the issues…. The reasons should make plain what the Adjudicator has determined and why. The authorities make it clear that the reasons do not have to be detailed or elaborate but an adjudicator cannot omit to give reasons entirely in respect of significant items and leave the parties to work out for themselves the basis upon which a determination has been made.*'

Citygate Properties Pty Ltd v BGC Construction Pty Ltd [2016] WASC 101

A court's discretion to grant leave to enforce a determination must be exercised having regard to the objects, purpose and policy of the WA Act which, expressed compendiously, is 'to keep the money flowing'. Having regard to that object, a party who has the benefit of a determination is entitled to enforce it.

FACTS

In September 2015, under the same construction contract between the builder, BGC Construction Pty Ltd (**claimant**) and Citygate Properties Pty Ltd (**respondent**) referred to in *BGC Construction Pty Ltd v Citygate Properties Pty Ltd* [2016] WASC 88, the respondent received an adjudication in its favour (**Third Determination**) and sought leave to enforce as a judgment of the court under section 43(2) of the WA Act. The claimant did not challenge the Third Determination but attempted to block its enforcement.

The claimant argued that in any event that the question of enforcement should await the outcome of the respondent's application for judicial review of the First Determination and the Second Determination (as defined in *BGC Construction Pty Ltd v Citygate Properties Pty Ltd* [2016] WASC 88). That in fact happened as a result of the way the court listings were organised, and the court found in favour of the respondent and quashed both the First and Second Determinations.

The court then went on to consider in this judgment whether there were any remaining grounds upon which the respondent should not be allowed to enforce the Third Determination.

DECISION

The court granted leave to the respondent to enter judgment to enforce the Third Determination.

Tottle J held that:

- what constitutes a sufficient reason for refusing leave to enforce a determination will depend on a consideration of all the relevant circumstances and must be assessed bearing in mind the scheme and policy of the WA Act;
- the court's discretion to grant leave to enforce a determination must be exercised having regard to the objects, purpose and policy of the WA Act which, expressed compendiously, is 'to keep the money flowing'. Having regard to that object, a party who has the benefit of a determination is entitled to enforce it.

His Honour noted that the claimant did not challenge the Third Determination by bringing an application for judicial review. In the absence of such a challenge, the claimant's submissions—that the reliance of the respondent on the processes of the WA Act were opportunistic or an abuse of process—did not amount to a sufficient reason not to grant leave to enforce the Third Determination. The fact that the First and Second Determinations, which were initially in the claimant's favour, were quashed, disposed of the claimant's argument that it would be contrary to the object of the WA Act and manifestly unjust to allow the respondent to enforce the Third Determination in its favour.

His Honour also noted that the WA Act clearly contemplated that determinations may be made which call for money to be paid by a contractor to a principal. Therefore, granting leave to the respondent, who is the 'principal' in this case, to enforce the Third Determination was not inconsistent with the purpose of the WA Act.

Cooper & Oxley Builders Pty Ltd v Steensma [2016] WASC 386

This decision demonstrates the requirement for adjudicators to consider the respondent's submissions, including the merits of a counterclaim or set off, in reaching their determination.

FACTS

Cooper & Oxley Builders Pty Ltd (**respondent**) entered into a contract with AM Land Pty Ltd (**claimant**). The claimant made two claims for progress payments under the contract which remained unpaid by the respondent. The respondent did not respond to the payment claims with a payment certificate pursuant to the contract. The respondent asserted that it was entitled to set off its entitlement to liquidated damages and damages for rectification work against any amount claimed by the claimant under the contract.

The claimant applied to have the dispute adjudicated under the WA Act. The adjudicator determined that each of the progress claims and the asserted set off gave rise to separate payment disputes under the Act and that he did not have the jurisdiction to adjudicate more than one payment dispute simultaneously. The adjudicator therefore only considered the first payment claim and found in favour of the claimant.

Subsequently, the claimant referred the second payment claim to adjudication. The adjudicator determined the payment dispute in favour of the claimant and refused to consider the respondent's set offs on the basis that the defence put forward occurred after the date at which liability for the claimant's payment claim was to be determined.

The respondent commenced an application for certiorari to quash each adjudication determination on the grounds of jurisdictional error.

DECISION

The court held that the adjudicator had made a jurisdictional error in both determinations and granted the respondent's application for certiorari to quash both determinations.

Le Miere J held that in the first determination the adjudicator erred in deciding he could not concurrently consider the set off claim. Sections 27, 31(2)(b) and 32(1)(a)(ii) of the WA Act required the adjudicator to take into consideration the respondent's response, including the merits of a counterclaim or set off, in reaching a determination. His Honour clarified that the respondent raised the set off as a defence to the payment claim and that it did not constitute a 'payment dispute' as the claim had not crystallised. The adjudicator was therefore required to consider the set offs as a response rather than a dispute to be adjudicated separately. The adjudicator erred in finding he was precluded from considering the set off.

As for the second adjudication determination, his Honour clarified that the scope of section 31(2)(b) of the WA Act requires the adjudicator to determine whether any party to the dispute is liable to make a payment. This extends to all antecedent liabilities arising up until the date of determination. The respondent's set off defence was raised after the adjudication application but prior to determination. The adjudicator erred in failing to consider the set off.

Subsequent developments

Since this decision, section 32(3)(c) of the WA Act has been amended, allowing the adjudicator to use his or her own discretion in determining whether or not to simultaneously adjudicate more than one payment dispute, subject to restrictions.

Duro Felguera Australia Pty Ltd v Samsung C&T Corporation [2016] WASC 119

An adjudication determination under the WA Act does not prevent a party from relying on its contractual entitlement to claim on performance bonds as security for amounts that party claims to be due under the contract.

FACTS

The defendant, Samsung C & T Corporation (**respondent**) engaged Duro Felguera Australia Pty Ltd (**claimant**) to perform works in relation to the Roy Hill mining and port project. Under the contract for works:

- the claimant was required to provide security for its performance under the contract in the form of bonds valued in excess of $76,000,000 (security bonds); and
- the respondent was entitled to have recourse to this security where it considered that it was, or would be, entitled to recover the amount from the claimant under the contract.

On the basis that the claimant had failed to rectify defective works the respondent gave notice of its intention to have recourse to the security bonds by making demand on the issuers of the security bonds for payment under the security bonds (**notice of intention**).

Prior to the issue of the notice of intention the claimant had obtained three separate adjudication determinations with respect to payment claims under the WA Act and was in the process of applying to the court to enforce these determinations.

The claimant therefore sought an interlocutory injunction to restrain the respondent from converting the security bonds on the basis that to do so would disregard the adjudication determinations.

DECISION

The court dismissed the claimant's application for an injunction.

In doing so, Le Miere J held that adjudication determinations made under the WA Act are an interim adjudication of rights under the contract in question, and therefore do not preclude recourse to security. This finding is consistent with earlier decisions (*Patterson Building Group Pty Ltd v Holroyd City Council* [2013] NSWSC 1484 and *Fabtech Australia Pty Ltd v Laing O'Rourke Australia Construction Pty Ltd* [2015] FCA 1371) regarding the exercise of contractual recourse to security for amounts due that are the subject of adjudication determinations under the New South Wales and Queensland security of payment legislation equivalents of the WA Act.

His Honour noted that the WA Act should not be interpreted as altering the terms of a construction contract, and that a determination under the WA Act should not therefore alter the allocation of risk agreed between the parties under the security provisions of the contract.

His Honour also noted that the purpose of an injunction was to maintain the status quo pending final determination of the rights between the parties. In seeking an injunction to prevent the respondent from exercising its contractual right to security, his Honour held that the claimant was essentially seeking to alter the status quo pending final determination of the dispute.

Field Deployment Solutions Pty Ltd and SC Projects Australia Pty Ltd [2016] WASAT 47

Section 31(2)(a) and section 31(2)(b) of the WA Act are mutually exclusive alternatives. An adjudicator's determination made under section 31(2)(b) of the WA Act, despite comments from the adjudicator indicating that dismissal under section 31(2)(a) of the WA Act may have been more appropriate and the adjudicator's express assumption of jurisdiction was enough for the State Administrative Tribunal of Western Australia to categorize the decision as one made under section 31(2)(b) of the WA Act which it does not have power to review.

FACTS

Field Deployment Solutions (**claimant**) applied for adjudication of a payment dispute arising from a construction contract between it, as supplier, and an unincorporated joint venture between SC Projects Australia Pty Ltd and Sea Trucks Australia Pty Ltd (together, the **respondents**).

The adjudicator found, in favour of the respondents, that the application for adjudication was not served within the time limits prescribed by the WA Act. Despite this being a ground on which an adjudicator can dismiss an application pursuant to section 31(2)(a)(ii) of the WA Act, the adjudicator found that he did have jurisdiction to hear the dispute.

The adjudicator declined to dismiss the proceeding under section 31(2)(a) of the WA Act and proceeded to make a determination under section 31(2)(b) of the WA Act.

The claimant then applied to the State Administrative Tribunal of Western Australia (**Tribunal**) for a review of the adjudicator's determination, seeking a ruling that:

- the adjudicator's decision be set aside; and
- the Tribunal substitute its own decision on the merits of the case.

The claimant submitted that the adjudicator's 'purported finding' that the application was made out of time meant that the adjudicator had never assumed jurisdiction and a reviewable decision existed.

The respondent submitted that:

- the adjudicator's comments regarding time limits did not divest him of the jurisdiction which he had assumed; and
- a 'decision' for the purposes of the WA Act was made under section 31(2)(b) of the WA Act and the Tribunal therefore had no power to review it.

DECISION

The Tribunal agreed with the respondent and dismissed the application.

President J C Curthoys J held that the adjudicator had expressly assumed jurisdiction to determine the dispute and had done so pursuant to section 31(2)(b) of the WA Act.

The Tribunal also found that section 31(2)(b) and section 31(2)(b) of the WA Act are mutually exclusive alternatives. As such, if a determination was made under section 31(2)(b) of the WA Act, there could not have been a decision made to dismiss the adjudication under section 31(2)(b) of the WA Act.

The Tribunal also found that a review of the merits of the adjudicator's determination is outside the jurisdiction of the Tribunal and such an application should be made to the WA Supreme Court.

Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation [2016] WASCA 130

The WA Court of Appeal has confirmed that a payment dispute may arise under section 6 of the WA Act before the amount claimed in a payment claim is due under a construction contract. It has also provided guidance as to the circumstances in which an adjudicator can fall into jurisdictional error.

FACTS

In February 2014, Samsung C&T Corporation (**respondent**) subcontracted Laing O'Rourke Australia Construction Pty Ltd (**claimant**) to carry out construction work on the Roy Hill project.

On 27 January 2015, the claimant submitted a progress claim for $43,443,517 (**January Claim**). The respondent issued an 'assessment' of the January Claim which was accepted to amount to a dispute of the claim.

On 10 February 2015, the respondent exercised its contractual right under the subcontract to terminate the subcontract 'for its sole convenience'.

On 21 February 2015, the respondent and the claimant entered into an 'Interim Deed', under which the respondent paid $45,000,000 to the claimant on account of its work (**Deed Payment**).

On 25 February 2015, the claimant submitted a progress claim for all works performed prior to the termination of the subcontract of $54,713,156.41 (**February Claim**).

The respondent did not pay either Claim. The claimant applied adjudication of both. The adjudicator determined that the respondent should pay the claimant $20,965,076 for the January Claim and $23,175,442.01 for the February Claim (**Determinations**).

The claimant sought leave to enforce the Determinations as judgments of the court. The respondent commenced separate proceedings for judicial review to quash the Determinations for jurisdictional error.

At first instance, in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237 (analysed in our Roundup of 2015 cases), Mitchell J held that:

- under section 6 of the WA Act, a payment dispute may arise before the amount claimed becomes due under the contract if the amount has been disputed; and
- the adjudicator had exceeded his jurisdiction by making the determinations without proper reference to the terms of the subcontract and therefore the Determinations should be quashed for jurisdictional error.

DECISION

Although the majority (comprising Martin CJ and Newnes JA) of the Court of Appeal upheld Mitchell's construction of section 6 of the WA Act, it unanimously overturned the decision on jurisdictional error finding that:

- an adjudicator will not exceed their jurisdiction merely because he or she misconstrues the contract or makes an error in applying its terms;
- an adjudicator will exceed their jurisdiction if they expressly exclude the contract from consideration; and
- in cases which do not fall within those two categories, the preferable course is to ascertain what the adjudicator has done and consider whether his or her actions constitute a determination under the WA Act.

The court concluded that the decision of Mitchell J to quash the determinations should be set aside.

However, the court did not grant leave to the claimant to enforce the determinations because the respondent had already made the Deed Payment.

The Court of Appeal emphasised the objectives and purpose of the WA Act, noting that:

- section 30 of the WA Act provides that *'the object of an adjudication of a payment dispute is to determine the dispute fairly and as quickly, informally and inexpensively as possible*'; and
- the Minister's Second Reading Speech makes it clear that the WA legislature intended the rapid adjudication process under the WA Act to be a '*trade-off between speed and efficiency on the one hand, and contractual and legal precision on the other*'.

MRCN Pty Ltd (Trading As West Force Construction) and Pindan Contracting Pty Ltd [2016] WASAT 114

When dismissing an application for adjudication, an adjudicator must reach that conclusion based on the facts before him or her. He or she is not required to consider or follow an adjudicator's previous decision to adjudicate a dispute under the same contract involving issues in common with the current matter.

A clause in a subcontract stating that retention monies were to be released upon final completion of the head project works was not necessarily a 'pay when paid' clause.

FACTS

Pindan Contracting Pty Ltd (**respondent**) was appointed as lead contractor on a prison redevelopment. The respondent entered into a subcontract with MRCN Pty Ltd (**claimant**) for the provision of precast concrete rigging services.

Under a clause of the subcontract, the claimant was entitled to the release of its retention monies in two stages:

- 50% upon certification of practical completion of the works under the head contract; and
- the balance upon certification of final completion of the works under the head contract.

The claimant successfully pursued adjudication of a payment dispute regarding release of the first 50% of the retention monies, with the adjudicator finding that practical completion of the works under the head contract occurred on 17 April 2015.

The claimant then applied for adjudication in relation to the release of the balance of the retention monies, claiming that *'final completion'* of the works under the head contract had occurred when the defects liability period expired (ie one year from 17 April 2015). The adjudicator dismissed the application (**dismissal**), finding that practical completion of the head contract works had not occurred and payment was not due, despite the earlier adjudication.

In an application to the State Administrative Tribunal of Western Australia (**Tribunal**), the claimant sought a review of the adjudicator's dismissal decision and the recovery of the balance of the retention monies.

DECISION

The Tribunal upheld the adjudicator's decision to dismiss the claimant's application, agreeing that practical completion of the head contract had not yet occurred.

On this basis, Member T Carey found that the balance of the retention monies was not due to be returned, so there was no payment dispute for the purposes of section 6 of the WA Act. The Tribunal held that the adjudicator was therefore obliged to dismiss the claimant's application for adjudication under section 31 of the WA Act as the formal requirements for adjudication had not been met.

The claimant had argued that the decision to dismiss its application would effectively overturn the decision of the previous adjudicator that payment of the first 50% of the retention monies was due. The Tribunal held that adjudicators must make decisions on the basis on the facts before them and are not required to follow the decision of a previous adjudicator, even if the new decision will effectively overturn a previous one.

The claimant had also argued that, by making return of the retention monies under the subcontract conditional on practical completion under the head contract, the retention clause was a 'pay when paid' clause, which are prohibited under section 9 of the WA Act. The claimant relied on the assumption that the respondent would be entitled to return of a guarantee or retention under the head contract on practical completion, and this meant that return of the claimant's retention was dependent on the release of the respondent's retention. The Tribunal disagreed with this reasoning, finding that it was too speculative and that practical completion of the head contract works did not necessarily coincide with the release of a hypothetical retention under the head contract.

Samsung C&T Corporation v Loots [2016] WASC 330

The decision clarifies the functions and the scope of the powers of adjudicators in payment dispute claims under the WA Act.

FACTS

On the Roy Hill Iron Ore Project, the head contractor, Samsung C&T Corporation (**respondent**) subcontracted with Duro Felguera Australia Pty Ltd (**claimant**).

The claimant successfully obtained five adjudication determinations under the WA Act in its favour. The amount awarded to the claimant under the determinations totalled more than $60 million.

The respondent brought an application to set aside all five adjudication determinations on the basis of jurisdictional error.

The claimant sought leave to enforce the determinations.

DECISION

The court set aside the second and third of the five adjudication determinations on the basis of jurisdictional error and granted leave to the claimant to enforce the first, fourth and fifth determinations. As a result, the respondent was required to pay the claimant $12 million.

Second determination

Beech J set this aside on the ground that the adjudicator exceeded the limits of his statutory powers. The adjudicator found the respondent had the right to set off $6.66 million, however, refused to give credit for the payment after finding that in an earlier progress certificate the respondent had wrongly set off $13.1 million. His Honour held the statutory function and powers of an adjudicator do not direct attention to the merits of competing claims made in response to earlier or separate progress claims. It is not open to an adjudicator to find that the amount payable to a party in relation to the payment claim before the adjudicator is to be increased (or decreased) on the ground that the adjudicator considers that a party wrongfully denied liability (or wrongfully made a claim) in relation to an earlier, different claim.

Third determination

His Honour set this aside on the basis that the adjudicator exceeded his statutory authority in determining the claimant was entitled to claim a sum of $32.4 million, which was not within the progress claim. His Honour referred to *Alliance Contracting Pty Ltd v James* [2014] WASC 212 (analysed in our Roundup of 2014 cases) reiterating that *'the function of the adjudicator is to determine the merits of the payment claim the disputing of which constitutes the payment dispute, and to determine whether any party to that payment dispute is liable to make a payment in respect to that payment claim'*. As the claimant had not made a payment claim in respect of the $32.4 million, the adjudicator had no power to determine the respondent's obligation to pay that sum. In addition, Beech J held that the adjudicator breached the requirements of procedural fairness in failing to consider the respondent's submissions in regards to the $32.4 million.

Remaining determinations

His Honour rejected:

- the respondent's argument that adjudicators made a jurisdictional error in adopting a construction of the subcontract that was outside reasonable bounds, stating that an adjudicator has jurisdiction to err in the construction of a contract; and
- the respondent's submission that the progress claims in question were not 'payment claims' as defined in the WA Act because the claims were not limited to construction work. His Honour held this to be a restrictive interpretation, unsupported by its text and object, of the WA Act.

SC Projects Australia Pty Ltd v Field Deployment Solutions Pty Ltd [No 2] [2016] WASC 51

Section 19 of the WA Act implies the provisions of Schedule 1 Division 6 of the WA Act into a construction contract that does not have a written provision about interest to be paid on any payment that is not made at the time required by the contract. The implied provision provides for interest to be payable under the construction contract by a party to another party on or before a certain date but which is unpaid after that date, at the rate prescribed by section 8(1)(a) of the *Civil Judgments Enforcement Act 2004* (WA).

FACTS

SC Projects Australia Pty Ltd and Sea Trucks Australia Pty Ltd, jointly, as principal (**respondent**) and Field Deployment Solutions Pty Ltd as supplier (**claimant**) entered into a contract whereby the claimant agreed to supply, operate and manage vehicles to haul material for rehabilitating a right of way relating to a gas pipeline installation (**supply contract**).

The respondent terminated the agreement and the parties were involved in numerous disputes about matters arising under the supply contract (analysed in the 'Western Australia' section of our Roundup of 2014 cases and Roundup of 2015 cases respectively).

Clause 14.1 of the supply contract required the respondent to pay the claimant the 'Site Instruction Price' for services performed under each 'Site Instruction' within 30 days of receipt of an undisputed invoice. The final invoice issued by the claimant included a charge for interest on unpaid invoices.

The issues before the court were:

- a range of other questions relating to the construction of the contractual provisions in the supply contract; and
- whether interest was payable on unpaid amounts under the supply contract which were due for more than 30 days, pursuant to the operation of section 19 of the WA Act.

DECISION

The court agreed with the parties (it being now common ground between them) that the supply contract:

- was a construction contract; and
- did not contain an express provision for interest on overdue payments.

Mitchell J agreed with the parties that, as such, section 19 of the WA Act was implied into the supply contract.

Accordingly, his Honour held that interest was payable on unpaid amounts under the supply contract that were due for more than 30 days, at the rate prescribed by section 8(1)(a) of the *Civil Judgments Enforcement Act 2004* (WA).

Australian Capital Territory

CASE INDEX

- *Creative Building Services Pty Ltd v TIO Air Conditioning Pty Ltd* [2016] ACTSC 367
- *Denham Constructions Pty Ltd v Islamic Republic of Pakistan* [2016] ACTSC 67
- *Denham Constructions Pty Ltd v Islamic Republic of Pakistan (No 2)* [2016] ACTSC 215
- *Denham Constructions Pty Ltd v Islamic Republic of Pakistan (No 3)* [2016] ACTSC 249
- *Denham Constructions Pty Ltd v Islamic Republic of Pakistan (No 4)* [2016] ACTSC 288

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

Australian Capital Territory overview

EMERGING TRENDS

If it wasn't for the spat between the now liquidated Denham Constructions and the Islamic Republic of Pakistan there would have not been much excitement on the SOPA front this year. It seems that contractors in the small ACT market are reluctant to use the ACT Act.

DEVELOPMENTS

The ACT Act produced a couple of judgments that will be useful in Australia-wide SOPA consideration. The case of *Creative Building Services v TIO Air Conditioning Pty Ltd* [2016] ACTSC 367 highlights the danger of the adjudicator just accepting what one party says without due consideration of whether the claimant has proved its entitlement.

Additionally the costs decision in *Denham Constructions Pty Ltd v Islamic Republic of Pakistan (No 3)* [2016] ACTSC 249 where the effect of the SOPA legislation on the test to be considered where a respondent rejected a *Calderbank* offer was explained.

FUTURE

We do not expect to see any upswing in the number of cases and they will continue to trickle through.

Creative Building Services Pty Ltd v TIO Air Conditioning Pty Ltd [2016] ACTSC 367

Where an adjudicator awards a claimant more than the amount which they claimed, the decision of the adjudicator may be open to appeal on the grounds of a jurisdictional error.

FACTS

Creative Building Services Pty Ltd (**respondent**) entered into a subcontract agreement with TIO Air Conditioning Pty Ltd (**claimant**) on 3 February 2015 for the installation of air-conditioning units at the LinQ Apartments.

On 14 December 2015, the claimant served a payment claim on the respondent under the ACT Act. The payment claim was marked as claim '13' and as the 'Final Progress Claim'. It also displayed the adjusted contract value against the sum which had been paid at that time.

On 10 February 2016, the claimant notified the respondent pursuant to section 19(2) of the ACT Act of its intention to apply for adjudication of the payment claim, which preceded the lodgement of an adjudication application on 2 March 2016. The adjudicator determined that the respondent was liable to pay the claimant. The adjudicator held that the payment claim submitted by the claimant reconciled the entire project works.

The relevant amounts are:

Payment claim – total amount claimed	$41,710.67
Amount awarded in the adjudication determination	$143,293.27
Contract value (adjusted)	$1,893,865.22
Sum paid under the contract	$1,593,042.38
Difference between contract value and sum paid under the contract	$300,822.84

The total claim in the payment claim was therefore significantly less than the difference between the contract value and the sum paid as well as the amount awarded.

The issue before the court was whether or not the adjudicator's awarding of an amount substantially higher than that claimed was within the adjudicator's jurisdiction.

DECISION

The court found in favour of the respondent.

Mossop AsJ found that a jurisdictional error was established as the adjudicator exceeded his jurisdiction and the determination was void for jurisdictional error.

Pursuant to section 15(2) of the ACT Act, his Honour held that the use of the words 'Total Claim' and the reference to the ACT Act next to the amount claimed as part of payment claim 13 infer that the total amount claimed in the payment claim was $41,710.67 (rather than a greater amount following reconciliation of moneys owed).

Section 24(2) of the ACT Act provides that the adjudicator must, when deciding an application, consider the payment claim and payment schedule to which the application relates together with any relevant documentation made by the claimant in support of the claim. Mossop AsJ held this to mean that the adjudicator is obliged to 'consider' the payment claim and payment schedule but is not expressly confined to the scope of that amount when making a decision.

If, however, the claimant had only sought a particular amount, it would be inconsistent with statutory processes for the adjudicator to award an amount greater than that claimed (being $41,710.67). As the adjudicator in the present case did not conclusively determine the amount claimed, his Honour held that, objectively, the quantum of the payment claim ($41,710.67) defined the upper limit of the adjudicator's decision. A jurisdictional error was therefore established because the adjudicator exceeded the jurisdiction which was established by this quantum.

His Honour provided that the usual consequence of establishing a jurisdictional error is to grant an order in the nature of a writ of certiorari which occurred in the present case to quash the adjudicator's decision.

Denham Constructions Pty Ltd v Islamic Republic of Pakistan [2016] ACTSC 67

The court will impose a high threshold on an applicant for summary judgment in debt proceedings resulting from a failure to pay on a payment claim under the ACT Act.

FACTS

In April 2013, Denham Constructions Pty Ltd (**claimant**) and the Islamic Republic of Pakistan (**respondent**) entered into a building contract in relation to building work at the High Commission of Pakistan in Canberra. During the course of the works the claimant made claims for variations under the building contract which were either approved in part or rejected by the respondent's architects. The works were completed in June 2015.

On 11 September 2015, the claimant submitted a progress claim under the ACT Act seeking $1,027,054.89 (**claimed amount**), which included a variation claim for an adjustment of time cost in relation to various prior extension of time claims. By email on 15 September 2015, the respondent denied the claimant's *'claim to adjust the contract'* (**Email Response**) on the basis that that claim was time-barred; and, by other correspondence after the due date for issuing a payment schedule, certified for payment only $750.18 in respect of the progress claim.

On 5 November 2015, the claimant commenced proceedings seeking judgment under section 16(4) of the ACT Act to recover the unpaid portion of the progress claim as a debt on the basis that the Email Response was not a payment schedule – the subject of *Denham Constructions Pty Ltd v Islamic Republic of Pakistan (No 2)* [2016] ACTSC 215.

On 8 February 2016, the claimant sought summary judgment against the respondent in a claim for debt totalling the claimed amount. The claimant alleged that the respondent failed to provide a payment schedule and as a result the respondent became liable under section 16(4) of the ACT Act to pay the claimed amount.

The respondent denied that the document served by the claimant on 11 September 2015 was a payment claim under the ACT Act (**Invalidity Argument**) on the bases that the payment claim was:

- for adjusted time costs, and was therefore not a claim for construction work and/or the supply of related goods and services as required by the ACT Act; and/or
- not for additional works but repeated claims for variations that had been previously rejected, and was therefore invalid or otherwise an abuse of process.

In the alternative, the respondent also argued that the Email Response was sufficient to constitute a payment schedule and that the ACT Act did not apply because the land to which the construction contract related was subject to the exclusive jurisdiction of the Commonwealth (**Alternative Arguments**).

DECISION

The court dismissed the claimant's application for summary judgment.

Mossop AsJ stated the principles relevant to summary judgment:

- summary judgment is only granted in situations where the defence is '*so obviously untenable that it cannot possibly succeed*';
- applicants face a '*very high threshold*';
- the lack of a cause of action must be '*clearly demonstrated*'; and
- the procedure calls for *'exceptional caution*'.

His Honour held that although the Invalidity Argument appeared to be weak, there were factual issues to be resolved and the Invalidity Argument should be considered on full argument.

Given that the court had found that the Invalidity Argument was an arguable defence, it was unnecessary for the court to consider the Alternative Arguments.

Denham Constructions Pty Ltd v Islamic Republic of Pakistan (No 2) [2016] ACTSC 215

Unless a previous payment claim has been the subject of adjudication, it may be re-issued in the next available reference date.

Repeating variation claims previously accepted or rejected in an earlier payment claim is not an abuse of process.

Whilst the High Commission for Pakistan is on 'National Land' within the Commonwealth's jurisdiction, the ACT Act an enactment of the ACT Legislative Assembly—is not invalid to the extent it applies to building work on the High Commission.

FACTS

The facts are set out in *Denham* Constructions Pty Ltd v Islamic Republic of Pakistan [2016] ACTSC 67.

This decision is the principal judgment in the series of proceedings between the parties.

On 5 November 2015, the claimant commenced proceedings seeking judgment under section 16(4) of the ACT Act to recover the unpaid portion of the progress claim as a debt on the basis that the Email Response was not a payment schedule.

In defence of the claimant's claim for judgment of the progress claim amount, the respondent argued that:

- its Email Response complied with the requirements of a payment schedule as set out in sections 16(2) and 16(3) of the ACT Act;
- the progress claim was invalid because the amounts claimed related to previous reference dates and no new reference date had arisen since the last progress claim;
- the progress claim amounted to an abuse of process on the basis that it repeated variation claims which had been accepted or rejected previously and contained costs for extensions of time which the claimant had previously calculated to be nil;
- the High Commission for Pakistan is on 'National Land' (being land reserved by the Commonwealth to its exclusive control) and the ACT Act, as an enactment of the ACT Legislative Assembly, does not extend to building work on 'National Land'; and
- the High Commission lies within the 'seat of government' of the Commonwealth, which is subject to the Commonwealth Parliament's exclusive jurisdiction under section 52(i) of the Commonwealth Constitution, such that the ACT Act does not apply.

DECISION

The court found against the respondent on each of its arguments and held that the claimant was entitled to recover the unpaid portion of the claimed amount plus interest.

Payment claim

Mossop AsJ held that the Email Response did not meet the requirements of a payment schedule under the ACT Act, as it did not:

- identify the payment claim to which it related (but rather the variation claim which formed only one component of the progress claim);
- state the amount of payment (if any) that the respondent proposed to make; and
- identify any reasons for withholding payment in relation to any other element of the payment claim aside from the one variation claim.

Reference date

Mossop AsJ, following the decision of McDougall J in *Broadview Windows Pty Ltd v Architectural Project Specialists Pty Ltd* [2015] NSWSC 955 (which was analysed in our Roundup of 2015 cases), was of the view that the contract did not tie the entitlement to make a progress claim to the continuation of work on-site or limit the existence of reference dates in a manner that would prevent them from arising within the 12-month period after the construction work.

The progress claim was therefore consistent with a contractual valuation of the work up to the date of the claim, rather than only payment for the work done during the period since the last claim was made. As a consequence, the progress claim was not in contravention of section 15(5) of the ACT Act.

Abuse of process

Mossop AsJ held that the repetition of claims that have not been paid or the subject of an adjudication is not an abuse of process.

Further, the respondent's arguments in relation to the claimant's reformulation of its adjustment of time costs in the progress claim and entitlement to claim generally for delay were matters to be determined by an adjudicator and did not amount to an abuse of process.

National Land and seat of government (constitutional argument)

His Honour held that the Commonwealth, by maintaining a power to legislate with respect to 'National Land' (which included the Pakistani High Commission), had not qualified the powers of the ACT Legislative Assembly to enact law with respect to 'National Land'. The operation of the ACT Act would only be affected where the Commonwealth was a party to the construction contract on 'National Land'. The respondent's position in respect of the application of the ACT Act to land within the 'seat of government' was rejected on the basis that, even if the Pakistani High Commission was taken to have formed part of the 'seat of government' within the scope of the Commonwealth Constitution, it would still not prevent the ACT Act operating in relation to a contract for construction work on it.

Denham Constructions Pty Ltd v Islamic Republic of Pakistan (No 3) [2016] ACTSC 249

Whether a party's conduct in refusing to accept a *Calderbank* offer will be unreasonable (and therefore result in the presumption of a costs award on an indemnity basis) will depend on the context of the accepted policy of the ACT Act). That is, the contractor is prima facie entitled to payment when a payment schedule is not tendered, and therefore the principal will bear the insolvency risk while the matter is finally determined.

Where a voluntary intervener in court proceedings is appropriate to ensure proper arguments are put forth, it is does not necessarily mean the intervener is entitled to costs of hearing.

FACTS

The Attorney-General had intervened in the proceedings of *Denham Constructions Pty Ltd v Islamic Republic of Pakistan (No 2)* [2016] ACTSC 215, pursuant to the following (**applicable Acts**):

- section 78A of the *Judiciary Act 1903* (Cth); and
- section 27 of the *Court Procedures Act 2004* (ACT).

Denham Constructions Pty Ltd (**claimant**) applied for costs to be made on an indemnity basis from the date of expiry of a *Calderbank* offer.

The Attorney-General applied for an order for costs in his favour.

The Islamic Republic of Pakistan (**respondent**) argued that the terms of the applicable Acts displaced the general discretion of the court to make orders in relation to costs.

DECISION

The court held that no costs are ordered in favour of the Attorney-General.

Mossop AsJ ordered the respondent is to pay the claimant's costs of the proceedings on a party and party basis up until 13 January 2016 (the date of the *Calderbank* offer) and thereafter on a solicitor and client basis.

Costs in relation to the claimant

The court accepted the claimant's submission that the offer involved a compromise of entitlements even though the offer did not require actual payment prior to the proceedings ending.

Mossop AsJ rejected the argument that the offer gave rise to ambiguity due to the overlapping obligations of the ACT Act and the construction contract. In the letter that set out the *Calderbank* offer, immediately prior to the words that expressed the offer, there was an express reference to the fact that '*any payment under the [ACT] Act is interim in nature and "on account" (accordingly your client can seek to re-agitate/challenge the claims made under it.)*'. His Honour held that it was clear from the express reference that the offer only related to the claim under the ACT Act and did not affect the underlying entitlements under the construction contract.

His Honour affirmed that reasonable or unreasonable conduct to refuse an offer must be made on accepted policy of the ACT Act, and in this instance the claimant's conduct in not accepting the offer, in circumstances where its rights to re-agitate the dispute were preserved, was found to be unreasonable.

Costs in relation to the Attorney-General

Mossop AsJ held that costs in favour of the Attorney-General for intervention and submitting accepted arguments must be exercised cautiously; otherwise there is potential for adverse costs to act as a deterrent to raising questions of constitutional law.

Denham Constructions Pty Ltd v Islamic Republic of Pakistan (No 4) [2016] ACTSC 288

The respondent in Denham Constructions Pty Ltd v Islamic Republic of Pakistan (No *2*) [2016] ACTSC 249 was again successful in its application for a further stay preventing enforcement of that judgment until determination of proof of debt under section 533C of the *Corporations Act 2001* (Cth). As the claimant was insolvent (and the judgment amount would be dispersed to secured creditors), the respondent successfully argued that it would be deprived of its right to obtain a set-off under section 533C of the *Corporations Act 2001* (Cth) for its claim of $503,000.

FACTS

After the 12 August 2016 decision in *Denham Constructions Pty Ltd v Islamic Republic of Pakistan (No 2)* [2016] ACTSC 215, on 17 August 2016, his Honour gave judgment for the claimant in the amount of $1,062,886.78 (**17 August judgment**) and granted a stay of any enforcement of the judgment for a period of seven days. On 24 August 2016, his Honour granted the respondent's application and continued the stay. During that application, the main issue was whether or not the claimant was insolvent. His Honour made directions relating to the filing and service of additional evidence and outlines of submissions, which were not complied with. In addition, the matter was listed for 7 September 2016.The respondent sought further stay of execution of judgment award pending resolution of the balance of $503,780.65 (**architect certificate amount**).

On 1 September 2016, a winding up order was made in respect of the claimant and receivers were appointed on 2 September 2016. The respondent applied for, subject to its undertaking to lodge a formal proof of debt with the liquidator of the claimant, orders to stay the 17 August judgment for a further period of 21 days following the determination by the liquidator of that proof of debt.

The respondent argued, on the basis of the decision in *Alexander v Cambridge Credit Corporations Ltd* (1985) 2 NSWLR 685, that stay of orders are similar to the principles that govern interlocutory relief; such as the respondent must show the appeal raises serious issues for determination, there is a real risk it will suffer prejudice or damage, and the appeal is considered on the balance of convenience. Subsequently the respondent contended that if a judgment was made at this stage it would go straight to the receiver, and the respondent would be left as a creditor of a company without any assets. The respondent further submitted that section 553C of the *Corporations Act 2001* (Cth) (**Corporations Act**) required the net amount payable to be determined by the mutual credit and set off. (Section 533C of the Corporations Act provides that, where there have been mutual dealings between an insolvent company and another entity, the liquidator must take account of what is due from one party to the other and set-off the sum due from one party against any sum due from the other party.)

The claimant submitted that it should not be assumed that there was any entitlement to avoid the judgment amount or there was no contest about the respondent's additional claim for the architect certificate amount. No inference should be drawn from the circumstances in which no payment schedule was served.

DECISION

The court held for the respondent that the judgment pronounced on 17 August 2016 be stayed until 21 days following the liquidator's determination of this proof of debt under section 553C of the Corporations Act.

His Honour accepted the approach taken by McDougall J in *Veolia Water Solutions & Technologies (Australia) Pty Ltd v Kruger Engineering Australian Pty Ltd (No 3)* [2007] NSWSC 459. The relationship between the ACT Act and section 553C of the Corporations Act is that the progress claim is satisfied by mutual set-off.

South Australia

CASE INDEX

- *Maxcon Constructions Pty Ltd v Vadasz & Ors* [2016] SASC 148
- *Maxcon Constructions Pty Ltd v Vadasz & Ors (No. 2)* [2016] SASC 156

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

South Australia overview

EMERGING TRENDS

Jurisprudence on the SA Act is developing gradually, continuing to take significant guidance from existing NSW authorities.

DEVELOPMENTS

This year saw further judicial consideration of the SA Act in the Supreme Court of South Australia and the first to be considered by the Full Court of the Supreme Court.

The SA Supreme Court confirmed the primary objective of the SA Act is to preserve cash flow to contractors and the risk that a subcontractor might not be able to refund moneys ultimately found due to the head contractor after any successful action by the head contractor is a risk which has been assigned by the Parliament of South Australia to the head contractor.

A related decision emphasised the need for head contractors to properly investigate the financial standing of subcontractors prior to contract; the mere fact a subcontractor fails to disclose its bankruptcy to a head contract will not necessarily render the contract void for illegality and consequently will not necessarily invalidate a payment claim (*Maxcon Constructions Pty Ltd v Vadasz & Ors* [2016] SASC 148). Further it confirmed an adjudicator's determination that is infected with a non-jurisdictional error on the face of the record is not open to judicial review (*Maxcon Constructions Pty Ltd v Vadasz & Ors* [2016] SASC 148; *Maxcon Constructions Pty Ltd v Vadasz & Ors (No. 2)* [2016] SASC 156).

FUTURE

Given that the NSW Act is in very similar terms to the SA Act, NSW authorities have continued to be used as guidance in understanding the rights and obligations of parties under the SA Act.

Maxcon Constructions Pty Ltd v Vadasz & Ors [2016] SASC 148

The risk that a subcontractor might not be able to refund moneys paid as progress payments under the SA Act that are ultimately found to be due to the head contractor after a successful action by the head contractor is a risk which the Parliament of South Australia has assigned to a head contractor.

The case is also a reminder of the danger of entering into a contract with an undischarged bankrupt.

FACTS

On or about 15 December 2015, Maxcon Constructions P/L (**respondent**) contracted with Vadasz (**claimant**) to supply and install piling for an apartment complex development in Adelaide.

On 25 February 2016, the claimant served a payment claim seeking payment of $204,864.55 for completed piling works. In response, the respondent issued a payment schedule for the amount of $141,163.55 (**payment schedule amount**).

The claimant successfully made an application for adjudication in the amount of $214,614.35 pursuant to section 22 of the SA Act. The respondent failed to pay the claimant this amount.

On 8 July 2016, a judge of the SA Supreme Court made an order that the respondent pay into the court the sum of $215,030.85. This sum was paid into court.

The claimant sought payment from the Supreme Court Suitor's Fund of $141,163.55 (being the sum equal to the amount in the payment schedule) and leave to register judgment pursuant to the adjudication certificate.

The respondent sought an interlocutory order for a stay of the adjudicator's decision.

(In *Maxcon Constructions Pty Ltd v Vadasz & Ors (No. 2)* [2016] SASC 156, the respondent brought an application for judicial review seeking to have the adjudication set aside on the basis that the adjudicator lacked jurisdiction because the claimant had failed to disclose to the respondent that he was an undischarged bankrupt before entering the contract (in effect voiding the contract for illegality).)

DECISION

The court found in favour of the claimant, and:

- refused the respondent's application for a stay;
- granted leave to the claimant to register judgment for the amount of the adjudication certificate (being $215,030.85); and
- made an order for payment of the amount in the payment schedule (being $141,163.55) to the claimant out of the Supreme Court Suitor's Fund.

Stanley J stated that progress payments required by the SA Act seek to preserve cash flow to contractors notwithstanding the risk that a contractor might not be able to refund moneys ultimately found to be due. The mere existence of this risk is not ordinarily sufficient to justify a stay.

While there could be circumstances which justify the grant of a stay, those circumstances were found not to exist in this case. In reaching this decision, his Honour weighed up all the circumstances of the case, including:

- the risk that the respondent might not be able to recover some of the amounts in its payment schedule due to its status under the *Bankruptcy Act 1966* (Cth); and
- the prejudice to the claimant if the stay was granted and the underlying policy of the SA Act.

Maxcon Constructions Pty Ltd v Vadasz & Ors (No. 2) [2016] SASC 156

Judicial review does not lie for non-jurisdictional error of law on the face of the record under the SA Act.
This case also emphasises the need to properly investigate the financial standing of subcontractors prior to contract.

FACTS

The facts of this case are set out in *Maxcon Constructions Pty Ltd v Vadasz & Ors* [2016] SASC 148.

The respondent brought an application for judicial review seeking to have the adjudication set aside on the basis that the adjudicator lacked jurisdiction because the claimant failed to disclose to the respondent that he was an undischarged bankrupt before entering the contract (in effect voiding the contract for illegality).

DECISION

The court found in favour of the claimant and dismissed the respondent's application for judicial review. Stanley J held the adjudicator did not err in awarding a sum of money be paid out to the claimant.

His Honour found that as a matter of fact the claimant had failed to disclose the fact of his bankruptcy to the respondent, in contravention of the requirement for disclosure in section 269(1)(b) of the *Bankruptcy Act 1966* (Cth).

However, his Honour held that such non-disclosure does not necessarily affect the subsequent performance of a contract.

Also, where a contract has been performed, it would be disproportionate to relieve a party such as the respondent of its obligations under the contract on that basis.

If the contract was declared void in this instance, his Honour:

- determined that to do so would be disproportionate to the seriousness of the claimant's failure; and
- concluded it would effectively permit the respondent to enjoy the benefit of the work performed by the claimant for free.

Northern Territory

CONTENTS

CASE INDEX

- *CH2M Hill Australia Pty Limited & Anor v ABB Australia Pty Ltd & Anor* [2016] NTSC 42
- *CH2M Hill Australia Pty Limited & Anor v ABB Australia Pty Ltd & Anor (No. 2)* [2016] NTSC 43

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

Northern Territory 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 further judicial consideration of the NT Act in the Supreme Court of the Northern Territory.

The NT Supreme Court provided a useful analysis of an adjudicator's obligation to provide reasons and when an adjudication determination will be quashed and void in light of failure to do so. It also clarified that s 27 of the NT Act does not preclude a party making an adjudication application where the 'substance of the dispute' has been the subject of a previous adjudication so long as it is not the same payment dispute (*CH2M Hill Australia Pty Limited v ABB Australia Pty Ltd* [2016] NTSC 42).

The NT Supreme Court also confirmed that as a general rule a party who successfully appeals an adjudication determination will have its costs unless exceptional circumstances warrant departure from the rule (*CH2M Hill Australia Pty Limited & Anor v ABB Australia Pty Ltd & Anor (No.2)* [2016] NTSC 43).

FUTURE

Given the NT Act is modelled on the WA Act, WA cases continue to be used as guidance in understanding the rights and obligations of parties under the NT Act.

CH2M Hill Australia Pty Limited & Anor v ABB Australia Pty Ltd & Anor [2016] NTSC 42

The decision provides a useful analysis of an adjudicator's obligation to provide reason and when a failure to do so will result in the adjudication decision being void. Further, it clarifies that section 27 of the NT Act does not preclude a party from making a adjudication applications where 'the substance of the dispute' has been the subject of a previous adjudication as long as it is not the same payment dispute.

FACTS

CH2M Hill Australia Pty Limited and UGL Engineering Pty Limited (together, the **respondent**) contracted ABB Australia Pty Ltd (**claimant**) to supply major equipment for the combined cycle power plant at the Icthys Onshore LNG Facilities near Darwin (**Contract**).

In relation to two payment claims, different adjudicators were appointed on the respective adjudication applications which were made five days apart (**Application 1** and **Application 2** respectively). Application 1 was dismissed for being out of time. In Application 2 the adjudicator determined that the respondent owed the claimant an amount of $3,372,045.80 (**Determination**).

The respondent sought judicial review of the Determination on the grounds that:

- due to the degree of overlap between them, Application 2 was a duplicate of Application 1 and breached section 27(a) of the NT Act or, alternatively, was an abuse of process;
- Application 2 was too complex and should have been dismissed without a determination of its merits under section 33(1)(a) of the NT Act; and
- the adjudicator had failed to deal with a number of critical issues in the Determination relating to the claimant's entitlement to an extension of time under the Contract.

DECISION

The court found in favour of the respondent.

Kelly J made an order in the nature of certiorari quashing the Determination . The Determination was void and of no effect because the failure of the adjudicator to provide reasons for his findings on critical issues (which were fundamental to determining the claimant's right to the claimed extension of time) amounted to failures to:

- consider those issues;
- comply with the basic requirements of section 34 of the NT Act to consider the response to the adjudication and its attachments; and
- make a bona fide attempt to deal with critical issues in the adjudication.

In respect of section 27 of the NT Act, Her Honour:

- held that it does not preclude the making of an application for adjudication where 'the substance of the dispute' has been the subject of a previous adjudication. While the claimant's submissions in Application 1 and Application 2 both dealt with same extension of time issues, the claims giving rise to the respective payment disputes were different; and
- confirmed its effect is that a party to a construction contract may apply for adjudication unless such an application for that specific payment dispute had already been made by a party.

Her Honour also confirmed that a court could restrain any party from proceeding with an adjudication or from enforcing a determination for abuse of process. including by making serial applications for adjudication in the knowledge and expectation that the responses would raise precisely the same issues in each one), but held that this was not such a case.

CH2M Hill Australia Pty Limited & Anor v ABB Australia Pty Ltd & Anor (No. 2) [2016] NTSC 43

The SA Supreme Court has taken the view that successful party to the appeal of an adjudication application should only be deprived of its costs in exceptional circumstances. In this decision only one of multiple grounds raised by the plaintiff was successful; however the court held that the further grounds were not unreasonably raised such as to give rise to exceptional circumstances to depart from costs following the event.

FACTS

In the substantive proceedings, *CH2M Hill Australia Pty Limited v ABB Australia Pty Ltd* [2016] NTSC 42 (***CH2M No. 1***), out of the three broad grounds that the respondent had raised, the court found in favour of the respondent on only one of these grounds (**rubber stamping ground**) and quashed the purported determination.

The respondent was also successful in its other application for an interlocutory injunction to restrain the claimant from enforcing the purported determination.

The respondent applied for an order that the claimant pay its costs of the interlocutory injunction application and incurred under CH2M No. 1 on the basis that they were successful and costs follow the event.

The claimant argued that there should be a split costs order because the respondent succeeded on only one of those grounds in *CH2M No. 1*.

DECISION

The court ordered the claimant to pay the respondent's costs of, and incidental to, *CH2M No. 1* (including the costs of the interlocutory injunction application).

Kelly J referred to *Wormald International (Aust) Pty Ltd v Aherne* [1995] NTSC 69 as authority that a successful party should only be deprived of its costs in exceptional circumstances.

Although the respondent was successful only on the rubber stamping ground, her Honour held that it was not unreasonable for the respondent to have relied also on other grounds. The different grounds relied upon by the respondent were simply different bases for arguing that the purported determination was of no effect and were not separate, stand-alone issues. Slightly modifying the extract from Gino E Dal Pont's 'Law of Costs' cited by Olsson AJ in *Territory Sheet Metal Pty Ltd v Australia and New Zealand Banking Group Ltd (No 3)* [2010] NTSC 13, her Honour held that:

> *'this was a case for the application of the principle that the court should not 'dissuade [litigants], by the risk of an adverse costs award from canvassing all reasonable issues material to the decision of the case'.*

Finally, her Honour found that the claimant's contention that much of the evidence advanced by the respondent was irrelevant and/or not ultimately relied upon by the respondent was a matter more appropriately dealt with by the Taxing Master.

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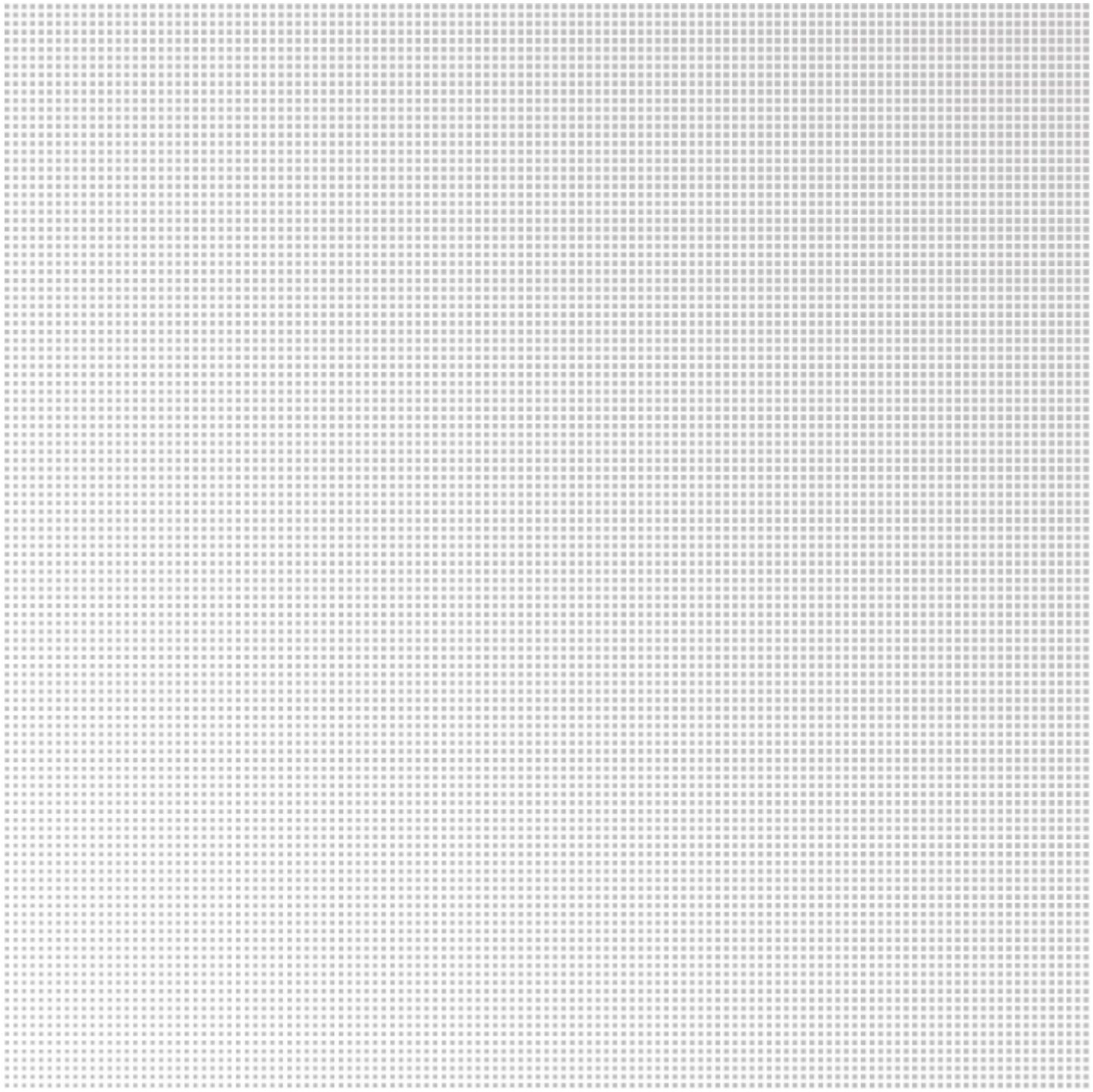

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