
MinterEllison

# Contents

# National Overview

◄ CONTENTS ►

## ANOTHER YEAR – ANOTHER TRIP TO THE HIGH COURT FOR SOPA

After the excitement of the *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd* [2016] HCA 52 decision last year (analysed in our Roundup of 2016 cases) we didn't have to wait very long until the High Court got to consider another SOPA case (in fact two) when the High Court heard the appeal from the NSW Court of Appeal in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379 (also analysed in our Roundup of 2016 cases) and the appeal from the Full Court of the Supreme Court of South Australia in *Maxcon Constructions Pty Ltd v Vadasz* [2017] SASCFC 2. The decisions handed down early in 2018 affirmed that there is no right to challenge adjudicator's decisions in NSW and SA on the grounds of error of law on the face of the record.

### National inconsistencies in SOP legislation

The decisions also highlight the nuances and inconsistencies between the operation of SOP legislation in different Australian jurisdictions. Given that the cases concerned the SOP legislation in New South Wales and South Australia the implications for each State and Territory may be different. It is, for example, considered unlikely that the High Court's decisions will impact upon the position in Victoria where the Victorian Supreme Court has previously determined (on the basis of the Victorian legislation and Victorian Constitution) that it is open to a party to seek judicial review in relation to determinations that contain non-jurisdictional errors of law.

In Queensland the major talking point was the introduction of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF**) which while it has been passed is still waiting to be proclaimed to commence. The BIF has major changes to the SOP landscape in Queensland including numerous benefits for claimants and numerous challenges for respondents as well as the introduction of a bonding scheme.

In Victoria interest focused on whether Digby J's appointment as Judge in Charge of the TEC list of the Victorian Supreme Court (in place of Vickery J) would see any departure from the previous SOPA jurisprudence. However with only two decisions it was not possible to identify any trend.

In the Northern Territory the Ichthys project has given opportunity for the development of the Territory's SOPA jurisprudence while WA major decisions followed the East Coast jurisdictions decisions regarding errors of law going to jurisdiction and excluding claims for damages for breach.

We hope you enjoy our comprehensive summary of the key security of payment decisions in 2017. If you have any feedback or questions we would love to hear from you.

**RICHARD CRAWFORD**

Partner
Projects, infrastructure and Construction

# New South Wales

◄ CONTENTS ►

## CASE INDEX

- *Abergeldie Contractors Pty Ltd v Fairfield City Council* [2017] NSWCA 113
- *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* [2017] NSWCA 289
- *Arconic Australia Rolled Products Pty Limited v McMahon Services Australia Pty Ltd* [2017] NSWSC 1114
- *Bouygues Construction Australia Pty Ltd v Southern Cross Electrical Engineering Ltd* [2017] NSWSC 1665
- *Castle Constructions Pty Ltd v Ghossayn Group Pty Ltd* [2017] NSWSC 1317
- *Fairfield City Council v Abergeldie Contractors Pty Ltd* [2017] NSWSC 166
- *FAL Management Group Pty Limited as Trustee for TF Investment Trust v Denham Constructions Pty Ltd* [2017] NSWSC 150
- *Falco's Pty Limited v AB Developments (Australia) Pty Limited* [2017] NSWSC 1320
- *Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd* [2017] NSWCA 53
- *Fu Xing Pty Ltd v Sidway Constructions Pty Ltd* [2017] NSWDC 17
- *Futurepower Developments Pty Ltd v TJ & RF Fordham Pty Ltd* [2017] NSWSC 232
- *Home Site Pty Limited v ACN 124 452 786 Pty Limited (formerly known as Nahas Construction (NSW) Pty Limited)* [2017] NSWSC 698
- *Mt Lewis Estate Pty Ltd v Metricon Homes Pty Ltd* [2017] NSWSC 1121
- *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd t/a Total Concept Group* [2017] NSWSC 194
- *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4
- *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151
- *Quasar (Constructions) Commercial Pty Limited v Trilla Group Pty Limited*
- *Quickway Constructions Pty Limited v Paul J Hick* [2017] NSWSC 830
- *Quickway Constructions Pty Limited v Paul J Hick* [2017] NSWSC 830
- *Regal Consulting Services Pty Ltd v All Seasons Air Pty Ltd* [2017] NSWSC 613
- *Samuel Homes Pty Ltd v Derek Raithby* [2017] NSWSC 205
- *SMLXL Projects Pty Limited v RIIS Retail A/S* [2017] NSWDC 131
- *Watpac Constructions (NSW) Pty Limited v Charter Hall Funds Management Limited* [2017] NSWSC 865
- *West Tankers Pty Ltd v Scottish Pacific Business Finance Limited* [2017] NSWSC 621

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 contained a mixed bag of decisions with no substantive trend; however, the key cases clarified the interaction between the NSW Act and common contractual provisions.

## DEVELOPMENTS

The key decisions this year have triggered the need for parties to turn their mind to careful drafting of common contractual provisions.

The Court of Appeal in *Abergeldie Contractors Pty Ltd v Fairfield City Council* [2017] NSWCA 113 (***Abergeldie***) reversed the first instance decision by holding that the date of practical completion was the date on which the certificate of practical completion was issued and not the date certified in the certificate of practical completion. This decision highlights a number of important consequences, especially for contractors, flowing from the common practice of a superintendent 'back-dating' the date of practical completion. This may have follow on consequences for liability for liquidated damages, insurance, release of security and duration of the defects liability period.

The decision in *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* [2017] NSWCA 289 confirmed that the contractual 'deeming' of early payment claims under a contract is at odds with the NSW Act and would give rise to confusion. If there is no reference date to a support an 'early' payment claim, there is no statutory entitlement to a progress payment. Parties should consider the effect of this decision on the ability to submit early progress claims.

In *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151 we saw the Court of Appeal reinforce the prevention principle, which is the inability of a principal to recover LDs for a delay when the delay has been caused by a principal's breach of contract. It confirms that the prevention principle can be limited or excluded by a unilateral right for a principal to extend time under the contract, but where that right is not expressly reserved to the principal to exercise for its own benefit there will be an implied duty to exercise the discretion fairly or in good faith.

## FUTURE

Whilst the *Abergeldie* decision has caught many by surprise, aspects of the judgment suggest that the specific construction of a completion clause may leave room for parties to navigate this issue and allow back-dating of the date of completion in the certificate of practical completion.

The NSW Court of Appeal in *All Seasons Air v Regal* (in reliance on the decision on the High Court's decision in *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd [*2016] HCA 52 (analysed in our Roundup of 2016 cases) affirmed that the right to a progress payment can only occur *'on and from each reference date'*. However, White JA noted that the High Court in *Southern Han* had not expressed a determinative view as to whether a payment claim could be made *'with effect'* from a reference date, as the question had not arisen in that case. His Honour's comment raises an interesting line of argument and the absence of clear authority on this issue at the High Court level.

For those jurisdictional error enthusiasts, the year also saw the *Shade Systems* decision appealed to the High Court. This decision, which was just handed down now, provides solid authority that adjudication determinations in NSW are not open for review for non-jurisdictional errors of law on the face of the record.

## *Abergeldie Contractors Pty Ltd v Fairfield City Council* [2017] NSWCA 113

**This case overturns the decision in *Fairfield City Council v Abergeldie Contractors Pty Ltd* [2017] NSWSC 166. The court held that the date of practical completion was the date on which the certificate of practical completion was issued, not the date certified by the superintendent in the certificate as the date practical completion was achieved.**

**The practical implications of that decision for the building and construction industry are potentially far reaching (and possibly unintended).**

**First, the date of practical completion is relevant to a number of provisions in a construction contract unrelated to the making of payment claims, including:**

- **when liquidated damages begin to accrue;**
- **when certain security is released; and**
- **the duration of the defects liability period.**

**Secondly, depending on the specific terms of the contract, the common practice of a superintendent 'back-dating' practical completion may be ineffective at law. This places a greater onus on superintendents to promptly issue the certificate of practical completion, as the failure to do so may give rise to liability for breach of contract.**

**Despite the fact the outcome of this case provided the contractor involved with the remedy it was seeking, the decision was not necessarily beneficial for contractors more generally, who are now theoretically faced with greater exposure to liquidated damages and (in effect) a longer defects liability period.**

## FACTS

The plaintiff Fairfield City Council (**respondent**) entered into a building contract with the first defendant Abergeldie Contractors Pty Ltd (**claimant**). The contract was an amended AS 4000–1997 contract which specified that only two reference dates would occur after practical completion – the first date for a progress claim arising immediately after practical completion and the final payment claim. Relevantly, the following occurred:

- On 16 September 2016, the claimant was of the opinion that practical completion had occurred and requested that the superintendent issue a certificate of practical completion.
- On 28 October 2016, the claimant submitted payment claim no. 15 to the respondent.
- At 10.32am on 25 November 2016, the claimant submitted payment claim no. 16 to the respondent as no certificate of practical completion had been issued by the superintendent.
- Later that same day, the superintendent certified the date of practical completion as having occurred on 16 September 2016.

In response to payment claim no. 16, the respondent issued a payment schedule for $NIL on the ground that there was no reference date available for payment claim no. 16 as the immediate reference date following practical completion had already been 'used' by payment claim no. 15.

Consequently the claimant filed an adjudication application in respect of the payment claim. The adjudicator made a determination that the claimant was entitled to some of the amount claimed, and the respondent brought an application before the Supreme Court of New South Wales to have the determination quashed on the basis that the relevant payment claim was not made in respect of a reference date.

The Supreme Court found in favour of the respondent, quashing the adjudicator's determination and concluding the purported payment claim was not a payment claim within the meaning of section 13 of the NSW Act. The claimant appealed this decision.

The question to be determined by the Court of Appeal was:

Did 'practical completion' of the work occur:

- on 16 September 2016, as the respondent submitted, with the result that the relevant reference date was 28 September 2016; or
- on 25 November 2016 (being the on the date on which the certificate of practical completion was issued by the superintendent), as the claimant submitted, with the result that the relevant reference date was 28 November 2016?

## DECISION

The Court of Appeal unanimously determined to allow the appeal, setting aside the decision of the trial judge (Ball J), holding that the date of practical completion was the date on which the certificate of practical completion was issued, not the date certified by the superintendent in the certificate as the date practical completion was achieved.

In making its determination, the court considered the following factors supported the above conclusion:

- The language of clause 34.6 of the contract between the parties and the use of the present perfect tense ('has been reached') indicated that the actual time of completion was unimportant. In addition, the fact that the contract specifically referred to a certificate of practical completion - 'evidencing' the date of practical completion as opposed to 'stating' the date of practical completion' - further supported this argument.
- The achievement of practical completion was dependent upon the superintendent forming an opinion regarding whether practical completion had been achieved and not on the existence of the underlying elements of practical completion.
- The claimant could not know whether practical completion had been reached until it received the certificate of completion. A lack of certainty as to the precise date of practical completion could be potentially 'commercially disastrous'.
- It would be 'inconvenient in the extreme' if the existence of a reference date under a construction contract turned on the satisfaction of a judge of a set of facts following a trial. The court stated such a conclusion would 'drive a horse and cart (or perhaps a B-double) through the legislation scheme'.

# *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* [2017] NSWCA 289

**The New South Wales Court of Appeal (NSWCA) has confirmed that a payment claim served before a reference date will not be served in accordance with the NSW Act) even where the relevant contract contains a standard clause which attempts to deem the early payment claim to be made on the later reference date. The inclusion of such 'deeming' clauses in construction contracts should be reconsidered by parties, as the NSWCA says they lead to confusion rather than certainty in the SOPA process.**

## FACTS

In 2015, Regal Consulting Services Pty Ltd (**respondent**) entered into a written contract (amended AS4903-2000) with All Seasons Air Pty Ltd (**claimant**) for the performance of mechanical ventilation and air-conditioning works on a residential development at Waitara.

Clause 37.1 of the contract (unamended from the standard AS4903-2000) read:

> *'The Subcontractor shall claim payment progressively in accordance with Item 37.* ***An early progress claim shall be deemed to have been made on the date for making that claim*** *[emphasis added].'*

Item 37 of the contract provided that progress claims were to be made 'on the 20th day of the month'.

The claimant made a payment claim on 20 June 2016. On 12 July 2016 it made a further purported payment claim, and the respondent provided a payment schedule on 26 July 2016 which effectively scheduled nil.

The claimant applied for adjudication and the parties disputed the validity of the 12 July 2016 payment claim. The adjudicator determined that, due to clause 37.1 of the contract, the reference date for the 12 July 2016 payment claim was 20 July 2016 and it was validly served.

The respondent commenced proceedings in February 2017 in the New South Wales Supreme Court (per McDougall J) challenging the adjudicator's determination. McDougall J found in favour of the respondent – see *Regal Consulting Services Pty Ltd v All Seasons Air Pty Ltd* [2017] NSWSC 613).

## DECISION

On appeal, the NSWCA upheld McDougall J's decision and dismissed the claimant's appeal.

Leeming J and Payne JJA, in reliance on the High Court's judgment in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52 (***Southern Han***) (analysed in our Roundup of 2016 cases), held that entitlement under section 8(1) of the NSW Act and service of a payment claim under section 13(1) of the NSW Act can only occur, at the earliest, 'on or from each reference date'.

Their Honours agreed with McDougall J that clause 37.1 of the contract operated to start the subcontractor's contractual, as opposed to statutory, rights to payment on the 20th day of the month, even if the claim was served earlier. However, in relation to the subcontractor's statutory rights:

- the claimant's construction of the clause sat 'awkwardly' in light of section 13(5) of the NSW Act which prohibits the service of more than one payment claim in respect of each reference date. Their Honours doubted that contravention of section 13(5) by serving more than one payment claim on or from each reference date could be achieved by a deeming provision;
- the claimant's position that an early payment claim became a payment claim for the purposes of the NSW Act on 20 July 2016 did not promote the purpose of the legislation. The NSW Act requires certainty as to when a payment claim has been served and the claimant's construction would give rise to confusion; and
- the Court of Appeal's comments in *Abergeldie Contractors v Fairfield City Council* [2017] NSWCA 113 that a payment claim made before a reference date was taken to have been made on the reference date were observations only and not authoritative.

Relevantly, White JA noted that the High Court in *Southern Han* had not expressed a determinative view as to whether a payment claim could be made 'with effect' from a reference date. As there was no reference date at all in *Southern Han*, the question had not arisen in that case.

# *Arconic Australia Rolled Products Pty Limited v McMahon Services Australia Pty Ltd* [2017] NSWSC 1114

**The decision of the New South Wales Supreme Court provides guidance as to whether a claimant is prevented from bringing successive adjudication applications regarding the same disputed issue for reasons of issue estoppel when there had been no determination of the merits of the adjudication application.**

**The court also considered whether the repetitious re-agitation of a payment claim was an abuse of process.**

## FACTS

Arconic Australia Rolled Products Pty Limited (**respondent**) engaged McMahon Services Australia Pty Ltd (**claimant**) to decommission an aluminium plant. The claimant served three successive payment claims on the respondent, numbered 13, 14 and 15 and four resulting adjudication applications. The disputed part of each claim was for delay costs or variations for an undocumented discovery of hazardous material, which was discussed in different ways in each of the adjudication applications (**disputed claim**).

### Timeline

On 4 May 2017, the claimant served payment claim number 13 on the respondent which was rejected by the respondent in its payment schedule. On 29 May 2017, the claimant made the first adjudication application which *'for reasons only known to the claimant'* contained a report that was marked *'without prejudice'*. The claimant subsequently withdrew the application because the adjudicator determined that the report should not have been given to him.

On 22 June 2017, the claimant made the second adjudication application based on payment claim number 13. The respondent contended that the claimant's submissions related to different reasons to the reasons for non-payment in the payment schedule. The adjudicator agreed with the respondent and found that the claimant's submissions were not duly made.

In the meantime, the claimant served payment claim number 14 on 2 June 2017, again dealing with the disputed claim. The third adjudication application subsequently made by the claimant was rejected by the adjudicator as no reference date had arisen under the contract, rendering payment claim number 14 invalid.

On 4 July 2017, the claimant served payment claim number 15, leading to the fourth adjudication application. It was agreed between the parties that nothing should happen in relation to the fourth adjudication until the court determined the proceedings.

### Submissions

The respondent argued:

- the claimant was issue estopped from re-agitating the fourth adjudication application; and
- the repetitious re-agitation of the disputed claim was an abuse of process.

The claimant's position was that the disputed claim had never been determined. Therefore the principle of issue estoppel had no relevance and there was no abuse of process.

## DECISION

The court dismissed the respondent's application and held that issue estoppel had not arisen as the adjudicator (of the first, second and third adjudication applications) had not made a substantive determination. As the adjudicator had taken the view that it was not open to him to consider the claim as framed, the merits of the disputed claim had not been decided.

McDougall J found that although the respondent had been put to the trouble and expense of repeatedly responding to 'inadequate' adjudication applications by the claimant, there was no abuse of process by the claimant. Section 13(6) of the NSW Act expressly provides that a claimant is not prevented, in successive adjudication applications, from claiming amounts the subject of prior payment claims.

His Honour's view was that an abuse of process would be founded if a claimant had repeatedly re-agitated a claim which had already been decided on its merits, using different bases or pretexts to justify the reconsideration. As the claim had not been decided on its merits, there was no abuse of process.

# *Bouygues Construction Australia Pty Ltd v Southern Cross Electrical Engineering Ltd* [2017] NSWSC 1665

**While only an interim decision, the court's finding that there was a serious case to be tried that the adjudicator acted outside her jurisdiction in reaching a conclusion that was 'legally unreasonable' is of particular interest. With the Court of Appeal confirming that a determination cannot be set aside for an error of law on the face of the record in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379, which has now been confirmed by the High Court, industry participants will be eager to learn how the argument of 'legally unreasonable' is fleshed out by the parties in submissions and dealt with by the Supreme Court.**

## FACTS

The defendant, Southern Cross Electrical Engineering Ltd (**claimant**) entered into three contracts with the plaintiff, Bouygues Construction Australia Pty Ltd (**respondent**). The claimant made a payment claim under each contract and subsequently referred each payment claim to adjudication.

The adjudicator found sums owing to the claimant in respect of each payment claim, and in doing so rejected the respondent's set-off claim for liquidated damages on the basis that:

- there was an agreement between the parties that the respondent would not deduct liquidated damages; and
- the respondent's calculation of liquidated damages over a two-month period was 'erroneous' and it only had an entitlement to claim liquidated damages for a one month period.

The adjudicator also concluded that, in accordance with section 20(2B) of the NSW Act, the respondent's expert evidence could not be considered because it relied on 'new rates' that were not referred to in the payment schedule.

The respondent commenced proceedings seeking to have the adjudicator's determination quashed. Pending final determination of those proceedings, the respondent applied for an interim injunction to restrain the claimant from taking further steps under the NSW Act, including requesting provision of an adjudication certificate and filing an adjudication certificate as a judgement for a debt.

## DECISION

The court found that there was a serious question to be tried as to whether the adjudicator had jurisdiction to make the determinations and the balance of convenience favoured making the interim orders sought by the respondent.

### Serious case question to be tried

There was a serious question to be tried that the adjudicator's:

- analysis and conclusion that there was an agreement between the parties was 'legally unreasonable' and arguably constituted a jurisdictional error. The adjudicator acknowledged that there was no written evidence as to the existence of such an agreement, but concluded that the respondent had not persuaded her that it denied making such an agreement;
- rejection of the respondent's claim to liquidated damages due to an 'erroneous calculation' of a two-month period, was a misconception by the adjudicator of what was required of her and arguably constituted a jurisdictional error; and
- finding that she could not take into account the respondent's evidence in relation to the appropriate rates to be used, was a misconception of section 20(2B) of the NSW Act and arguably constituted a jurisdiction error. The court agreed with the respondent's contention that section 20(2B) does not prohibit the inclusion of evidence in an adjudication response not included in a payment schedule provided such evidence is logically probative of one or more of the reasons for withholding payment included in the payment schedule.

### Balance of convenience

The court found the balance of convenience favoured the grant of an interlocutory injunction for a number of reasons, including that the respondent had agreed to provide the usual undertakings as to damages and pay into court the disputed amount. Further, the claimant provided no evidence that it would suffer undue prejudice by not receiving immediate payment, whereas there was a likelihood in the future that the respondent's prospects of tendering for future work may be affected if no relief was granted.

# *Castle Constructions Pty Ltd v Ghossayn Group Pty Ltd* [2017] NSWSC 1317

**The court has again determined that a term of a construction contract, which requires an additional condition be met in order for a reference date to arise or a contractor to be entitled to a progress payment, is void under section 34 of the NSW Act. In this case, the court held that an oral term requiring that completed works be signed off on by an engineer and surveyor before the final payment claim could be made did not facilitate the contractor's statutory entitlement to payment. Even so, the adjudicator's determination was still quashed on the basis that a supporting statement was not provided with the payment claim.**

## FACTS

In May 2016, Castle Constructions Pty Ltd (**respondent**) entered into an oral construction contract with Ghossayn Group Pty Ltd (**claimant**) for bulk excavation, piling, anchoring and shoring works (**contract**). Certain terms of the contract were recorded in writing. The respondent is the sole shareholder of Castlenorth Pty Ltd (**Castleton**), the second plaintiff in these proceedings and owner of the land on which the project took place.

On 30 September 2016, the claimant submitted its final payment claim, and an adjudicator later made a determination for payment of that claim in favour of the claimant.

The respondent argued in the proceedings that the adjudicator had no jurisdiction to make a determination as:

- no 'reference date' had arisen as the engineer and surveyor had not provided the sign-off required under the contract;
- the claimant was a head contractor and did not serve a supporting statement with the payment claim; and
- the adjudicator wrongly concluded that the respondent did not provide an adjudication response within time (ie two business days after the date on which the adjudicator's acceptance was received).

## DECISION

The court found in favour of the respondent, quashing the adjudicator's determination for jurisdictional error on the basis that the claimant was a head contractor and failed to provide a supporting statement.

### No reference date

Section 8 of the NSW Act entitles the claimant to progress payment on and from each reference date, being the date determined by the terms of the contract (section 8(2)(a)) or, in the absence of such terms, the last day of the month (section 8(2)(b)). Stevenson J found that the term of the contract requiring sign-off by an engineer and surveyor before the claimant could make a final payment claim was void under section 34 of the NSW Act and so could not be used to determine the reference date. As such, the last day of the month (30 September 2016) was the valid reference date.

### No supporting statement

The second basis turned on whether the respondent was a 'principal' or had been engaged under a construction contract by Castlenorth in respect of the works, making the claimant a subcontractor for the purposes of the NSW Act. The court considered evidence of the loans from the respondent to Castlenorth, and the fact that the respondent did not hold a licence as a building contractor, to show that a construction contract did not exist between Castlenorth and the respondent. The claimant was therefore a head contractor and had failed to serve a valid payment claim with a supporting statement in breach of section 13(7) of the NSW Act.

### Service of Response

Section 31(2) of the NSW Act states that service of a notice is effected when the notice is 'received at that place'. The court found that there was no requirement under section 31(2) that the notice be received at that place during normal office hours. Therefore, as the adjudicator's notice was delivered to the respondent's address at 7:30pm on Wednesday 7 December 2016, the response was required to be lodged within 2 business days, being 9 December 2017. The response was lodged on 12 December 2016 and was not validly served. Interestingly, Stevenson J also found that delivery by a neighbour, who redirected the notice which was delivered into the wrong mail box by Australia Post, did not mean that the notice was not delivered by post.

# *Fairfield City Council v Abergeldie Contractors Pty Ltd* [2017] NSWSC 166

**This case affirms, and illustrates some of the difficulties that may arise in practice in applying the outcome of, the High Court's decision in *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd* [2016] HCA 52 (analysed in our Roundup of 2016 cases).**

## FACTS

The plaintiff, Fairfield City Council (**principal**) entered into a building contract with the first defendant, Abergeldie Contractors Pty Ltd (**builder**). The contract was an amended AS 4000–1997 contract which specified that only two reference dates would occur after practical completion – the first date for a progress claim arising immediately after practical completion and the final payment claim. Relevantly, the following occurred:

- On 16 September 2016, the builder was of the opinion that practical completion had occurred and requested that the superintendent issue a certificate of practical completion.
- On 28 October 2016, the builder submitted payment claim no. 15 to the principal.
- At 10.32am on 25 November 2016, the builder submitted payment claim no. 16 to the principal as no certificate of practical completion had been issued by the superintendent.
- Later that same day, the superintendent certified the Date of Practical Completion as having occurred on 16 September 2016.

In response to payment claim no. 16, the principal issued a payment schedule for $NIL on the ground that there was no reference date available for payment claim no. 16 as the immediate reference date following practical completion had already been used by payment claim no. 15.

Consequently the builder filed an adjudication application in respect of the payment claim. The adjudicator made a determination that the builder was entitled to some of the amount claimed and the principal brought an application before the Supreme Court of New South Wales to have the determination quashed on the basis that the relevant payment claim was not made in respect of a reference date.

## DECISION

The court found in favour of the principal and concluded that the purported payment claim was not a payment claim within the meaning of section 13 of the NSW Act as it was not made in respect of a reference date under the building contract. Pursuant to a certiorari order, Ball J quashed the adjudication determination.

This decision follows the High Court's decision in *Southern Han*. As the final reference date rested on when practical completion actually occurred (as opposed to the date that the certificate of practical completion was issued), the court analysed when practical completion actually occurred and came to the conclusion that it had occurred on 16 September 2016.

His Honour commented that having the final reference date depend on the occurrence of practical completion rather than the date of the certificate of practical completion is not unreasonable or uncommercial despite the fact that this may make cause practical difficulties in determining when final reference dates under the building contract were to occur.

# *FAL Management Group Pty Limited as Trustee for TF Investment Trust v Denham Constructions Pty Ltd* [2017] NSWSC 150

**Claimants who have a strongly arguable case that a judgment obtained by a company under the NSW Act is not payable under the relevant construction contract may be entitled to a permanent stay on those judgments in circumstances where the claimant was insolvent. The court is entitled to consider any reason advanced for the continuation of a stay of proceedings; consideration is not confined to the circumstances that existed at the time a stay is initially granted.**

## FACTS

In October 2013, FAL Management Group Pty Limited (**FAL**) entered into a design and construct contract (**Contract**) with Denham Constructions Pty Ltd (**Denham**).

After submitting a payment claim in July 2014, Denham obtained an adjudication certificate consequent upon an adjudication determination in respect of that claim and registered it as a judgment debt in the District Court of New South Wales (**District Court judgment**).

Shortly after, FAL was served with a notice of claim (**Notice of Claim**) by a subcontractor, N Moits & Sons (NSW) Pty Ltd (**Moits**), claiming amounts payable by Denham Constructions Project 960 Pty Ltd (**Denham 960**).

An issue arose concerning Moits' entitlement to the amount claimed because of the identity of the entity, Denham 960, with which Moits was contracting. As a consequence, the District Court made orders staying the judgment which Denham had obtained against FAL on two conditions:

- that the amount paid by FAL be paid into the District Court; and
- that FAL commence proceedings seeking a declaration concerning the validity of the Notice of Claim.

FAL duly commenced proceedings. Hammerschlag J subsequently made orders transferring the moneys to the Supreme Court of New South Wales, dismissing the proceedings and continuing the stay on that part of the District Court judgment pending the outcome of the separate proceedings commenced by Moits.

In June 2014, FAL terminated the Contract. Later in June 2014 Denham commenced separate proceedings against FAL in the Supreme Court seeking, among other things, the return of security provided under the Contract (**Denham proceedings**). FAL filed a cross-claim against Denham seeking to recover overpayments made to Denham and filed a substantial amount of evidence which demonstrated the strength of its claim.

Denham was placed in to liquidation in August 2016. Moits has made no claim for the moneys held by the District Court, and, having regard to Denham's liquidation, it may be assumed that the Moits proceedings will never be heard.

FAL and Denham both filed applications seeking payment of the moneys held by the court.

## DECISION

The court rejected Denham's application and made orders for the money to be paid to FAL and for the District Court judgment to be permanently stayed.

In considering the decision to stay proceedings, Ball J held that the court was not confined to consider the reasons under which the stay was originally granted but instead was entitled to consider any reasons advanced.

His Honour considered the judgment obtained by *Denham* under the NSW Act. First, it is enforceable immediately. Secondly, unlike other judgments, it does not affect a party's rights under the relevant contract, as a party is free to sue to recover amounts the subject of the judgment if the party maintains that the relevant amount is not properly payable under that contract.

When considering whether to stay proceedings, the court will take in to account the following matters, including the:

- strength of the contractual claim;
- likelihood that the contractor will be unable to repay the amount; and
- risk that the contractor will become insolvent if a stay is granted.

Ball J reached the decision to permanently stay proceedings on the following:

- Denham had gone in to liquidation and the lifting of the stay would have the effect of making any payment to Denham permanent.
- FAL had a strongly arguable claim to recover the payment (and more) under the Contract and that consequently Denham was never entitled to the payment under the Contract.
- Payment of the moneys by FAL into court was not intended to affect its rights to recover under the Contract.
- There was nothing preventing Denham's liquidator from suing FAL to recover the moneys if paid out.

# *Falco's Pty Limited v AB Developments (Australia) Pty Limited* [2017] NSWSC 1320

**Contractors are still serving multiple payment claims for the same reference date. A contractor cannot serve a second payment claim for the same reference date and then make an adjudication application under the NSW Act in relation to the second payment claim. The decision of the New South Wales Supreme Court has reaffirmed the prohibitory nature of section 13(5) of the NSW Act, which provides that a claimant cannot serve more than one payment claim in respect of the same reference date under the construction contract.**

## FACTS

### The contract

In July 2016, the first defendant, AB Developments (Australia) Pty Limited (**claimant**), entered into a construction contract to supply concrete to the plaintiff, Falco's Pty Limited (**respondent**). No work was done under the contract after April 2017.

### Payment claims

In April and May 2017, the claimant sent a number of progress claims to the respondent, which were held by the court to be payment claims for the purposes of the NSW Act. As the contract made no express provisions for reference dates, section 8(2)(b) of the NSW Act applied to make the reference date *'the last day of the named month in which the construction work was first carried out'*.

One of the claims was for formwork, steel fixing and pouring concrete. The next payment claim appeared to be a resubmission of that claim but in a slightly different amount. A third payment claim for formwork, steel fixing and concrete pour in a walkway (**third payment claim**) was dated 28 April 2017 but was not actually served until 25 May 2017. On 26 May 2017, the claimant served another payment claim (**fourth payment claim**) for amounts outstanding under the earlier invoices and amounts withheld by the respondent.

### Adjudication application

The claimant took the view that there had been no payment schedule and decided to proceed pursuant to section 15(2)(a)(ii) of the NSW Act by making an adjudication application in relation to the fourth payment claim.

The adjudicator made a determination that the applicant was entitled to the amount claimed, together with interest. The respondent challenged the determination on various grounds, including that the applicant was not permitted under section 13(5) of the NSW Act to serve the fourth payment claim.

## DECISION

### No right to make an adjudication application in respect of the later payment claim

The court found in favour of the respondent, deciding that the claimant had no right to make the adjudication application in respect of the fourth payment claim and that the adjudicator therefore had no power to consider it. Since no work under the contract was done after April 2017, 30 April 2017 was the only reference date available to support a payment claim. Accordingly, there was no reference date to support the fourth payment claim which was served at a later point in time.

The court cited the decision in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190, in which Allsop P said at [14] that the words in section 13(5) of the NSW Act are a sufficiently clear statutory indication of the prohibitory nature of the section and that *'the same reference date as a pervious payment claim is not a payment claim under the NSW Act and does not attract the statutory regime of the NSW Act'*.

# *Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd* [2017] NSWCA 53

**If a respondent seeks to challenge an adjudicator's determination, they should seek interlocutory relief or an undertaking from the claimant not to take steps to enforce that determination in court. Otherwise there is no obligation on a claimant to notify the respondent that it intends to enforce an adjudicator's determination.**

## FACTS

Fitz Jersey Pty Ltd (**respondent**) engaged Atlas Construction Group Pty Ltd (**claimant**) to design and construct a large mixed use development in Mascot, Sydney. In November 2016, the clamant served a final payment claim pursuant to the NSW Act for an approximate amount of $11 million, which was the subject of an adjudication. The adjudicator determined that the payment claim was payable in full, and following non-payment of the adjudicated amount, the clamant obtained an adjudication certificate.

Prior to the adjudication certificate being filed, the respondent, who considered the adjudication determination to be void, commenced proceedings challenging the validity of the determination. Although it did not pay the adjudicated amount within the required five-business day period, the respondent did not seek interlocutory relief or an undertaking by the clamant that it would not enforce the adjudicator's determination in court. The clamant obtained a judgment debt against the respondent on the basis of its failure to pay the adjudicated amount, pursuant to which a garnishee order was obtained and served on the respondent's bank, which was then paid.

The respondent initially applied to have the garnishee order set aside in the NSW Supreme Court, which was dismissed. The respondent then appealed to the NSW Court of Appeal, arguing that both the judgement of the court enforcing the adjudication certificate, and the garnishee order, should be set aside.

## DECISION

The court dismissed the appeal, finding that there was no obligation under statute or common law that the clamant notify the respondent that a certificate had been filed, nor were they obliged to inform the court that the respondent had commenced proceedings when applying for a garnishee order.

The court also rejected the respondent's argument that the clamant did not comply with its duty of candour when it failed to disclose the proceedings commenced by the respondent in applying for the garnishee order, and that the court should have therefore exercised its equitable discretion to refuse the garnishee order. Basten JA held that, while some circumstances warranted the intervention of the court in refusing a garnishee order, including where interlocutory relief in the nature of a stay was being sought but had not yet been granted, none of these circumstances applied to the present case. There was therefore no reason for the court to intervene on the basis of the respondent's failure to take any action to prevent the clamant from enforcing its rights.

# *Fu Xing Pty Ltd v Sidway Constructions Pty Ltd* [2017] NSWDC 17

**Summary judgment under the NSW Act will not be available where a disputed issue of fact that can only be resolved at a hearing exists.**

## FACTS

Fu Xing Pty Ltd (**builder**) and Sidway Constructions Pty Ltd (**principal**) were parties to a construction contract dated 9 February 2016.

The principal claimed that it issued a notice terminating the contract on 26 or 27 September 2016. The builder claimed that the contract was not terminated until 26 October 2016.

On 4 October 2016, the builder issued a letter which it purported was a payment claim in respect of the 25 October 2016 reference date (**4 October Claim**) (a payment claim in respect of the 25 September 2016 reference date had already been served). The principal did not issue a payment schedule.

The builder brought an application for summary judgment against the principal in respect of the 4 October Claim, relying on section 15(2)(a)(i) of the NSW Act.

## DECISION

The builder's application for summary judgment was dismissed. Gibson DCJ identified two primary issues relevant to the application for summary judgment:

### Was the 4 October Claim a payment claim under the NSW Act?

Gibson DCJ did not reach a definitive conclusion on this point, but commented:

- if the 4 October Claim was a payment claim under the NSW Act, it was the second payment claim served in respect of the 25 September 2016 reference date, which is prohibited by section 13(5) of the NSW Act; and
- an 'ingenious argument' by the builder's solicitor that the terms of the contract permitted the bringing forward of payment claims was 'untested by law and probably contrary to the ratio of *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd* [2016] HCA 52 (analysed in our Roundup of 2016 cases).

Gibson DCJ commented in obiter that, had the principal brought an application for summary dismissal, her Honour would have made a decision on whether the 4 October Claim was a payment claim under the NSW Act. However, no such application was before the court.

### There was a disputed issue of fact as to the date of termination of the contract

Gibson DCJ stated that, given:

- there was a disputed issue of fact as to when the termination of contract occurred; and
- the 4 October Claim was served after the date of termination contended for by the principal,

the disputed issue of fact as to the date of termination of the contract must be resolved. Her Honour held that this could only be resolved as a disputed issue of fact at hearing, and therefore summary judgment was not available.

# *Futurepower Developments Pty Ltd v TJ & RF Fordham Pty Ltd* [2017] NSWSC 232

**This case reiterates that failure by an adjudicator to give detailed reasons will not constitute a denial of natural justice, provided the reasoning demonstrates that the adjudicator has turned their mind to the issues raised. Further, where the Building and Construction Industry Security of Payment Act 1999 (NSW) gives the adjudicator jurisdiction to fix an error, the occurrence of such an error cannot be jurisdictional error.**

## FACTS

In June 2015, Futurepower Developments Pty Ltd (**respondent**) entered into a construction contract with TJ & RF Fordham Pty Ltd (**claimant**) to undertake the construction of roads and drainage works for a residential subdivision at Edmondson Park, New South Wales.

In April 2016, the claimant submitted a payment claim under the NSW Act which included amounts for variations to the contract for costs associated with removing asbestos discovered during excavation. The respondent's payment schedule proposed to pay an amount of $216,144.27 but indicated an amount payable of $0 in respect of the variations. The scheduled amount was subsequently paid.

In May 2016, the claimant lodged an adjudication application. The adjudicator found in favour of the claimant in the sum of $684,054.89, which included both the amount paid ($216,144.27) and an amount for the variations.

The respondent sought to have this determination quashed for jurisdictional error on the basis that the adjudicator failed to have proper regard to its submissions (but, alternatively, for failing to provide adequate reasons for its decision).

## DECISION

The court dismissed the respondent's summons and claim for relief, concluding that the applicant had been afforded procedural fairness.

### Failure to account for amounts previously paid in payment schedule

The adjudicator's failure to take account of the amount already paid by the respondent was held not to invalidate the determination. Under section 22(5) of the NSW Act, an adjudicator may correct a determination if it contains an error arising from an accidental slip or omission.

Ball J held that it was an obvious slip to include the amount as part of the determination and, since the NSW Act gave the adjudicator jurisdiction to fix the error, it could not be jurisdictional error.

### Having proper regard to the submissions

His Honour held that the adjudicator had adequately considered the respondent's submissions. It was sufficient that the adjudicator had correctly identified the issue that he was required to address and the terms of the contract that were relevant to that issue.

In reaching this judgment, Ball J reiterated a number of relevant principles, including that:

- regard must be had to the scheme prescribed by the NSW Act;
- reasons should be read in their entirety and not sifted minutely in an attempt to find error justifying the court's intervention;
- so long as the reasoning demonstrates that the adjudicator has turned their mind to the issues raised, failure to give detailed reasons is not indicative of a denial of natural justice; and
- an honest error is not the same as making a determination without good faith (which will make a determination invalid).

# *Home Site Pty Limited v ACN 124 452 786 Pty Limited (formerly known as Nahas Construction (NSW) Pty Limited)* [2017] NSWSC 698

**The decision of the Supreme Court of New South Wales further clarifies the position concerning entitlement to recover amounts on a quantum meruit basis. The court accepted that it may be necessary to estimate the fair value of what is supplied, because for one reason or another, the actual costs are not available or it is not appropriate to separate out the cost of the supply of materials and labour in calculating the value of what is supplied.**

## FACTS

By a contract dated 22 December 2009 (**contract**), and amended by a deed dated 22 February 2010, Home Site Pty Limited (**respondent**) engaged Nahas Construction (NSW) Pty Limited (**claimant**) to undertake the construction of, and perform certain design work for the development of a residential development (**development**).

On 14 August 2012, when work on the development was substantially complete, the claimant went into voluntary administration. Relying on the appointment of administrators and the deed of company arrangement (**DOCA**), the respondent terminated the contract on 20 February 2013.

On 21 August 2013, the claimant made an adjudication application under the NSW Act in respect of the last progress claim (**PC 21**) for $1,052,036.15 (including GST). The adjudicator subsequently determined the amount payable by the respondent to the claimant in respect of PC 21 was $557,697.09.

On 22 November 2013, the respondent commenced proceedings in the Supreme Court of New South Wales seeking leave to proceed against the claimant pursuant to section 440D of the *Corporations Act 2001*(Cth) and an injunction restraining the claimant from enforcing a District Court judgment the claimant had obtained on the basis of the adjudication determination and was successful.

Subsequently the respondent sought a declaration that it did not owe the claimant any further payments. The respondent's position was that it had claims for liquidated damages, defects and payments made to subcontractors that exceeded the remaining retention.

A further issue was that the claimant was unlicensed so that that under the *Home Building Act 1989* (NSW) the claimant was not entitled to payment under the contract but in equity was still entitled to payment on a quantum meruit basis.

## DECISION

The court held that the respondent did not owe the claimant any further payment as its offsetting claims did in fact exceed the remaining retention. The respondent could not recover the excess because of the DOCA.

However, Ball J made some useful comments on the quantum meruit claim. The claimant's quantum meruit claim was calculated by estimating the amount another builder would have charged for undertaking the work set out in the relevant drawings. In arriving at the amounts claimed, the claimant, through a quantity surveyor, took no account of the actual costs incurred.

His Honour found that the claimant's approach was mistaken, relying upon the principles for assessing the amount recoverable for work performed under an unenforceable contract established by Deane J in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; [1987] HCA 5 at [263], being a fair value for the benefit provided. That is remuneration calculated at a reasonable rate for work actually done or the fair market value of materials actually supplied.

In some cases it may be necessary to estimate the fair value of what is supplied because, for one reason or another, the actual costs are not available or it is not appropriate to separate out the cost of the supply of materials and labour in calculating the value of what is supplied. However, a genuine attempt must be made to identify and provide evidence of the actual costs incurred. The court noted that it is common ground that the claimant is not entitled on a quantum meruit basis to a sum greater than the contract sum as varied in accordance with the contract.

# *Mt Lewis Estate Pty Ltd v Metricon Homes Pty Ltd* [2017] NSWSC 1121

**A supporting statement referring to a payment claim yet to be made does not comply with sections 13(7) and 13(9) of the NSW Act.**

## FACTS

Mt Lewis Estate Pty Ltd (**respondent**) engaged Metricon Homes Pty Ltd (**claimant**) to construct 87 villas at a cost of $16,975,000.

On 16 December 2016, the claimant served a payment claim (**claim**) on the respondent in the amount of $3,316,584.32. The claim was accompanied by a supporting statement signed by the New South Wales General Manager for the claimant on 13 December 2016.

On 3 February 2017, the respondent served a payment schedule (**schedule**) proposing to pay nil.

The claimant lodged an adjudication application. The respondent responded submitting, among other things, that the adjudicator lacked jurisdiction to make a determination as the claim was not accompanied by the requisite supporting statement and was therefore not a payment claim under the NSW Act.

On 10 March 2017, the adjudicator made his determination in favour of the claimant, ordering the respondent to pay the adjudicated amount of $1,830,537.09, plus the adjudicator's fees and expenses. The respondent challenged the validity of the determination by application to the Supreme Court.

### First Ground of Challenge – Supporting Statement

The respondent argued that the supporting statutory declaration failed to comply with the requirements imposed by the NSW Act as it was made on 13 December 2016 in respect of the 16 December 2016 claim.

### Second Ground of Challenge – Void as Being Out of Time

The respondent also argued that the determination was void as it was made one day out of the time prescribed by section 21(3) of the NSW Act.

## DECISION

The court found in favour of the respondent on both grounds of challenge.

Hammerschlag J determined that the claim was invalid due to the prospective statutory declaration. The declaration could not refer on its face to a non-existent payment claim. Sections 13(7) and 13(9) of the NSW Act specifically contemplate that a declaration, which relates to a payment claim which is actually in existence at the time the declaration, is made and identifies the work to which the claim relates. His Honour held that a declaration cannot logically or rationally be made that all amounts have been paid to subcontractors, when the payment claim to which it relates has not yet been made. To find otherwise would offend the intent of the provisions, having regard to extrinsic material.

In considering the second ground of challenge, Hammerschlag J found that, as the adjudicator's determination was out of time, the adjudicator had no power to determine that his fees and expenses should be paid.

# *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd t/a Total Concept Group* [2017] NSWSC 194

**A determination made under the NSW Act can be effectively challenged where the adjudication application that is provided to a respondent is not a copy of the application provided to the adjudicator.**

**Further, if an adjudication application is served on a USB stick, it is not service of a copy in writing until it is opened by the recipient and the recipient becomes aware of the contents of the documents.**

## FACTS

In May 2015, Parkview Constructions Pty Limited (**respondent**) entered into a subcontract with Total Lifestyle Windows Pty Ltd t/a Total Concept Group (**claimant**) to design, supply and install glazed windows and doors for a centre project in Woolooware.

In October 2016, the claimant issued a payment claim under the NSW Act. The respondent served a payment schedule for nil dollars.

The ensuing dispute was referred to adjudication. Due to the claimant's errors, whilst the respondent received the correct application (via a USB stick), the adjudicator was provided with the wrong application, receiving instead an earlier version. The adjudicator never received the revised application, and the respondent never received the earlier version.

The adjudicator held that he was not able to consider the response and determined an amount in favour of the claimant. In reaching his determination, the adjudicator held that the respondent's response was not filed on time. This conclusion depended on a factual finding that the application had been served on 9 November 2016 when a USB stick containing the documents was delivered to the respondent's postal address, and not on 10 November 2016 when the respondent received and accessed the USB stick. By filing the response on 17 November 2016, the adjudicator held that the respondent was outside the five-business day limit imposed by the NSW Act.

Following the grant of an interlocutory injunction in December 2016, the respondent commenced proceedings to have this determination quashed or set aside, on the grounds that the adjudicator had no jurisdiction to determine the application (due to the respondent's errors of service), that there was jurisdictional error and a denial of procedural fairness.

## DECISION

The court found that the respondent's complaints had been made out and that the adjudicator's determination should be quashed. This conclusion was based on the following issues.

### A copy of submissions

Hammerschlag J considered the differences between the application provided to the respondent and that provided to the adjudicator. Under the NSW Act, a copy of the application must be served on the respondent. Further, the written words of the application copied to the respondent must be the same as those referred to the adjudicator.

The court found that the differences between the application provided to the adjudicator and to the respondent were not trivial, as they included (amongst other differences):

- evidence in the original application which was not included in the revised application; and
- witness statements in the original application which had been removed from the revised application.

As the applications could not properly be viewed as a copy, the adjudicator was held not to have had jurisdiction to determine the matter.

### Service of the USB stick

The court found that the claimant's response had been served in time and should not have been disregarded by the adjudicator. In order to equate to service in writing under the NSW Act, the recipient must have taken steps to access, open and view the files so that the recipient becomes aware of the contents of the documents. Service of the USB stick at the registered postal address was insufficient. Service in writing was, therefore, held to have occurred on 10 November 2016 when the respondent accessed the USB stick.

The court quashed the adjudicator's determination on the basis that the determination was both procedurally unfair and contained jurisdictional error.

# *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4

**On 14 February 2018 the High Court delivered this landmark judgment which unequivocally confirms that the NSW Act removes a court's jurisdiction to overturn an adjudicator's determination infected by non-jurisdictional errors of law.**

**Both this decision and the High Court's decision in *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5 mean that parties left unhappy by an erroneous adjudication determination will have very limited options to bring a challenge. The decision emphasises the interim nature of adjudication determinations.**

**The High Court reinforced that instead of challenging an adjudication determination parties can seek final determination by a court or other agreed alternative dispute procedures.**

**The risk for industry is that typically on a construction project 'whoever holds the money holds the power'. It may be some months (or years) until a final determination is made to correct the adjudicator's error (if proven).**

## FACTS

In *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd; Maxcon Constructions Pty Ltd v Vadasz & Ors* [2017] HCATrans 112, the High Court granted special leave arising out of the judgment in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379 (analysed in our Roundup of 2016 cases) and *Maxcon Constructions Pty Ltd v Vadasz (No 2)* [2017] SASCFC 2.

Shade Systems served a payment claim which Probuild who refused to pay on the basis that it was owed a higher amount for liquidated damages than being claimed. The adjudicator rejected Probuild's liquidated damages claim and awarded an amount to Shade Systems.

The High Court granted special leave to hear appeal from Probuild to overturn the NSW Court of Appeal's decision which had found that adjudication determinations are not open to judicial review for non-jurisdictional errors of law.

## DECISION

The High Court affirmed that an adjudicator's non-jurisdictional errors of law will not be overturned

The High Court unanimously dismissed the appeal by Probuild to overturn the adjudicator's determination.

It was critical for the High Court that the NSW Act:

- is intended to set up a unique scheme for the expeditious resolution of disputes, even if timeframes may be 'brutally harsh';
- stands apart from the parties' rights under the contract - even if the contractual provisions are contrary to the SOP provisions, the NSW Act will operate in full;
- is intended to set up an informal process to determine adjudication applications;
- deliberately omits a right of appeal from the determination of the adjudicator; and
- defers the final determination of the parties' contractual rights to a different forum.

Accordingly, even obvious (and serious) non-jurisdictional errors of law on the face of the record will not be enough to set aside an adjudicator's determination.

# *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151

**In order to avoid setting time 'at large' and preserve the right to claim liquidated damages, a contract should include an extension of time mechanism, and a principal should unilaterally direct EOTs where it causes a contractor to be delayed.**

**What has been made clear by this case, and the line of authorities preceding it, is that both parties to a construction contract should exercise their rights under contractual extension of time regimes in order to preserve their rights to delay damages or to liquidated damages (as the case may be) and that a principal should exercise its power to direct extensions of time in good faith unless the particular provision makes it clear that the exercise of such a right is for the sole benefit of the principal.**

## FACTS

The appellant, Probuild Constructions (Aust) Pty Ltd (**respondent**), was the head contractor for the renovation of the Tank Stream Hotel in Hunter Street, Sydney. The respondent subcontracted with DDI Group Pty Ltd (**claimant**) under an amended AS4303-1995 contract (**subcontract**). The subcontract included an extension of time (**EOT**) regime with a discretionary power for the respondent to direct EOTs. As events turned out, the date of practical completion occurred some 144 days after the date for practical completion.

The claimant served the respondent with a payment claim under the NSW Act in the sum of $2,175,267. The majority of the payment claim was in respect of variations which the respondent had directed after the date for practical completion. In its payment schedule, the respondent set off the claimant's claim with liquidated damages (**LDs**), asserting that the claimant had not applied for, had not been granted, and was not entitled to, any EOT.

The claimant made an adjudication application under the NSW Act. In its adjudication application the claimant gave notice that its adjudication documents should be treated as both a notice of delay and an EOT claim (presumably because the subcontract did not contain a time bar for EOT claims). In reliance on the prevention principle, the adjudicator rejected the respondent's claim for LDs, concluding that it was *'totally inconsistent and unreasonable'* for the respondent to claim LDs for the period when the respondent was directing, and the claimant was performing, variation works.

The respondent commenced proceedings in the Supreme Court seeking an order in the nature of certiorari quashing the adjudicator's purported determination. The respondent's essential complaint was that the adjudicator rejected the claim for LDs by applying the prevention principle, an argument which neither party had contended, and that the adjudication determination was therefore infected by a denial of procedural fairness.

The primary judge, Meagher JA, dismissed the respondent's summons, holding that the adjudicator had *'dealt with Probuild's argument as made'* in *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2016] NSWSC 462 (analysed on our Roundup of 2016 cases).

The respondent appealed. The primary issue on appeal was whether the adjudicator applied the prevention principle and whether, in so doing, he had denied the respondent procedural fairness.

## DECISION

The Court of Appeal dismissed the appeal.

McColl JA held, with whom Beazley ACJ and Macfarlan JA agreed, that having regard to the documents which were before the adjudicator, the prevention principle was squarely in issue because the respondent, in its adjudication response, sought to avoid the operation of the prevention principle by submitting, in effect, that it was the claimant's failure to claim EOTs which resulted in its liability to pay LDs. For this reason, there was no denial of procedural fairness in respect of the respondent.

However, putting aside the point on procedural fairness, the significance of this case lies in the Court of Appeal's views expressed on the prevention principle. The Court of Appeal confirmed the previous line of authority (including that of *Peninsula Balmain*) that, in the context of construction contracts, the prevention principle may preclude an owner recovering LDs for delay where that delay has been caused by that owner in breach of the contract. This is because, if the prevention principle applies, the contractual date for practical completion ceases to be the proper date for the completion of the works; if there is no contractual mechanism for extending the time for practical completion, then there is no date from which LDs can run, and the right to LDs is then lost. In other words, time is set 'at large'.

The operation of the prevention principle can be modified or excluded by contract by including EOT mechanisms and a unilateral right for the owner to direct EOTs where no claim for one is made.

McColl JA expressed the view that the respondent was required to exercise its reserve power honestly and fairly on the basis of the prevention principle or on the basis that there was an implied duty on the respondent to act in good faith in exercising the unilateral power to extend time. As the subcontract did not include provisions to the effect that the unilateral power to extend time is for the benefit of the respondent only, the respondent was under an implied duty of good faith to direct EOTs in circumstances where it knew (or ought to have known) that the claimant was delayed because of the respondent's variation directions.

# *Quasar (Constructions) Commercial Pty Limited v Trilla Group Pty Limited* [2017] NSWSC 860

**For there to be a material denial of justice, the adjudicator must resolve the dispute on a basis which has not been raised or 'hinted at' in any of the documents in the adjudication. It is not enough that the parties did not make submissions on the specific argument relied on by the adjudicator.**

## FACTS

Quasar (Constructions) Commercial Pty Limited (**respondent**) engaged Trilla Group Pty Ltd (**claimant**) to undertake hydraulic work for Quasar for a development at Forest Lodge (contract).

The parties fell into dispute. The claimant served a payment claim on the respondent claiming $861,000 (plus GST). The respondent certified nil in the payment schedule after setting off a claim for liquidated damages.

The dispute was referred to adjudication. The claimant argued that time was at large due to the respondent's acts of prevention in failing to issue a revised construction program and appoint a superintendent to manage the works. The respondent's defence was that the prevention principle had no effect where the contract contained an extension of time (**EOT**) clause.

The adjudicator determined that the claimant was entitled to $462,000 (including GST). The adjudicator decided that the respondent could not set off liquidated damages, because the claimant:

- was unable to assess if the delay had an impact on the critical path because the respondent had not provided an updated construction program; and
- therefore could not request an EOT under the contract.

The respondent applied to the court seeking:

- a declaration that the adjudicator's determination was void for the reason it was decided on a basis for which neither party had contended and as such was a material denial of natural justice; and
- a stay of enforcement of the adjudication determination until such time as the respondent's liquidated damages claim could be heard and determined by the court.

## DECISION

The court dismissed the respondent's application. The court determined that there was no denial of natural justice and that there were no grounds for ordering a stay of enforcement of the adjudication determination.

### Denial of natural justice

The adjudicator's finding that the claimant was not able to determine the critical path and could not request an EOT was not a material denial of natural justice. The respondent put before the adjudicator the defence that the prevention principle had no effect where the contract contained an EOT clause. That issue having been raised, it was incumbent upon the adjudicator to deal with it as best he could on the material provided and within the tight timeframe allowed.

### Application to stay proceedings

McDougall J recognised that the court had jurisdiction to grant a stay in circumstances where a claimant is insolvent (or on the edge of insolvency) and where there is a cross-claim.

In the present case, the claimant's financial results for the last four years showed it had operated at a small but reasonably consistent loss. However the evidence also showed that the claimant is still trading, has won four substantial subcontracts, and its present financial position would be reversed if it were paid the adjudicated amount. His Honour therefore declined to grant a stay and ordered that the money paid into court by the respondent be paid out to the claimant.

# *Quickway Constructions Pty Ltd v Electrical Energy Pty Ltd* [2017] NSWCA 337

**Contractors who engage in factoring arrangements should ensure they are legally entitled to receive the proceeds of a payment claim to ensure they can enforce their right to payment under the NSW Act.**

**This majority decision of the New South Wales Court of Appeal creates issues for a party seeking to rely on the NSW Act to enforce a debt that has been assigned to a third party. While the language of the NSW Act creates a broad entitlement in favour of a person who 'claims to be entitled to a progress payment', the court found that by expressly stating on an invoice that the entitlement to payment had been assigned to a third party, the debtor is no longer claiming to be entitled to a progress payment.**

## FACTS

In March 2017, Quickway Constructions Pty Ltd (**respondent**) engaged Electrical Energy Pty Ltd (**claimant**) to undertake electrical cable hauling works at a substation in Canterbury and a substation in Leichhardt. The claimant separately entered into a factoring agreement with Bibby Financial Services Australia Pty Ltd (now called Scottish Pacific (BFS) Pty Limited) (**Bibby**) which assigned every debt owing from a customer of the claimant, whether existing or future, to Bibby (**factoring agreement**).

On 22 April 2017, the claimant sent the respondent an invoice in the sum of $24,725.25 for works done at Canterbury. Pursuant to the factoring agreement, the invoice sent to the respondent by the claimant contained a notation that it had been assigned to Bibby, and asked that payment be made directly to Bibby. The respondent did not pay the invoice. The claimant invoked the NSW Act payment procedure, subsequently obtaining an adjudication determination in its favour.

The respondent unsuccessfully challenged the adjudication determination in the New South Wales Supreme Court on the basis that the claimant could not rely on the NSW Act to enforce payment *'to be made to a subcontractor'*, given the underlying entitlement to payment had been assigned to Bibby. The primary court found that the liability to pay a payment claim under the NSW Act is a statutory liability, and therefore the underlying assignment of an invoice under general law is irrelevant.

In the present case, the respondent sought leave to appeal the primary decision on the basis that the assignment of the invoice to Bibby extinguished the claimant's entitlement to payment from the respondent, and therefore the claimant was not a person who *'claims to be entitled to a progress payment'*.

## DECISION

In a majority decision, the court allowed the appeal, quashed the adjudication determination and set aside orders 2(a) and 3 of the primary judgement. Gleeson and Leeming JJA found that the express notation on the invoice, stating that payment had been assigned to Bibby, was evidence that the claimant was not claiming to be entitled to a progress payment, and therefore the invoice did not constitute a valid payment claim for the purpose of the NSW Act. The court based its decision on the fact that the document asserting to be a payment claim (in this case, the invoice) itself denied that any money was owed to the claimant.

The judges were not unified in their decision, with Macfarlan JA applying a broad interpretation to the ordinary meaning of the word 'claims', capturing any person who issues a payment claim regardless of whether that person is subsequently disentitled to payment. While the appeal was ultimately allowed, the views of Macfarlan JA suggest the issue of assigned debt is still uncertain in the context of the NSW Act.

# *Quickway Constructions Pty Limited v Paul J Hick* [2017] NSWSC 830

**An adjudicator appointed under the NSW Act may be disqualified by reason of apparent bias (there need not be actual bias). Where there is doubt as to the presence of actual or apprehended bias (in the opinion of a fair-minded lay observer), an adjudicator may, but is not mandated to, seek advice from the parties as to their opinion on the matter. In this particular case, if a party is seeking to have an adjudication determination overturned, the Authorised Nominating Authority should not appoint that adjudicator to determine a subsequent adjudication between the same parties.**

## FACTS

Quickway Constructions Pty Limited (**Quickway**) was a party to several adjudication proceedings with Electrical Energy Pty Limited in relation to payment claims that Quickway had not paid.

Initial proceedings (**challenge proceedings**) regarding two adjudication determinations were under way when a separate adjudication application was lodged relating to a payment claim for work done at Bateau Bay (**Bateau application**).

The individual who accepted appointment as the adjudicator for the Bateau application was also the second defendant in the challenge proceedings. Quickway asserted that the adjudicator's interest as a party to the challenge proceedings gave rise to a conflict of interest or a perceived apprehension of bias.

## DECISION

The court found in favour of Quickway and made orders to disqualify the adjudicator from the Bateau Application.

### Procedural fairness in adjudication

The adjudicator's functions mimic the judicial function. Concepts of natural justice and procedural fairness are to be afforded to both parties by an adjudicator who must perform duties in the absence of the actuality or appearance of bias.

### Apprehension of bias

The respondent did not assert the presence of actual bias. Rather, the test reiterated in *Michael Wilson & Partners Limited v Nicholls* [2011] HCA 48; (2011) 244 CLR 427 suggested that a *'fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide'*.

### Appointment of adjudicators

Under the NSW Act, an adjudicator is not required to give parties an opportunity to be heard on whether he or she should accept or decline an appointment. However, an adjudicator is not prevented under the NSW Act from requesting the Authorised Nominating Authority to make enquiries in cases of doubt. In this case, where the adjudicator was party to earlier, related proceedings, an enquiry would have been appropriate.

# *Regal Consulting Services Pty Ltd v All Seasons Air Pty Ltd* [2017] NSWSC 613

**A contractual deeming provision in relation to the reference date for a payment claim will not override the operation of the NSW Act. If a payment claim is served on a date in respect of which no reference date exists, the payment claim will be invalid.**

## FACTS

On 8 June 2015, the plaintiff Regal Consulting Services Pty Ltd (**respondent**) and the first defendant All Seasons Air Pty Ltd (**claimant**) entered into a subcontract under which the claimant undertook to perform mechanical ventilation and air conditioning work for the respondent. The subcontract was a 'construction contract' for the purposes of the NSW Act).

The subcontract provided that progress claims should be made monthly, on the 20th day of each month, and that progress claims made before the 20th day of any month *'shall be deemed to have been made on the date for making that claim'* (**deeming provision**).

On 12 July 2016, All Seasons made a progress claim seeking payment of $44,500 inclusive of GST. The progress claim purported to also be a payment claim for the purposes of section 13(1) of the NSW Act.

The respondent provided a payment schedule disputing liability for the whole of the claim on the basis that the claimant had already served a payment claim based on the reference date of 20 June 2016, and the next reference date—20 July 2016—had not accrued at the time the claimant served the payment claim.

The claimant's payment claim was referred to adjudication. The second defendant, the adjudicator, concluded that she had jurisdiction to deal with the dispute and determined that the adjudicated amount was the claimed amount. The claimant subsequently obtained a judgment for debt for the amount certified.

The respondent brought proceedings in the NSW Supreme Court contending that the adjudicator lacked jurisdiction to deal with the payment claim on the basis that there was no available reference date to support it. The respondent relied on the recent decision of the High Court of Australia in *Southern Han Breakfast Point Pty Ltd (In Liq) v Lewence Construction Pty Ltd* [2016] HCA 52 (***Southern Han***) which was analysed in our Roundup of 2016 cases.

In *Southern Han* the court held that a party's entitlement to a progress claim existed *'only on and from each reference date under the construction contract'*, therefore concluding that the existence of a reference date was a precondition to the making of a valid payment claim.

## DECISION

The court determined that, in the absence of an available reference date, there was no valid payment claim and the adjudicator had no jurisdiction to make a determination under the NSW Act.

McDougall J found that the deeming provision was a contractual payment regime, intended to aid in the administration of the contract, and did not override the operation of section 8 of the NSW Act.

The entitlement to a progress payment given by section 8 of the NSW Act arises not only because the claimant has undertaken to carry out construction work but also because a reference date has arisen. If no reference date has arisen, there is no statutory entitlement to a progress payment.

# *Samuel Homes Pty Ltd v Derek Raithby* [2017] NSWSC 205

**Parties wishing to challenge the validity of an adjudication determination should ensure they commence proceedings expeditiously, as 'significant' delay (in this case approximately eight months) may result in the court exercising its discretion to refuse relief.**

## FACTS

Samuel Homes Pty Ltd (**respondent**) built residential homes. Derek Raithby (**claimant**) was an architect who provided services to the respondent for a number of residences.

The claimant served a payment claim on the respondent under the NSW Act on or around 30 March 2016. The respondent did not serve a payment schedule in response. The claimant commenced an adjudication, and on 20 June 2016 the adjudicator determined that the respondent owed the claimant $18,799.

The claimant obtained judgment against the respondent in the Local Court on the basis of the adjudication determination, following which the claimant invoked a number of procedures to obtain payment (which were unsuccessful).

The respondent then commenced proceedings in the Supreme Court on 17 February 2017, almost eight months after the date of the adjudication determination, seeking (amongst other things) that the adjudication determination be quashed and the judgment of the Local Court be set aside.

## DECISION

The court refused to grant the relief sought by the respondent on the basis of the respondent's *'significant and unacceptable delay'*.

Hammerschlag J noted that the respondent's excuse for its delay in bringing the proceedings (namely, that the director of the respondent and his life partner were already litigating a dispute with the claimant regarding another adjudication determination, and they were hoping that they might settle both disputes) exacerbated, rather than exonerated, its delay.

In obiter, Hammerschlag J even suggested that, given the strict timetables for which the NSW Act provides, the respondent's deliberate delay might be thought to amount to a waiver of the right to challenge the adjudication determination.

In light of the discretionary nature of remedies on judicial review, and the underlying purpose of the NSW Act (being the expeditious resolution, albeit on an interim basis, of payment disputes), it was held that the respondent's delay of approximately eight months in commencing proceedings was enough to withhold relief as a matter of discretion.

In addition, Hammerschlag J pointed out:

- the substantive challenges to the adjudication determination were not made out;
- the respondent's failure to serve a payment schedule in response to the payment claim had the effect that, under section 20(2A) of the NSW Act, the respondent was not entitled to serve an adjudication response; and
- there was no evidence before the court that the respondent did not owe the claimant the money the subject of the adjudication determination and Local Court judgment.

# *SMLXL Projects Pty Limited v RIIS Retail A/S* [2017] NSWDC 131

**This case is an important reminder that, if there is no 'concluded state of affairs' between parties as to the performance of additional work outside of an existing contract, a court may find that the additional work was not carried out under a 'construction contract' within the meaning of the NSW Act. Any payment claims made in respect of work not carried out under a 'construction contract' within the meaning of the NSW Act will not be valid payment claims under the NSW Act.**

## FACTS

A contractor, RIIS Retail A/S (**respondent**), engaged a subcontractor, SMLXL Projects Pty Limited (**claimant**) under three separate contracts to carry out fitout works at three 'Joe & The Juice' stores in Sydney: one on Pitt Street, one at Barangaroo and one in Sydney Airport.

The clamant served three purported payment claims on the respondent (one under each contract). The respondent had not provided payment schedules or paid the amounts claimed within the time allowed by the NSW Act. The clamant commenced proceedings in the District Court to recover the claimed amounts and sought summary judgment in those proceedings.

The respondent defended the application for summary judgment on the following bases (amongst others):

- the Pitt Street and Barangaroo payment claims failed to properly identify the construction work to which they related, meaning they were not valid payment claims under the NSW Act (**Work Identification Defence**); and
- the Barangaroo and Sydney Airport payment claims were claims for unapproved variations. As there was no agreement for the clamant to perform the variations, the variations were not carried out under a construction contract, and there was no right to issue a payment claim for them under the NSW Act (**Unapproved Variations Defence**).

## DECISION

The court ordered summary judgment on the Pitt Street and Barangaroo payment claims for the clamant and dismissed the claimant's claim in respect of the Sydney Airport claim.

### Work Identification Defence

The court considered *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 (***Brookhollow***) and found that if a payment claim, on its face, purported in a reasonable way to identify the construction work to which it related, then it would not be invalid for the purposes of the NSW Act. The court also considered *Leighton v Arogen* [2012] NSWSC 1323 (which was analysed in our Roundup of 2012 cases), in which it was held that, in certain contexts, it was appropriate to take into account a party's background knowledge to determine whether a payment claim was sufficiently meaningful to enable that party to know the bases on which the payment claim was advanced.

The court held that both the Pitt Street and Barangaroo payment claims satisfied the test in *Brookhollow*. When all of the background material, correspondence and context was taken into account, each payment claim, on its face, provided sufficient detail of the construction work to which it related in a reasonable way. Accordingly, the Work Identification Defence failed.

### Unapproved Variations Defence

The court referred to *Machkevitch v Andrew Building Constructions* [2012] NSWSC 546 (***Machkevitch***) which was analysed in our Roundup of 2012 cases. In *Machkevitch*, the court held that for an 'other arrangement' (as used in the definition of 'construction contract' in section 4 of the NSW Act) to exist, there must be a *'concluded state of affairs, which is bilateral at least, which can amount to an arrangement under which one party to it undertakes to perform construction work for another party to it'*.

In relation to the Sydney Airport payment claim, the court found that the evidence did not establish, to the standard required for a summary judgment application, that there was a 'concluded state of affairs' that was 'bilateral at least' in relation to the alleged variations the subject of the payment claim. There was merely an assertion by the clamant that it was entitled to be paid for additional works. The court therefore held that the Sydney Airport payment claim was not made under a construction contract and was therefore not a valid payment claim under the NSW Act. Accordingly, the Unapproved Variations Defence was successful in relation to the Sydney Airport payment claim.

The court considered the Barangaroo payment claim and found that it was not a claim for unapproved variations but a claim for part of the contract sum. The respondent's Unapproved Variations Defence therefore failed in relation to the Barangaroo payment claim.

# *Watpac Constructions (NSW) Pty Limited v Charter Hall Funds Management Limited* [2017] NSWSC 865

**An unduly formal and technical approach should not be taken when determining compliance with the requirements of the NSW Act.**

**Where the contract allows multiple methods of service, it will be difficult to establish that the parties agreed to adopt one method to the exclusion of all others.**

## FACTS

The defendant Charter Hall Funds Management Limited (**respondent**) contracted with the plaintiff Watpac Constructions (NSW) Pty Limited (**claimant**) for the design and construction of a building at 333 George Street, Sydney. The contract set out an elaborate process for the making, assessing and payment of monthly progress claims. The contract allowed service of payment claims by Aconex, by post or by hand.

The claimant issued 36 progress claims over the life of the contract. For claims 1 to 35 the claimant issued every document to the respondent via Aconex. However, after the respondent provided a payment schedule for claim 36, the claimant served a tax invoice purporting to be a payment claim under the NSW Act. This was served only by hand in hard copy at the relevant address of the respondent. The respondent did not issue a payment schedule in respect of this tax invoice.

The respondent disputed the validity of this payment claim on various grounds, including that the payment claim failed to identify the construction work to which it related and was not supported by a valid reference date.

The respondent also argued that the claimant was estopped from serving the payment claim in the manner that it did. It alleged that, over the course of the project, each party had adopted a set of assumptions for the proper service of a payment claim and that the claimant had departed from these assumptions in its service of payment claim 36. The main assumption was the 'Aconex Convention': that all documentary communications, which purported to affect the legal rights and obligations of the parties, including in relation to claims for payment, would be communicated using Aconex.

Further, the respondent:

- asserted that the claimant engaged in misleading or deceptive conduct;
- alleged that the claimant was aware of the assumptions that the respondent had adopted; and
- alleged that the claimant, by remaining silent and not disabusing the respondent of the assumptions, had acquiesced in or induced the respondent's continued reliance on those assumptions.

## DECISION

The court held that the payment claim and method of service was valid.

McDougall J took the view that, when viewing the payment claim as a whole, there was no ambiguity or confusion and it sufficiently identified the construction work to which it related. His Honour favoured a non-technical approach and stated that the requirements of the NSW Act are not to be read as rules of court designed to govern civil litigation. His Honour lamented the increasingly formal and technical approach which appears to have been adopted by the courts in recent cases and considered this to be contrary to the object of the NSW Act.

The respondent's submission that the contract did not provide an available reference date was rejected. His Honour found that the contract did in fact set out what was to be the reference date and that one was available to support the payment claim.

His Honour went on to find that the claimant was not estopped from serving the payment claim in the manner that it did. Although the parties had clearly decided to use Aconex as their preferred method of communication, the evidence did not establish that the parties decided to only use Aconex and to forswear for all other means of communication authorised by the contract.

Neither was it found that the claimant had engaged in misleading or deceptive conduct. His Honour noted that section 18 of the *Australian Consumer Law (Competition and Consumer Act 2010* (Cth), Schedule 2) is unlikely to apply in situations such as this where both parties are of equal bargaining power and the conduct relied upon is not based on some active conduct or positive misrepresentation

# *West Tankers Pty Ltd v Scottish Pacific Business Finance Limited* [2017] NSWSC 621

**The prior assignment of a principal's debt by a contractor to a financier under a discounting facility agreement was held to prevail against a claim in respect of the same debt made by a subcontractor using a payment withholding request under section 26A of the NSW Act and then section 8(1) of the *Contractors Debts Act 1997* (NSW) (CD Act). Section 8(1) of the CD Act provides that service of a notice of claim on the principal operates to assign to the unpaid person the obligation to pay the money owed under the contract to the defaulting contractor. The time of service of claim on a principal is therefore critical, as a claim made under section 8(1) of the CD Act will not necessarily prevail over an earlier legal assignment of the debt. Unscrupulous contractors could defeat the purpose of section 26A of the NSW Act by assigning their debts to a wholly owned subsidiary. Principals should ensure that their construction contracts prohibit assignment without consent of the principal so that the moneys the subject of a notice of withholding can be excluded from such assignment.**

## FACTS

West Tankers Pty Ltd (**claimant**) supplies diesel fuel. Scottish Pacific Business Finance Pty Limited (**Scottish Pacific**) is a financier. This case was a contest to determine which of them was entitled to an amount paid into the District Court of New South Wales by a third party, the McConnell Dowell OHL Joint Venture (**principal contractor**).

The claimant supplied fuel to Ealwin Pty Ltd (**respondent**) which the respondent, in turn, supplied to and invoiced the principal contractor. The claimant provided an invoice to the respondent but they failed to pay.

In 2009, the respondent had entered into a facility agreement with Allianz Pty Ltd (**Allianz**) under which the respondent sold to Allianz debts owed to it. The debts purchased included the debt owed by the principal contractor to the respondent (**Ealwin debt**) and were transferred to Allianz 'completely and unconditionally'. Allianz then assigned its rights under the facility agreement to GE Commercial Corporation Australia Pty Ltd (**GE**) who then gave notice of the assignment to the principal contractor on 31 March 2016. GE then assigned its rights to Scottish Pacific on 3 May 2016.

Meanwhile, the claimant served a payment claim on the respondent on 18 February 2017. On 17 March 2016 the claimant applied for adjudication of its payment claim and served a payment withholding request on the principal contractor pursuant to section 26A of the NSW Act. Under section 26A of the NSW Act the principal contractor was then required to retain the money owed to the respondent. On 11 April 2016 the claimant obtained an adjudication determination which was filed as a judgment debt under section 7 of the CD Act on 26 April 2016. Section 8(1) of the CD Act provides that service of the notice of claim on the principal contractor operated to assign to the claimant the obligation to pay the respondent. The claimant served on the principal contractor a notice of claim pursuant to section 6 of the CD Act for the judgment debt on 5 May 2016.

Scottish Pacific asserted that it was the legal owner of the Ealwin debt due to the legal assignment to it under the facility agreement perfected by GE's notice of assignment to the principal contractor on 31 March 2016. The claimant claimed that, pursuant to section 8(1) of the CD Act, it is entitled to the money as the assignee of the Ealwin debt.

## DECISION

The court ordered the moneys in the District Court be paid to Scottish Pacific.

The court found that the NSW Act does not restrict the respondent from lawfully dealing with its property, being the Ealwin debt, whether after the service of a payment withholding request or at all.

By 31 March 2016, the debt owed by the principal contractor to the respondent had been assigned to GE. Upon service of the notice of assignment, GE became the legal owner of the Ealwin debt, and the respondent no longer had any interest, legal or beneficial, in it. From that date, the respondent had no legal entitlement to payment.

Even if section 8(1) of the CD Act had operated to assign the Ealwin debt to the claimant, that assignment would have occurred on 5 May 2016 which was in any event after the assignment of the Ealwin debt to GE. As the assignment to Scottish Pacific was effective and there was no assignment to the claimant, the moneys in the District Court should be paid to Scottish Pacific.

# Queensland

◄ CONTENTS ►

## CASE INDEX

- *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2017] QSC 85

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

# Queensland overview

## EMERGING TRENDS

The seven cases relevant to the Qld Act in 2016 were a veritable torrent compared to the single case in 2017. However, this may well change if the *Building Industry Fairness (Security of Payment) Act 2017* (BIF) is proclaimed to commence, as anticipated, in early 2018

## DEVELOPMENTS

BIF is more claimant friendly than was the Qld Act. Benefits for claimants include:

- there is no longer any need to endorse a claim or invoice;
- longer time frames to bring a claim;
- a statutory reference date created post termination.

Conversely the challenges for respondents increase. Challenges include:

- failure to provide a payment schedule exposing it not only to a 'default' judgment, but also to disciplinary action and imposition of penalties under the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**);
- no more second chance to respond to a payment claim;
- regardless of the claim value, all reasons for withholding money from the claimant must be given in a payment schedule; and
- failure to pay an adjudication amount may result in disciplinary action under the QBCC Act.

## FUTURE

[Following the commencement of BIF ], the transitional arrangements will see the completion of matters emanating from payment clams given before the commencement date, but every payment claim issued (without endorsement) after the proclamation date will progress under BIF.

Inevitably until the Queensland courts have provided interpretation of the new legislation the case load is likely to increase.

# *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2017] QSC 85

**The Supreme Court of Queensland confirmed that a contract will be considered a 'building contract' under the *Queensland Building and Construction Commission Act 1991* (Qld) if it contains even a minor amount of 'building work'.**

## FACTS

Wiggins Island Coal Export Terminal Pty Ltd (**principal**) engaged Civil Mining & Construction Pty Ltd (**contractor**) to perform earthworks and other civil works in relation to the principal's coal export terminal in Gladstone. Amongst other work the contractor was required to construct hardstand pavements in three areas and two fauna rope bridges over the inland conveyor.

The principal admitted that the contractor was entitled to the payment of interest on any moneys held to be due and payable to the contractor. The parties disputed the rate of interest which would apply. If the contract was for 'building work' under the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**), then interest would be paid at the penalty rate prescribed by section 67P of the QBCC Act.

The contractor claimed that the pavements works were roadworks not intended for public use but were for use by subsequent contractors at the site. The principal submitted that the pavement work was more correctly characterised as 'excavating' and 'earthmoving' works and were captured by the relevant exemptions in the *Queensland Building and Construction Commission Regulation 2003* (Qld) (**QBCC Regulation**), or, in the alternative, were temporary.

## DECISION

The Supreme Court of Queensland held that penalty interest was payable pursuant to section 67P of the QBCC Act. Flanagan J found that the pavement works were 'building work' under the QBCC Act.

His Honour held the works were properly characterised as roadworks as opposed to earthmoving or excavation works. His Honour stated that, although the pavement works fell under a section titled 'Rail Receive Bulk Earthworks', the work was more than simply earthmoving and excavating and included works that would appropriately be classified as roadworks. Importantly, his Honour found that there was no evidence to suggest the works were for public use, and therefore they were not caught by the roadworks exemption in the QBCC Regulation. Flanagan J also accepted the contractor's submission that the works were not temporary works, as the contract demonstrated they were to be used by subsequent contractors.

Given his Honour's decision in relation to the pavement works, Flanagan J did not have to decide whether the fauna rope bridge work was 'building work' under the QBCC Act.

# Victoria

◄ CONTENTS ►

## CASE INDEX

- *289 Grange Road Developments Pty Ltd & Anor v Dalle Projects Pty Ltd* [2017] VSC 409
- *Contract Control Services Pty Ltd v Department of Education and Training* [2017] VSC 507
- *Geotech Pty Ltd v Premier Developments Pty Ltd* [2017] VCC 874
- *Golets v Southbourne Homes & Anor* [2017] VSC 705
- *Maxcon Constructions Pty Ltd v Ily Australia Pty Ltd* [2017] VCC 1382
- *Maxcon Constructions Pty Ltd v Ily Australia Pty Ltd* [2017] VCC 1769
- *May Constructions (Residential) Pty Ltd v GPZ Pty Ltd and 38 Williams Road Pty Ltd* [2017] VCC 54
- *Melbourne Steel Erectors v M&I Samaras* [2017] VSC 308
- *Minesco Pty Ltd v Anderson Sunvast Hong Kong Ltd* [2017] VSC 299
- *Promax Building Developments Pty Ltd v PCarol & Co Pty Ltd* [2017] VCC 495
- *Teleios Group Pty Ltd v Wright Children Pty Ltd* [2017] VCC 449
- *Westbourne Grammar School v Gemcan Constructions Pty Ltd* [2017] VSC 645

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

# Victoria overview

## EMERGING TRENDS

On 1 March 2017, Digby J was appointed to the position of Judge in Charge of the Technology, Engineering & Construction List of the Victorian Supreme Court. Given that the vast majority of cases concerning the Vic Act have been heard and determined by Vickery J, we were curious to see whether Digby J would adopt a different approach on some of the more unique and controversial provisions of the Vic Act. However, in 2017 Digby J only issued two substantive judgments in respect of the operation of the Vic Act, neither of which indicate a noticeable shift in the construction and operation of Vic Act.

## DEVELOPMENTS

The Victorian Supreme Court in *Westbourne Grammar School v Gemcan Constructions Pty Ltd* [2017] VSC 645 followed the High Court's reasoning in *Southern Han Breakfast Point Pty Ltd (in liquidation) v Lewence Constructions Pty Ltd* [2016] HCA 52 (analysed in our Roundup of 2016 cases).) in holding that the right to make a payment claim under the Vic Act is premised on a contractual right to make that claim. Importantly, in that case, a valid suspension of the right to payment under the construction contract meant that the claimant had no right to payment which could be enforced under the Vic Act.

Further clarification was also provided by the Victorian Courts on:

- when an owner 'is in the business of building residences';
- when a construction contract provides 'a method of resolving disputes'; and
- what information must be included in a payment schedule for it to be valid.

Whether an owner *'is in the business of building residences'* is to be determined on a case by case basis. Relevant factors include the nature and scope of the project, whether it is intended that the building will be subsequently sold and the diversity of business pursuits of the owner. An owner may be 'in the business of building residences' even where it is a special purpose entity established for a specific project.

In *Contract Control Services Pty Ltd v Department of Education and Training* [2017] VSC 507, Digby J confirmed that a dispute resolution clause which allowed either party to elect whether to pursue litigation or arbitration was *'a method of resolving disputes'* for the purposes of section 10A(3)(d)(ii) of the Vic Act.

Finally, a payment schedule need not identify itself as such and will be valid if it broadly indicates whether or not the respondent intends to make payment in respect of the payment claim.

## FUTURE

The Vic Act continues to develop its own body of case law.

The number of payment disputes referred to adjudication in Victoria remains limited by the 'excluded amounts' provisions under section 10B of the Vic Act. However, one of the key questions to be addressed by John Murray AM in his review of the security of payment laws is whether certain types of claims (such as claims in respect of latent conditions, delays or variations) should be excluded from the security of payment Acts.

We await the delivery of the Murray Report as any recommendations (including whether there should be uniform security of payment laws across the country) are likely to substantially impact the Vic Act.

# *289 Grange Road Developments Pty Ltd & Anor v Dalle Projects Pty Ltd* [2017] VSC 409

This decision confirms that:

- **a claimant may seek relief under section 459E of the *Corporations Act 2001* (Cth) (Corporations Act) where a respondent fails to pay the amount scheduled in a payment certificate; and**
- **a respondent is not entitled to rely upon a claimant's breach of contract to avoid payment where that breach was caused by the act or omission of the respondent.**

## FACTS

289 Grange Road Developments Pty Ltd and 11 Mitchells Lane Developments Pty Ltd (**respondents**) engaged Dalle Projects Pty Ltd (**claimant**) to carry out demolition works at two properties located in Grange Road and Mitchells Lane respectively.

The contracts required the claimant to serve payment claims upon the superintendent. If no payment certificate was issued in response within 14 days, the payment claim became the payment certificate. As the respondents did not appoint a superintendent on either project, the claimant served payment claims upon the respondents directly. The respondents did not respond to the payment claims and after 14 days these claims became payment certificates. The respondents did not pay the claimant the entirety of the amounts claimed by the due dates under the contracts.

The claimant served statutory demands upon the respondents under the Corporations Act for the unpaid portions of the claimed amounts on each project, and the respondents commenced proceedings under section 459G of the Corporations Act to have the demands set aside.

## DECISION

The court upheld the statutory demand for Mitchells Lane but set aside the statutory demand for Grange Road.

### Mitchells Lane

The respondents submitted that the claimant had not complied with the contract as it had not issued payment claims directly to the superintendent. The respondents further submitted that the claimant was not entitled to issue a statutory demand before seeking an adjudication pursuant to the Vic Act.

The court rejected both submissions. As the respondents had failed to appoint a superintendent, they were not entitled to rely on the claimant's failure to submit payment claims to the superintendent to invalidate the payment claims. Further, the court held that adjudication under the Vic Act does not limit any other entitlement a claimant may have, and that the claimant was entitled to seek relief under the Corporations Act without first having recourse to the Vic Act.

### Grange Road

The court adopted the same position regarding the failure of the respondents to appoint a superintendent and the operation of the Vic Act. However, in this case, the claimant withdrew and reframed its payment claim after issuing the demand without withdrawing and reissuing the demand itself. The court held that there was a genuine question as to whether there was a debt due and payable under section 459E of the Corporations Act and set the demand aside under section 459G of the Corporations Act.

# *Contract Control Services Pty Ltd v Department of Education and Training* [2017] VSC 507

**This decision confirms that section 10A(3)(d)(ii) of the Vic Act will be satisfied where the contract provides for a method of resolving disputes which, if elected by either party, is capable of resulting in a binding resolution of the dispute.**

## FACTS

The Department of Education and Training (**respondent**) contracted Contract Control Services Pty Ltd (**claimant**) to provide construction works and related goods and services for the construction of the Bendigo Senior Secondary College Theatre Project. The contract was an amended AS2124-1992 contract which included amendments to the dispute resolution provisions. These dispute resolution provisions provided that either party could refer disputes to arbitration or litigation.

A dispute arose between the parties regarding a payment claim and the claimant made an adjudication application under the Vic Act. By the adjudication determination the adjudicator determined:

- the contract provided a 'method of resolving disputes' for the purposes of section 10A(3)(d)(ii) of the Vic Act; and
- the second class variations were not claimable variations under section 10A of the Vic Act and were therefore excluded amounts under section 10B of the Vic Act.

The claimant sought judicial review of the adjudication determination.

The key question was whether the contract made arbitration a binding obligation for the parties to enter upon and participate in, and therefore a method for resolving disputes for the purposes of section 10A(3)(d)(ii) of the Vic Act, as set out in *Branlin Pty Ltd v Totaro* [2014] VSC 492 (***Branlin***) (analysed in our Roundup of 2014 cases).

## DECISION

The court upheld the decision of the adjudicator finding that:

- in order to comply with the test set out in *Branlin*, *'a method of resolving disputes'* under section 10A(3)(d)(ii) of the Vic Act need not mandate a process which would result in a final and binding outcome; and
- it is sufficient for the purposes of section 10A(3)(d)(ii) of the Vic Act that the contract provides a method of resolving disputes which, upon election by either party, would result in a final and binding outcome.

Digby J observed that practically all references to arbitration involve an election and steps implementing such election, and it was always possible for the parties to agree on other methods of resolving disputes.

His Honour held that the fact that parties may agree a method other than arbitration did not alter the enforceability of the arbitral process available to the aggrieved party. His Honour also held that what was determinative, in this case, for the purposes of section 10A(3)(d)(ii) of the Vic Act was that a party with a dispute in relation to a second class variation could enforce the resolution of that dispute by a binding process of arbitral determination.

# *Geotech Pty Ltd v Premier Developments Pty Ltd* [2017] VCC 874

**This case confirms the importance of a payment claim identifying the construction work/related goods or services to which it relates if a claimant is to rely on the payment claim in an application for default judgment. In an application for default judgment, the evidence must establish that the procedural requirements have been complied with.**

## FACTS

Geotech Pty Ltd (**claimant**) entered into a contract with Premier Developments Pty Ltd (**respondent**) for construction work at 416 Smith Street, Collingwood (**contract**).

On or about 24 March 2017, the claimant issued a payment claim to the respondent for the amount of $215,457.90 under the contract and pursuant to the Vic Act. The respondent failed to serve a payment schedule within 10 business days of service, as required by section 15 of the Vic Act. Consequently, the claimant sought to recover the full amount of the payment claim by commencing proceedings under section 16 of the Vic Act.

The claimant considered that the respondent failed to file a notice of appearance within the time required and applied for default judgment on that basis. Deputy Registrar Malone ordered that the respondent pay the full amount of the payment claim, interest and costs. The respondent appealed the decision in the Victorian County Court.

## DECISION

The court set aside the default judgment because:

- entry of default judgment was premature as the evidence did not establish that delivery and service of the writ was effected at the respondent's address, service was deemed to be effected by post and accordingly the time for filing a notice of appearance had not expired when default judgment was entered; and
- there was a defence on the merits (discussed below).

The court observed that there were two reasons for the requirement in section 14(2)(c) of the Vic Act that a payment claim must identify the construction work/ related goods or services to which it relates:

- to enable the respondent to consider and respond to the payment claim by either accepting it in its entirety or in part or disputing it; and
- to define the issues in dispute if the matter is adjudicated.

Burchell JR ultimately found that, because the payment claim did not provide any breakdown or explanation for the claim for $215,457.90, there was an arguable defence on the merits that the payment claim insufficiently identified the work to which it related. The claimant's submissions—that the respondent, due to background circumstances, was nonetheless able to understand the payment claim—gave rise to triable issues which were not to be determined at an interlocutory stage.

# *Golets v Southbourne Homes & Anor* [2017] VSC 705

**An example of when the building of a home does not, under security of payment legislation, make a builder 'in the business of building residences' – A building owner is not in the business of building residences for the purposes of the Vic Act when, amongst other things, the building work is not for profit and the primary purpose of the work was to secure a dwelling house for the building owner.**

## FACTS

In 2014 Dr Markian Golets (**respondent**) engaged Southbourne Homes Pty Ltd (**claimant**) to construct two three storey townhouses on a site in Hawthorn for the sum of $1,935,000 under a construction contract. Following significant delays and slow progress on site, the contract was terminated either on 24 April 2017 or 19 May 2017.

In June 2017 the claimant purported to serve a payment claim for $438,870.63 under the Vic Act. The respondent served a payment schedule stating that NIL would be paid for a number of reasons, including that the claim was not a valid payment claim under the Vic Act because the contract was excluded from the application of the Vic Act by section 7(2)(b) of the Vic Act.

The claimant made and adjudication application. The adjudication determination awarded the claimant its claim to the extent of $351,427.

The respondent sought judicial review of the adjudication determination on the basis that the adjudicator committed a jurisdictional error, or alternatively erred in law, in determining that it was 'in the business of building residences'.

## DECISION

The court quashed the adjudication determination.

Vickery J confirmed his earlier decisions that what constitutes being 'in the business of building residences' for the purposes of section 7(2)(b) of the Vic Act is in each case an issue of fact to be determined on a case by case basis.

In concluding that the respondent was not in the business of building residences, his Honour considered the following salient features:

- Dr Golets and his wife were engaged in other professions (as a medical practitioner and pharmacist);
- there was no evidence that the project was intended to make a profit;
- here was no evidence of any building enterprise on a continuous and repetitive basis;
- there was no vehicle established to structure the construction of dwellings which had as its purpose a commercial enterprise to generate profit; and
- the primary purpose for construction was to secure a dwelling house for the Dr Golets and his family.

# *Maxcon Constructions Pty Ltd v Ily Australia Pty Ltd* [2017] VCC 1382 and *Maxcon Constructions Pty Ltd v Ily Australia Pty Ltd* [2017] VCC 1769

**Circumstances in which a court will grant summary judgment under the Vic Act – A special purpose vehicle was found to be in the business of building residences for the purposes of the Vic Act.**

## FACTS

By a design and construct contract Ily Australia Pty Ltd (**respondent**) contracted Maxcon Constructions (**claimant**) for the design and construction of a mixed residential and commercial development located at 381 Punt Road, Cremorne, 3121 (**project**).

By a payment claim under the Vic Act on 28 August 2016 the claimant claimed the sum of $559,002.20 from the respondent. By a final payment certificate the superintendent, on behalf of the respondent, certified payment of the full amount claimed in the payment claim.

The respondent failed to make payment to the claimant.

### Application for summary judgment

The claimant sought summary judgment of the claim pursuant to section 17(2)(a)(i) of the Vic Act (on the basis of a failure to pay in accordance with a payment schedule) or alternatively, section 16(2)(a) of the Vic Act (on the basis of a failure to pay when there was no payment schedule).

The respondent submitted that it had defences which had a real prospect of success to the claims being made, including that:

- the Vic Act did not apply because the respondent was not 'in the business of building residences';
- there was no valid reference date; and
- the payment claim had not been served on the respondent.

## DECISION

In *Maxcon Constructions Pty Ltd v Ily Australia Pty Ltd* [2017] VCC 1382, Burchell JR awarded summary judgment in favour of the claimant on the basis that none of the defences raised by the defendant had a real prospect of success.

In *Maxcon Constructions Pty Ltd v Ily Australia Pty Ltd* [2017] VCC 1769, Anderson J confirmed the orders made by Burchell JR.

### The business of building residences

The respondent was a special purpose vehicle which had not undertaken any works other than the project.

Burchell JR held that whether a building owner is 'in the business of building residences' is determined by examining the circumstances of each activity on a case by case basis and that the key determining factors are the building owner's purpose and its activities.

Burchell JR noted that this was a development on a commercial scale which involved the construction of 70 apartments, 5 town houses, 2 levels of basement residential and commercial parking and a ground floor commercial office with a contract price in excess of $20 million. Accordingly, Burchell JR determined that the respondent was 'in the business of building residences' under the Vic Act and there was no real prospect it could show it was not involved in the business of building residences.

Anderson J agreed that the respondent was in the business of building residences for the purposes of the Vic Act. Relevant factors identified by his Honour included that the contract was for a large mixed residential and commercial development which was primarily for sale to the general public and the contract was for a large sum. Anderson J noted that whilst no single factor is conclusive the nature and scope of the project, its scale and the intended purchasers and the lack of any diverse business pursuits of the respondent were the primary reasons for the conclusion.

### Reference dates under the contract

The claimant relied upon a reference date arising after the conclusion of the defects liability period, 12 months after the issue of a notice of practical completion by the superintendent.

The respondent alleged that no reference date had arisen because the works had never actually achieved practical completion within the meaning of the contract.

Burchell JR relied on *Abergeldie Contractors Pty Ltd v Fairfield City Council* [2017] NSWCA 113 and found that whether practical completion has been achieved is a question of fact to be determined by the superintendent and that courts should accept the superintendent's satisfaction as to practical completion. Therefore a reference date had arisen as contended by the claimant.

Anderson J agreed that the payment claim was made in accordance with the requirements of the Vic Act.

### Service of the payment claim

The claimant served the payment claim on the superintendent rather than on the respondent at the address or facsimile number nominated for service under the contract.

The respondent alleged that as a result it had never been served with the payment claim for the purposes of the Vic Act.

Burchell JR found that service on the superintendent was valid under the contract and under the Vic Act, relying on the decision in *Metacorp Pty Ltd v Andeco Constructions* [2010] VSC 199 (which was analysed in our Roundup of 2010 cases), that when all previous payment claims have been submitted to the superintendent the superintendent has actual or ostensible authority to receive the payment claim.

Anderson J agreed that service of the payment claim on the superintendent was good service of the claim under the Vic Act.

# *May Constructions (Residential) Pty Ltd v GPZ Pty Ltd and 38 Williams Road Pty Ltd* [2017] VCC 54

**Money paid into a designated trust account under section 28B(6) of the Vic Act may be used 'to satisfy the claimant's entitlements' under section 28F(2) of that Act, even when there is no valid review of an adjudication determination under section 28B of that Act.**

## FACTS

38 Williams Road Pty Ltd (**owner**) contracted May Constructions (Residential) Pty Ltd (**contractor**) for the construction of 7 apartments at 38 Williams Road, Prahran. In May 2016, the contractor submitted a payment claim for $128,502.32. The contractor made an adjudication application under the Vic Act, and in June 2016 the adjudicator determined that the owner was liable to pay to the contractor the whole of the payment claim.

The owner's solicitors, GPZ Legal Pty Ltd (**solicitor**), applied for review of the adjudication under section 28B of the Vic Act on the basis that the adjudicated amount included an 'excluded amount' for liquidated damages. As a pre-condition of making the review application, the owner was required to pay the alleged excluded amount of $110,000 into a designated trust account. Amounts were paid into the solicitor's trust account on 24 June 2016.

The adjudication review did not proceed because the owner made a number of procedural errors in the application for review. In the interim, the court entered judgment for the amount of the adjudication pursuant to section 28R of the Vic Act.

The contractor then sought a declaration that the money held in the solicitor's trust account was held on trust for the contractor pursuant to section 28F(2) of the Vic Act and requested that those funds be paid to it.

The owner contended that because a valid adjudication review application had not been made, the funds in the solicitor's trust account were not held on trust under section 28F of the Vic Act. Alternatively, the owner alleged that the statutory trusts ordinarily imposed by section 28F of the Vic Act were never imposed because the adjudicated amount did not include any excluded amounts and it had been mistaken in pursuing a review.

## DECISION

The court held that, as the owner had intended to make a review application and had contended that its review application was valid and that money had been paid into trust for the purpose of the review application, the $110,000 was held on trust for the contractor pursuant to the trust created by section 28F(2) of the Vic Act and should be applied, as contemplated by section 28F(2), to 'satisfy the claimant's entitlements'.

Further, the court found no evidence that the parties had agreed that the liquidated damages had already been paid and confirmed that the liquidated damages were an excluded amount under the Vic Act and that the determination could have been reviewed on its merits if the owner and the solicitor had not made procedural errors in the review application.

Finally, the court noted that the owner and solicitor had variously argued over the course of events that the review application was both valid and invalid or mistaken and that the court will rarely permit a party to assert one position when it suits, and a contrary position when circumstances are perceived to have changed.

# *Melbourne Steel Erectors v M&I Samaras* [2017] VSC 308

**A claimant cannot serve more than one payment claim in respect of each reference date under a construction contract. A respondent who seeks clarification of amounts claimed in a payment claim is not inviting the claimant to withdraw the payment claim and re-submit a further payment claim in respect of the same reference date.**

## FACTS

### Payment claims under the Vic Act

In January 2015, M&I Samaras (**respondent**) and Melbourne Steel Erectors (**claimant**) entered into a contract whereby the respondent engaged the claimant to erect the structural steel for the Chadstone Shopping Centre Retail Development Stage 40, in return for which the respondent agreed to pay the claimant the amount of $3,550,291.00 (plus GST).

On 20 October 2016, the claimant submitted a 'Progress Payment Claim No.21' in the amount of $3,595,362.04 (**first claim**). The respondent sought clarification regarding the first claim by way of a payment schedule and letter from the respondent's legal representation, Ezra Legal.

On 1 December 2016, the claimant submitted a subsequent 'Progress Payment Claim No.21' in the amount of $3,595,362.04 (**second claim**). On 14 December 2016, the respondent provided a payment schedule to the claimant in reply indicating that the second claim was invalid and that the claimant was indebted to the respondent in the amount of $1,552,725.26.

On 23 December 2016, the claimant made an adjudication application under the Vic Act.

### The adjudication determination

In the adjudication, the claimant contended that it withdrew its first claim by consent or with the agreement of the respondent. The respondent submitted that the second claim was invalid by reason of section 14(8) of the Vic Act because the second claim was the second payment claim in respect of the same reference date and was, for that reason, invalid pursuant to section 14(6) of the Vic Act.

The adjudicator was satisfied that the first claim was a valid payment claim under the Vic Act because it sufficiently identified the work such that the respondent could within reason understand the claim and be able to respond to it.

The adjudicator held that the respondent did not make any offer for the claimant to withdraw the first claim and issue a fresh payment claim. The adjudicator found that the claimant's second claim constituted a second final payment claim as it was submitted by the claimant in respect of the same reference date and was therefore invalid pursuant to sections 14(6) and 14(8) of the Vic Act.

The claimant sought judicial review of the adjudication determination on the basis that the finding that the first claim was not withdrawn following an invitation from the respondent to resubmit the payment claim:

- contained errors of law on the face of the record; and
- was contrary to the evidence before the adjudicator.

## DECISION

The court dismissed the claimant's application and held that:

- the adjudicator had not erred in finding that the second claim contravened sections 14(8) and 14(6) of the Vic Act; and
- the adjudicator did not have jurisdiction under the Vic Act to determine any dispute in respect of the payment claim.

Digby J held that:

- the Ezra Legal letter was not an invitation to withdraw the first claim;
- there appeared to be no correspondence or communication from the claimant to the respondent seeking confirmation of what the claimant contended was an offer conveyed by the Ezra Legal letter; and
- at no time did the claimant communicate that it was withdrawing or abandoning the first claim. Accordingly, the first claim was not withdrawn.

His Honour further held that it was open for the adjudicator to determine that the first claim was a valid payment claim within the meaning of the Vic Act. Accordingly, at the date of issue of the second claim, the first claim remained on foot because it had not been withdrawn, and, therefore, the second claim was invalid under sections 14(8) and 14(6) of the Vic Act.

# *Minesco Pty Ltd v Anderson Sunvast Hong Kong Ltd* [2017] VSC 299

**The decision provides guidance on 'special circumstances' for an extension of time to apply for judicial review and the obligation for an adjudicator under the Vic Act to be seen to provide natural justice.**

## FACTS

Anderson Sunvast Hong Kong Ltd (**claimant**) agreed to design, fabricate and supply curtain wall units to Minesco Pty Ltd (**respondent**) for installation on the Monash Children's Hospital in Clayton, Victoria.

In August 2016 the respondent issued a 'nil' payment schedule in response to the claimant's final payment claim, prompting the claimant to submit an adjudication application under the Vic Act. The respondent provided an adjudication response containing two reasons for withholding payment not in the payment schedule.

In September 2016 the claimant, at the adjudicator's request, provided further submissions on the additional reasons which included three unsolicited submissions which were not a response to the adjudicator's request (**unsolicited submissions**). The respondent wrote to the adjudicator requesting that the adjudicator disregard the unsolicited submissions and received no response. On 16 September 2016 the adjudicator made a determination for the claimant to pay the respondent $231,608.05.

- On 20 December 2016 the claimant obtained judgment against the respondent for the amount. On 24 January 2016 the respondent commenced proceedings for judicial review of the determination.

## DECISION

The court granted the respondent an extension of time to apply for judicial review, and quashed the determination on the grounds that the adjudicator had breached his obligation to provide natural justice.

### Extension of time to bring application for judicial review

Vickery J found that while the respondent was late in applying for judicial review under the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), 'special circumstances' under rule 56.02 applied. His Honour granted an extension of time in light of:

- the delay only lasting two months and spanning the Christmas and New Year holiday period;
- the respondent's unreciprocated attempts to resolve this dispute without litigation;
- the respondent promptly issuing proceedings once the claimant obtained judgment to enforce the determination;
- the claimant not suffering any specific prejudice as a result of the extension of time; and
- the respondent having an arguable case for judicial review.

### Denial of natural justice

While Vickery J was not satisfied that the adjudicator had actually considered the unsolicited submissions and therefore denied the respondent natural justice, his Honour held that by failing to advise the respondent:

- that he was disregarding the unsolicited submissions; or
- that he was considering the unsolicited submissions and that the respondent should provide further submissions,

the adjudicator had created the appearance that natural justice was not being afforded to the respondent. His Honour determined that the above constituted a breach of a rule of natural justice and accordingly quashed the adjudication determination.

# *Promax Building Developments Pty Ltd v PCarol & Co Pty Ltd* [2017] VCC 495

**Anderson J's decision provides guidance on the application of Vickery J's decision in *Director of Housing of State of Victoria v Structx Pty Ltd (t/as Bizibuilders) & Anor* [2011] VSC 410 (which was analysed in our Roundup of 2011 cases) that a building owner is *'in the business of building residences'* for the purposes of section 7(2)(b) of the Vic Act when it constructs residences *'for the purpose of profit on a continuous and repetitive basis'*.**

## FACTS

PCarol & Co Pty Ltd (**respondent**) was the trustee of the PCarol & Co Trust (**trust**). Between 2009 and 2011 the respondent undertook building work for three units at Reservoir, which units were sold between 2011 and 2012 for a total of $1,146,000. The respondent purchased property in Bellfield (**site**) in 2013, which it rented out between 2013 and 2015.

In January 2016 the respondent and Promax Building Developments Pty Ltd (**claimant**) entered into a domestic building contract for the construction of 12 apartments at the site for the contract sum of $3,010,260 (**contract**). The contract was subject to the respondent obtaining financier's approval.

On 20 March 2017 the claimant terminated the contract because financier's approval had not been obtained. On 31 March 2017 the claimant issued a payment claim for $115,875.42 under the Vic Act to the respondent (**payment claim**). The respondent did not serve a payment schedule in reply.

The claimant commenced proceedings under the Vic Act to seek judgment for the payment claim.

## DECISION

The court held that the respondent was, for the purpose of section 7(2)(b) of the Vic Act, in the business of building residences.

Anderson J found that whether a 'building owner is in the business of building residences' did not depend on the scale of the business, the success of the business, the number of projects undertaken either in the past or at any one time, or as contemplated for the future. Instead his Honour focused on the purpose of the trust and its activities. Accordingly, because his Honour identified that the purpose of the trust was to make investments in the property market and its sole activity had been the purchase and development of two properties, the respondent was held to be 'in the business of building residences'.

The respondent had also raised defences under section 14 of the Vic Act, that the payment claim did not adequately identify the construction work to which it related, and section 10A of the Vic Act, that the amounts claimed included excluded amounts. Anderson J dismissed these contentions.

# *Teleios Group Pty Ltd v Wright Children Pty Ltd* [2017] VCC 449

**Guidance from the courts on what must be included in a valid payment schedule. A response to a payment claim will be a valid payment schedule if it meets the requirements of section 15 of the Vic Act irrespective of its form and whether the respondent intended it to be a payment schedule under the Act.**

## FACTS

Teleios Group Pty Ltd (**claimant**) was engaged to carry out refurbishment of a warehouse at 12 Nellbern Road, Moorabbin, Victoria for Wright Children Pty Ltd (**respondent**).

On 25 December 2016, the claimant served a progress payment claim called 'Progress claim No 5' on the respondent claiming the sum of $93,896.21. On 11 January 2017, within the time required under the Act, the respondent sent an email to the claimant responding to the payment claim. The email of 11 January 2017 did not state that it was a payment schedule under the Act and instead:

- alleged that the payment claim was not accompanied by the *'necessary documentation required to verify the value of some of the items'*;
- noted that the respondent had exercised its rights under the defect and termination for default provisions of the contract and that the costs incurred by the respondent in completing the works and rectifying any defects (plus any liquidated damages) would be set off against amounts owed by the respondent to the claimant; and
- confirmed that once the claimant had provided the relevant information and the respondent had determined the set-off amount, the respondent would be in a position to issue the relevant payment schedule.

### Issues considered

The claimant sought summary judgement under section 16(2)(a)(i) of the Vic Act in the amount of $93,896.21 on the grounds that the respondent had failed to provide a payment schedule. The claimant contended that the email was not a payment schedule under section 15 of the Vic Act as it did not:

- specify the amount that the respondent proposed to pay in response to the payment claim;
- indicate the respondent's reasons for withholding payment; and
- purport to operate as a payment schedule.

## DECISION

The court held that the email constituted a payment schedule under section 15 of the Vic Act and therefore dismissed the claimant's application for summary judgment.

In determining whether the payment schedule specified the amount that the respondent proposed to pay in response to the payment claim, Lewitan J followed the reasoning of the Court of Appeal in *Façade Treatment Engineering Pty Ltd (In Liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 (which was analysed in our Roundup of 2016 cases) where it was held that the use of the word 'indicate' in the Act 'suggests that some lack of precision is permissible so long as the essence of what the [respondent] is intending to do is sufficiently communicated'. On this basis, her Honour considered that it was evident from the email that the respondent did not intend to pay the claimant anything in relation to the payment claim.

Lewitan J also referred to the reasoning of the New South Wales Supreme Court in *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140, in noting that payment claims and payment schedules are required to be produced quickly and often refer to matters in shorthand that can be readily understood by the parties. As such, the references to known defects, the termination for default provisions and liquidated damages under the contractual set off clause were sufficient reasons to enable the claimant to understand the nature of the case it would have to meet in any adjudication.

Ultimately, it was irrelevant that the email stated that a payment schedule would be issued in due course as the email none-the-less satisfied all of the requirements to be a payment schedule under the Act.

# *Westbourne Grammar School v Gemcan Constructions Pty Ltd* [2017] VSC 645

**Does a reference date arise where there is no right to payment under a construction contract? Section 48 of the Vic Act is not enlivened where the right to payment is validly suspended under a construction contract. This decision confirms that the Vic Act does not grant claimants an independent right to payment. The right to make a payment claim under the Vic Act is premised on the existence of a reference date under the contract.**

## FACTS

Westbourne Grammar School (**respondent**) engaged Gemcan Constructions Pty Ltd (**claimant**) to carry out alterations at the respondent's Williamstown campus (**contract**). Clause 39 of the contract entitled the respondent to give the claimant a show cause notice where the claimant had committed a substantial breach of the contract. Clause 39 also entitled the respondent to take over the balance of the works and to suspend the claimant's entitlement to payment under the contract where the claimant failed to show reasonable cause by the date and time stated in the show cause notice.

The respondent issued a show cause notice to the claimant. Following its issue, the respondent purported to take the works out of the claimant's hands. In response, the claimant contended that the show cause notice was not validly served. Subsequently, the respondent issued two further show cause notices (**second show cause notice** and **third show cause notice** respectively). However, the claimant contended that the second show cause notice did not include the information required under the contract and the third show cause notice could not cure the defects in either the initial show cause notice or the second show cause notice.

After the three show cause notices had been issued, the claimant issued a payment claim for $430,229.69. The respondent rejected the payment claim on the grounds that there was no reference date as the obligation to make payment under the contract had been suspended. In the adjudication determination, the adjudicator determined that:

- clause 39 of the contract was void pursuant to section 48 of the Vic Act;
- all three show cause notices issued to the claimant were invalid and the respondent was not entitled to suspend payment under clause 39 of the contract; and
- the respondent should pay the claimant $241,973.33.

The respondent sought judicial review of the adjudication determination.

## DECISION

The court quashed the decision of the adjudicator. Robson J held that the adjudicator had erred in finding that:

- section 48 of the Vic Act was enlivened; and
- the third show cause notice was invalid.

Robson J applied the reasoning of the High Court in *Southern Han Breakfast Point Pty Ltd (in liquidation) v Lewence Constructions Pty Ltd* [2016] HCA 52 (analysed in our Roundup of 2016 cases) in holding that the right to make a payment claim under the Vic Act is premised on a contractual right to make that claim. If, under the terms of the contract, there is no right to make a payment claim as the right to payment or a reference date has been suspended, then there is no contractual right of payment which the claimant can enforce under the Vic Act.

In respect of the show cause notices, Robson J upheld the adjudicator's finding that the second show cause notice was invalid. However, his Honour held that the third show cause notice validated the respondent's decision to take the works remaining out of the claimant's hands and enlivened the respondent's right to suspend payment, under clause 39 of the contract.

# Western Australia

◄ CONTENTS ►

## CASE INDEX

- *Bocol Constructions Pty Ltd and Keslake Group Pty Ltd* [2017] WASAT 15
- *Certa Civil Works Pty Ltd V Ghosh* [2017] WASC 327
- *John Holland Pty Ltd v Chidambara* [2017[ WASC 179
- *Total Eden Pty Ltd v ECA Systems Pty Ltd* [2017] WASC 58

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

# Western Australia overview

## EMERGING TRENDS

The decisions of the Western Australian courts and tribunals in 2017 have again emphasised the objectives of the WA Act, in particular the focus on fair, inexpensive and quick resolution of disputes.

## DEVELOPMENTS

The significant amendments to the WA Act at the end of 2016 do not appear to have had an impact on the number of security of payment cases being heard in Western Australia.

Whilst the amendments to the WA Act are largely procedural and targeted at providing more time and flexibility for adjudications, we are still waiting to see how courts and tribunals will interpret the more substantial amendments, such as the ability to 'recycle' claims by re-issuing disputed invoices with the applicant having a fresh 90 day timeframe in which to submit an adjudication application.

Two significant decisions in Western Australia in 2017 included:

- the State Administrative Tribunal in *Bocol Constructions Pty Ltd v Keslake Group Pty Ltd* [2017] WASAT 15, in which the tribunal found that only contractual rights can give rise to claims under the WA Act. The Tribunal distinguished contractual rights from common law claims for damages that are referable to a contract and confirmed the decision of the adjudicator to dismiss the application seeking damages at common law on the basis that it was not a valid payment claim under the WA Act; and
- the Supreme Court of Western Australia in *John Holland Pty Ltd v Chidambara* [2017] WASC 179, in which the Supreme Court found that an adjudicator failed to afford procedural fairness where making findings that were not contended for by either party. The Supreme Court also found that making determinations on the basis of a contract that is not in issue constituted jurisdictional error.

In February 2018, shortly after the decision in *John Holland Pty Ltd v Chidambara* [2017] WASC 179, the High Court of Australia delivered its decision in the case of *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd & Anor* [2018] HCA 4. The High Court held that because the NSW Act creates an interim entitlement that is informal and quick, the NSW Act should be read as intending to oust the jurisdiction of the NSW Supreme Court to quash adjudication determinations for non-jurisdictional errors of law. The *John Holland* decision can be distinguished from *Probuild* in that in that the errors were found to be jurisdictional errors of law and therefore the court had the power to overturn the determination.

## FUTURE

In the 2016 overview of our Roundup of 2016 cases we outlined proposed changes to the WA Act by the *Construction Contracts Amendment Bill 2016* (Cth) which was prepared in response to Professor Evans' *Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*.

With the majority of the reforms to the WA Act having only taken effect on 15 December 2016, we will continue to see courts and tribunals in Western Australia testing the amendments and developing security of payment case law.

# *Bocol Constructions Pty Ltd and Keslake Group Pty Ltd* [2017] WASAT 15

**The Western Australian State Administrative Tribunal has confirmed that only contractual rights can give rise to claims under the Act and distinguished this from common law claims for damages that are merely referable to a contract.**

## FACTS

Bocol Constructions Pty Ltd (**claimant**) entered into a contract with Keslake Group Pty Ltd (**respondent**) pursuant to which the respondent agreed to perform road surfacing work (**Contract**). The claimant applied for an adjudication of a payment dispute which was dismissed by the adjudicator without considering its merits. The claimant then applied to the tribunal for review of the decision.

The claimant made a payment claim alleging breach of an implied term of the Contract, namely that the respondent carry out work with proper care and skill. An application regarding the disputed claim was filed and named the respondent as *'the Trustee for the Complete Road Services Trust'* instead of the more accurate *'Keslake Group Pty Ltd as Trustee for the Complete Road Services Trust'*.

In dismissing the application, the adjudicator found that the claimant had not:

- prepared and served the application in accordance with the WA Act, due to the naming issue; and
- made a valid payment claim, as the claim sought damages at common law and, therefore, did not relate to the respondent's obligations under the Contract.

The claimant submitted the respondent's correct name could be found in the application as a whole and to dismiss its claim on this basis would defeat the purpose of the WA Act to resolve disputes fairly, informally and quickly.

The respondent contended that strict compliance with regulation 5 of the WA Regulations was required which meant that precise legal names must be used. It further argued that if such names were not used, subsequent judgements could not be enforced.

In relation to the alleged payment claim, the claimant submitted it was made *'under a construction contract'* as required by sections 3 and 6 of the WA Act and should therefore be adjudicated as a *'payment dispute'* under the WA Act. It sought a broad construction of the WA Act's wording.

The respondent contended the claim was not made under the Contract. Accordingly, it did not give rise to a *'payment dispute'* as defined in section 6 of the WA Act and could not be adjudicated.

## DECISION

The court held the adjudicator erred in law and fact by finding the claimant's application had not been prepared and served in accordance with section 26 of the WA Act. Her Honour noted the respondent was accurately described by the application and found that:

- regulation 5 was inexact and complying with it as the respondent contended would fail to promote the purpose of the WA Act and Regulations; and
- the way in which the respondent was named did not prevent enforcement proceedings from being brought.

In relation to the payment claim, Le Miere M found that, in substance, the claimant sought two terms be implied into the Contract: one requiring proper care and skill be exercised and another entitling the claimant to make a claim for damages if the first term was breached. Le Miere M declined to imply the latter term as it was not so obvious to go without saying and unnecessary to give business efficacy to the Contact.

A broad approach to interpreting the meaning of *'under a construction contract'* was rejected by the tribunal. Referring to previous judgements on the issue, Le Miere M held that for a *'payment claim'* to arise there must be a specific term in the Contract providing the right to make that claim. It cannot merely be referable to the Contract.

Le Miere M concluded that the claimant's right to claim damages arose under the common law and not under the Contract. The claimant's claim was not a *'payment claim'* as defined, and it did not give rise to a *'payment dispute'* capable of adjudication, under the WA Act. The tribunal concluded the decision of the adjudicator dismissing the application was correct.

# *Certa Civil Works Pty Ltd V Ghosh* [2017] WASC 327

**The Supreme Court of Western Australia has clarified that the WA Act will extend to contracts for professional services when those services are related to construction works and cautions against parties pursuing judicial review of adjudication determinations where they have chosen not to participate in the adjudication process.**

## FACTS

Mr Glynn Logue (the other party in these proceedings) (**claimant**) brought four applications against Certa Civil Works Pty Ltd (**respondent**) under the WA Act (**adjudication applications**). The adjudication applications claimed payment of four tax invoices issued by the claimant for professional services. The total amount of the four tax invoices was $42,845.43, which remained unpaid by the respondent at the time of the adjudication applications.

Mr Dulal Ghosh was appointed as the adjudicator on each of the adjudication applications. The respondent did not submit a response to the adjudication applications, or challenge the adjudicator's jurisdiction within the time required under the WA Act. The adjudicator determined the adjudication applications in the absence of the respondent's response. The adjudicator found in favour of the claimant on each of the adjudication applications and his determinations required the respondent to pay the claimant the amount claimed under the four invoices, plus costs (**determinations**).

The respondent sought judicial review of the determinations on the basis that the adjudicator acted outside the scope of his jurisdiction under the WA Act because:

- the claim was not made under a construction contract;
- the construction work had ended, and as such the contract with the claimant for professional services was not a construction contract; and
- the adjudicator failed to give adequate reasons for the determinations.

The respondent's application for judicial review sought to quash each of the adjudicator's determinations.

## DECISION

The court found that due to the respondent's non participation in the adjudication applications, the adjudicator could only determine the adjudication applications on the basis of the evidence given by the claimant. Martin J was satisfied that for the purpose of the WA Act, a construction contract includes contracts for professional services related to construction works and that the adjudicator had not been presented with any evidence to suggest that the claimant's invoices were for services unrelated to the construction works captured by the WA Act. Martin J did not accept that the contract for the claimant's professional services could not be regarded as a 'construction contract' under the WA Act simply because the physical construction works had been fully performed. Martin J's interpretation of section 5(2) of the WA Act was that the test of whether professional services were related to a construction contract was not simply a temporal question, but a question of the direct relationship of the professional services to the construction works.

The court held that the questions of whether the claim was made under a 'construction contract', or whether the claimant's professional services could be related to the respondent's construction works were factual disputes and did not raise any jurisdictional ground of error for consideration in a judicial review application. The court found against the respondent on all three grounds of review and dismissed the respondent's application.

The court noted that given the small amount claimed by the claimant and that the respondent chose not to participate at all in the adjudication applications, it would have been more appropriate for the respondent to pursue a full merits review in the Magistrates Court. On this basis, Martin J concluded that even if there had been merits in the respondent's application, his Honour would likely have declined relief as a matter of discretion.

# *John Holland Pty Ltd v Chidambara* [2017[ WASC 179

**The Supreme Court of Western Australia has found an adjudicator failed to afford procedural fairness where making findings that were not contended for by either party. The court also confirmed that making determinations on the basis of a contract that is not in issue constitutes jurisdictional error.**

## FACTS

John Holland Pty Ltd (**claimant**), applied for judicial review of an adjudication made under the WA Act requiring it to pay $6.1m (**determination**) to Schneider Electric Buildings (Australia) Pty Ltd (**respondent**). The determination considered a payment claim brought by the respondent against the claimant for work the respondent had conducted on the Perth Children's Hospital.

The respondent sought payment for various 'Milestone Works' which it claimed were at least 80% complete, being the threshold at which entitlement to payment arose under the subcontract between the parties (**Subcontract**). The respondent also argued that extension of time claims should be assessed after completion of delayed works as it would be inappropriate to deduct liquidated damages **(LDs**) in this regard any sooner.

The claimant contended the Milestone Works were less than 80% complete and argued there were no conditions to payment of LDs under the Subcontract. It claimed it could set off LDs regarding the delayed works at any time.

The most notable aspect of the adjudicator's conclusion that the respondent was entitled to payment was the reasoning which led to it. The adjudicator found:

- the parties had, by conduct, abandoned the stage dates for completion and, accordingly, the claim for LDs must be dismissed; and
- the Milestone Works threshold payment provision under the Subcontract constituted a 'disagreement' and, therefore, section 15 of the WA Act should be implied into the Subcontract which would enable claims for the Milestone Works at any stage of their completion.

The claimant sought judicial review in the Supreme Court of Western Australia asserting the determination made findings for which neither party contended, were not open to be made and upon which the claimant was denied a proper opportunity to be heard.

The respondent argued it had contended for the adjudicator's findings and that even if the determination was quashed, it wasn't obliged to return the claimant's payment as the determination was in substance a summary judgement which cannot be dismissed unless there is no real question to be tried.

## DECISION

In his decision, Chaney J warned against engaging in a 'line by line' scrutiny of determinations subject to judicial review and endeavoured to adopt a 'beneficial construction'. Nevertheless, his Honour ultimately found in favour of the claimant and quashed the determination due to the adjudicator's failure to afford procedural fairness.

Chaney J held that the adjudicator's findings:

- that LDs were unavailable due to the parties' abandonment; and
- that the Milestone Works threshold payment provision under the Subcontract was a 'disagreement';
- were not based on the respondent's contentions. As a result, the claimant was not given a proper opportunity to be heard.

Chaney J also held the adjudicator failed to adhere to section 25 of the WA Act by determining the issue of LDs on the basis of a contract other than the one in question. This was found to constitute a jurisdictional error.

The respondent's claim against repaying the money it received from the claimant was also dismissed. His Honour found money paid pursuant to a determination which is subsequently quashed does not finally determine the question of entitlement to it. The situation is not analogous to receiving summary judgement as the right to litigate the issue is preserved.

Chaney J ordered the determination be quashed and the money, paid by the claimant pursuant to it, be repaid.

# *Total Eden Pty Ltd v ECA Systems Pty Ltd* [2017] WASC 58

**The Supreme Court of Western Australia has remitted District Court proceedings to the Supreme Court and suspended the enforcement of a District Court judgment. While this matter involved no new statement of legal principle, it provides a useful example of how the court exercises its discretion when balancing the interests of a party which wants to enforce an adjudication determination against those of a party seeking judicial review of it.**

## FACTS

The plaintiff, Total Eden Pty Ltd (**claimant**), and the defendant, ECA Systems Pty Ltd (**respondent**), entered into a construction contract. On 1 November 2016, an adjudicator issued a determination under the WA Act in favour of the claimant. The respondent applied to the Supreme Court seeking judicial review of that determination (**judicial review application**).

In the meantime, the claimant applied to the District Court seeking to enforce the determination. The District Court proceeded to record the determination as a judgment of the District Court.

The respondent applied to the Supreme Court seeking orders that:

- the District Court proceedings be remitted to the Supreme Court to be heard together with the judicial review application; and
- pending determination of the judicial review application, the enforcement of the District Court judgment be suspended.

## DECISION

Pritchard J granted the respondent's application and made the orders sought.

### Whether the proceedings in the District Court should be remitted to the Supreme Court

The Supreme Court has a wide discretion, unfettered by any express prescription for its exercise. Her Honour considered it was appropriate to remit the District Court proceedings because the judicial review application would decide the validity of the adjudication determination and was therefore inextricably linked to the District Court judgment.

### Whether the suspension application should be granted

Ordinarily, a successful litigant at first instance is entitled to enforce the judgment. However, if special circumstances exist, enforcement may be stayed. The central issue is whether, without the grant of a stay, the right of appeal will be rendered nugatory. The appeal must also have reasonable prospects of success. Even if those conditions are met, the balance of convenience must favour the grant of a stay. These conditions are interrelated.

Her Honour considered that special circumstances existed. First, the respondent had wrongly been denied the opportunity to oppose the application for enforcement in the District Court. Secondly, if the stay was not granted, the judicial review application would effectively be rendered nugatory because the amount of the determination would already have been paid to the claimant and the respondent would have to try to recover that sum, if that were possible.

Her Honour noted, without prejudging the matter, there were reasonable prospects of success in the judicial review application.

The balance of convenience also favoured a stay. The respondent had significant assets. However, the claimant was not financially robust. If the respondent paid the determination sum to the claimant, it might not be recovered. While it was specifically acknowledged that the mere risk of no refund was not of itself enough to justify a stay, this was clearly a relevant consideration.

# Australian Capital Territory

◄ CONTENTS ►

## CASE INDEX

- *St Hilliers Property Pty Limited v ACT Projects Pty Ltd and Simon Wilson* [2017] ACTSC 177

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

# *St Hilliers Property Pty Limited v ACT Projects Pty Ltd and Simon Wilson* [2017] ACTSC 177

**This case emphasises the importance of submitting payment claims on time and the importance of having regard to reference dates.**

**This case also illustrates the difference in approach to allowing appeals of adjudicators' decisions. In NSW, appeals of adjudicators' decisions are precluded except for jurisdictional error, while the ACT expressly allows appeals based on errors of law. Accordingly the early 2018 High Court decisions which in respect of NSW adjudications limited the right of challenge to errors of law going to jurisdiction, do not apply to adjudications in the ACT.**

## FACTS

In July 2014, a subcontractor, ACT Projects Pty Ltd (**claimant**), contracted to perform structural works for St Hilliers (**respondent**). Work on the project was completed before 29 April 2015, and between 20 May 2015 and 20 April 2016, the claimant served twelve separate (but almost identical) payment claims on the respondent in relation to the same completed works.

Each time one of these payment claims was served, the respondent responded by issuing a payment schedule, in which it assessed the amount it owed as nil. On the first twelve occasions, the claimant did not pursue its payment claim further and did not seek adjudication. The claimant made a thirteenth payment claim which it served on 20 May 2016 (relating to work done before 29 April 2015). The respondent again served a payment schedule, assessing the amount payable by it as nil.

On 20 June 2016, the claimant lodged an adjudication application and the adjudicator determined that the respondent owed the claimant $222,260.53.

The respondent sought both judicial review of the determination under the *Administrative Decisions (Judicial review) Act 1989* (ACT) (**ADJR** Act) and also appealed from the determination on the basis of error of law. The ACT Act expressly allows for an appeal of an adjudicator's decision on a question of law. Both the matters were heard together, with the evidence in one being treated as evidence in the other.

On its application for review, the respondent sought to attack the determination on three separate grounds:

### The ADJR Application

- **Payment Claim**: Section 15(4) of the ACT Act provides that a payment claim may be given on the later of the end of the period worked out under the construction contract (section 15(4)(a) of the ACT Act) and the end of the period of 12 months after the construction work to which the payment claim relates was last carried out or the related goods and services to which the payment claim relates were last supplied (section 15(4)(b) of the ACT Act). The last construction work on the site occurred on or before 29 April 2015..

  The respondent submitted that the claimant was out of time with its payment claim because it could no longer rely on section 15(4)(b) of the ACT Act and any period which could be worked out under the contract had long passed, so section 15(4)(a) of the ACT Act did not apply either.

  In contrast, the claimant relied on section 15(4)(a) of the ACT Act asserting that clause 16.9 of the contract permitted the payment claim to be served when it was.

- **Reference Date**: The respondent submitted that when the payment claim was served, it was not lodged on a reference date, so the payment claim was invalid. In *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd & Ors* [2016] HCA 52 (analysed in our Roundup of 2016 cases), the High Court held that the existence of a reference date is a pre-condition for the making of a valid payment claim under the NSW Act.

  Clause 16.3(a) of the contract said:

  > *'Payment claims must include details of the value of the Subcontractor's Activities carried out by the Subcontractor on site and off site* ***to that time*** [*emphasis added*]'.

  The respondent argued that 'to that time' meant the reference date. Clause 16 of the contract gave the claimant one payment claim per month, being the 20th of each month. The respondent also submitted that this clause 16 established a regime where, once a reference date had been used, no further reference dates could accrue unless new work has been performed and that a new reference date could only accrue in a month when no construction work had been done if a valid payment claim had not been submitted in the previous month but where work had been done in that previous month.

  In contrast, the claimant submitted the words 'to that time' in clause 16.3(a) of the contract meant the time at which the payment claim is submitted and therefore the claimant was 'entitled' to submit a payment claim on a monthly basis so long as the specific requirements under clause 16.1 of the contract had been complied with.

- **Incorrect delegation**: The respondent argued that the adjudicator lacked jurisdiction as he impermissibly delegated his function. Instead of the adjudicator doing the assignment himself, as contemplated the ACT Act, the adjudicator asked another adjudicator, Mr Turner to prepare a draft adjudication. The adjudicator then took into account Mr Turner's views and incorporated such views in his own adjudication and put forward the adjudication as his own. The solicitor for the adjudicator submitted his client had engaged intellectually in all the material he had been required to engage in. The solicitor further submitted nothing in the ACT Act prevents an adjudicator from having assistance from someone who prepares a draft adjudication.

### The Appeal

The respondent contended that two errors of law has been made. The first was an issue of waiver. The second, which is dealt with above, concerned whether the payment claim had been served on a reference date.

Claims for variations were required to be made within a time limit imposed by clause 16.9 of the contract (**clause 16.9 time bar**). It was the respondent's case that the claimant made claims for variations, but in respect of some of them did not comply with the clause 16.9 time bar, so was barred from including the claims in its payment claim. When the respondent relied on the clause 16.9 time bar in its submissions to the adjudicator, the adjudicator received submissions on the point from the claimant which, by reason of an error law, the adjudicator accepted. The adjudicator agreed with the claimant's submission that by proceeding to consider some of the claimant's claims, despite the clause 16.9 time bar, the respondent had waived its entitlement to rely on the time bar provisions. The respondent submitted that when the adjudicator found there had been a waiver by it of its right to have payment claims served on time, the adjudicator did not identify the proper legal test for waiver, or make any relevant findings of fact which could go to the conclusion of there having been any such species of estoppel. The respondent further submitted that there had been no finding of any reliance by the claimant, and that such a finding was a necessary ingredient of estoppel in all of its forms. That, it was submitted, amounted to an error of law.

## DECISION

### The ADJR application

The adjudicator's determination was declared void and set aside.

- **Payment Claim**: The court considered that the adjudicator erred in finding in clause 16.9 of the contract a period within which the claimant could serve its payment claim.
- **Reference Date**: The court accepted the respondent's submission that the words 'to that time' in clause 16.3(a) of the contract must mean to the date immediately before the lodgement of the payment claim. As no work was done in the month before 20 May 2016, the payment claim was not served on a reference date, and was invalid..
- **Incorrect delegation**: The court, although accepting that the adjudicator was entitled to have assistance, what had occurred was far more than the benign description of 'assistance' and that the parties were entitled to have their dispute decided by a person who has agreed to decide it – which did not occur. The court was not satisfied on the balance of probabilities that the adjudicator actively engaged in the decision-making process of all aspects of the adjudication he was required to undertake. The adjudicator took into account documentation prepared by his colleague without active engagement. This is a failure to comply with section 24(2) of the ACT Act.

### The appeal

The respondent's appeal from the determination was allowed on the ground that there was an error of law.

- **Waiver**: The court found that the adjudicator made an error of law in finding that the payment claim was served on a reference date. The court also found that the adjudicator misstated the law. Using waiver in the sense of being a form of estoppel is incorrect. For waiver to apply, there must be some alteration of position, or detrimental reliance, induced or brought about by the representee's prior conduct. The adjudicator made no specific finding of reliance, or of any causal connection between any reliance on conduct of the respondent, and any such detriment. The court further noted that the adjudicator incorrectly proceeded on the erroneous view that a prior failure to insist on rights amounts to a waiver of those rights, and that the onus should be placed on the claimant to show that a waiver applied (not on the respondent to show that it did not apply).
- **Reference Date** The court was satisfied, for the reasons set out above, that in finding that the payment claim was served on a reference date, the adjudicator made an error of law.

# South Australia

◄ CONTENTS ►

## CASE INDEX

- *Aalborg CSP A/S v Ottoway Engineering Pty Ltd* [2017] SASCFC 158
- *Fabtech Aust P/L v Exact Contracting P/L* [2017] SADC 44
- *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5
- *Maxcon Constructions Pty Ltd v Vadasz (No 2)* [2017] SASCFC 2

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

2017 saw further judicial consideration of the SA Act in the Full Court of South Australia, in one instance, leading to an appeal in the High Court of Australia. In February 2018, the High Court confirmed that review of adjudication determinations made pursuant to security of payment legislation in South Australia and New South Wales is not available in respect of non-jurisdictional error. Additionally, the High Court's view of what will amount to a 'pay when paid' provision in under the SA Act is likely to lead to greater scrutiny and debate on this topic..

## DEVELOPMENTS

On 12 May 2017, the High Court granted Maxcon Constructions Pty Ltd (**Maxcon**) special leave to appeal the Full Court of the Supreme Court of South Australia's decision in *Maxcon Constructions Pty Ltd v Vadasz (No 2)* [2017] SASCFC 2 (*Maxcon Constructions Pty Ltd v Vadasz & Ors* [2017] HCATrans 112) (***Maxcon* appeal**). The Full Court had found that the SA Act did not permit judicial review on a basis other than for jurisdictional error. The Full Court however would not have reached that conclusion save for considering it was bound by the New South Wales Court of Appeal decision in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379 (***Probuild***) (which was analysed in our Roundup of 2016 cases). Blue J also held that if the adjudicator had made a jurisdictional error, the determination could be severed such that Maxcon would only be liable for the amount not infected by the jurisdictional error.

The *Maxcon* appeal was heard alongside the appeal of the New South Wales Court of Appeal decision in *Probuild*, which case concerned very similar issues and formed the basis of the primary decision in *Maxcon* (*Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5). The High Court confirmed, in respect of the NSW and SA Act, that judicial review of an adjudicator's determination is not available for non-jurisdictional errors of law. The High Court also took a broad view of what will constitute a 'pay when paid' provision pursuant to section 12 of the SA Act. The High Court determined that the adjudicator had not made an error of law in finding that a provisions which made the release of retention monies under the subcontract contingent on an event occurring under a head contract was a void 'pay when paid' provision.

The Full Court of the Supreme Court has expanded the grounds on which an application for summary judgment, in reliance on an entitlement under the SA Act, may be defended (*Aalborg CSP A/S v Ottoway Engineering Pty Ltd* [2017] SASCFC 158). In line with New South Wales and Queensland Courts of Appeal authorities, the Full Court of the Supreme Court confirmed that in proceedings to recover as a debt an unpaid portion of a claimed amount, the SA Act's exclusion of certain defences 'in relation to matters arising under the construction contract' does not preclude a respondent from raising a defence of misleading conduct or estoppel.

The District Court also had the opportunity to confirm that whilst the courts will not take an overly technical approach in determining whether a response constitute a payment schedule under the SA Act, where a response does not satisfy the basic requirement of section 14 and does not give adequate notice of the respondent's position, it will not constitute a payment schedule within the meaning of the SA Act (*Fabtech Aust P/L v Exact Contracting P/L* [2017] SADC 44).

Following nearly three years of reviews and consultation with industry, the *Building Construction Industry Security of Payment (Review) Amendment Bill 2017* (SA) (**Bill**) was tabled. Key changes include penalty provisions for entities that engage in assault or other threatening behaviour to apply pressure on contractors to not seek payment under the SA Act, increased functions and transparency of the Small Business Commissioner, and stricter requirements for authorised nominating authorities. The Bill is still moving through Parliament, having been received by the Legislative Council on 31 October 2017, and read a second time on 1 November 2017.

## FUTURE

Whilst the High Court's decision in Maxcon brings clarity in respect of the reviewability of adjudications determinations under the SA Act, it is anticipated that the findings in respect of the scope of the 'pay when paid' exclusion in section 12 of the SA Act will generate disputes in respect of existing contracts and require parties to carefully consider retention and payment provisions going forward.

South Australia can also expect the Bill to be passed in the near future, leading to tighter regulation of authorised nominating authorities, and increased administration-related activity from the Small Business Commissioner.

## *Aalborg CSP A/S v Ottoway Engineering Pty Ltd* [2017] SASCFC 158

**The Supreme Court expands the grounds of defence relating to an application for summary judgment under the SA Act. The Full Court of the Supreme Court has found that in proceedings to recover as a debt an unpaid portion of a claimed amount, the SA Act does not preclude reliance on estoppel or misleading conduct in respect of the question of valid service. This decision brings South Australia into line with NSW and Qld Courts of Appeal authorities with respect to the availability of a defence of misleading conduct under the NSW and Qld Acts. The Full Court concluded that defences of misleading conduct and estoppel are not of a type that can be categorised as being 'in relation to matters arising under the construction contract'. The decision expands the grounds on which an application for summary judgment, in reliance on an entitlement under the SA Act, may be defended.**

### FACTS

In March 2015, Aalborg (**respondent**) and Ottoway (**claimant**) entered into a contract for the supply and fabrication of tubular steel towers. The respondent, being a company incorporated in Denmark, maintained its head office in Denmark, with an Australian registered office at its Australian accountant's address. The parties' contract contained a clause requiring all relevant documentation to be provided by Ottoway to Aalborg in one hard copy and one electronic copy.

Between April 2015 and April 2016, the claimant issued 22 invoices by both email and hard copy to the respondent's Denmark head office. All but the first of the invoices comprised payment claims within the meaning of section 13 of the SA Act.

In May 2016, the claimant sent formal notices and proceedings in two separate actions instituted in the South Australian Supreme Court to the respondent, by email and in hardcopy to the respondent's registered Australian office (**May 2016 documents**).

In August 2016, the claimant issued a further payment claim (**August 2016 payment claim**) addressed to the respondent care of its registered Australian office; unlike previous invoices, it was sent only in hard copy to the respondent's registered Australian office and was not emailed. The respondent did not provide the requisite payment schedule in relation to the August 2016 payment claim. Consequently, the claimant commenced proceedings seeking summary judgment for the August 2016 payment claim.

The respondent contended that the claimant was estopped from asserting that the payment claim was correctly served, on the basis that the claimant had historically delivered all invoices and payment claims to the respondent's overseas head office in hard copy as well as by email. The respondent submitted that the claimant's departure from this norm (particularly the absence of email) constituted the basis of the estoppel. Similarly, the respondent argued that in sending the August 2016 payment claim to the registered Australian office in hard copy only, the claimant had engaged in misleading conduct in contravention of the Australian Consumer Law.

The claimant submitted that the respondent was precluded from relying on such defences as section 15(4)(b)(ii) of the SA Act precludes a respondent from establishing a defence 'in relation to matters arising under the construction contract'.

The Master awarded summary judgment to the claimant and held that service had been validly effected, in compliance with section 109X of the *Corporations Act 2001* (Cth) and following obiter in *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* [2006] NSWCA 259. The Master also followed the decision in *Lucas Stuart Pty Ltd v Council of the City of Sydney* [2005] NSWSC 840 (***Lucas***) in which case the respondent was precluded from advancing a defence of misleading conduct or estoppel by the equivalent provision in the NSW Act. The respondent appealed.

## DECISION

In a unanimous judgment, the full court of the Supreme Court (Kourakis CJ, Blue and Bampton JJ) allowed the appeal and set aside the summary judgment before remitting the matter to proceed to trial.

With regard to the estoppel issue, the full court agreed with the respondent's submission that the Master had erred. The full court held that the question of whether or not the payment claim was validly served was one that must necessarily be determined in accordance with the general law, and the general law for this purpose includes the law of estoppel. Estoppel was therefore, in the full court's view, not within the category of defences arising 'under the construction contract' within the meaning of section 15(4)(b)(ii) of the SA Act. To the extent *Lucas* found otherwise, the full court declined to follow that decision.

With regard to the misleading conduct issue, the full court turned to New South Wales and Queensland Supreme Courts of Appeal authorities which considered that, on the proper interpretation of reciprocal legislation in those state, a defence of misleading conduct pursuant to the *Trade Practices Act 1974* (Cth) (as was applicable at the time) was not one that raised 'under the construction contract'. The full court was not inclined to depart from those authorities, and held that the defence of misleading conduct was not precluded by section 15(4)(b)(ii) of the SA Act.

With regard to whether or not the respondent had an arguable case for estoppel or misleading conduct, the full court held that the Master had not properly considered the fact that the May 2016 documents had been emailed to the respondent and the respondent had responded. It would have been impossible for the Master, on the summary judgment application, to be satisfied that there was no ongoing representation by the claimant that invoices would be served by email. Similarly, the full court consider that had the Master properly recognised that the May 2016 documents had been emailed, the claimant would have established a reasonably arguable defence of misleading conduct.

In light of its conclusion regarding the estoppel and misleading conduct points, the full court considered it both unnecessary and undesirable to decide on this appeal the constructional issues relating to sections 109X and 601CX of the *Corporations Act 2001* (Cth) and the interaction with the contract

# *Fabtech Aust P/L v Exact Contracting P/L* [2017] SADC 44

**A response to a payment claim must satisfy the basic requirements of section 14 of the SA Act.**

**Whilst the courts will not take an overly technical approach in determining whether a response is a payment schedule, where a response does not satisfy the basic requirements of section 14, and does not give adequate notice of the respondent's position, it will not be a payment schedule within the meaning of the SA Act. Consequently, section 15(2)(a)(i) of the SA Act will apply and the full amount of the payment claim will be recoverable as a debt due.**

**Further, a party who fails to respond to a payment claim on the basis they are seeking to reach agreement with the claimant does so at great risk absent express agreement that the payment claim is withdrawn.**

## FACTS

Fabtech Aust Pty Ltd (**claimant**) was engaged by Exact Contracting Pty Ltd (**respondent**) to supply and install materials and undertake construction in relation to a dam at Seppeltsfield Wines. The claimant purported to serve a payment claim pursuant to the SA Act.

Following receipt of the payment claim the respondent sent the claimant an email (**Email**), rejecting various assertions made in the payment claim. The Email was sent in the context of discussions held by the respondent and the claimant regarding the merits of certain variation claims and how they might be resolved.

Once the time for a payment schedule had elapsed, the claimant asserted that the Email did not constitute a valid payment schedule under the SA Act, and that it was therefore entitled to recover the payment claim amount as a debt due under section 15(2)(a)(i) of the SA Act. The claimant subsequently sought summary judgment for the amount of the payment claim.

The respondent initially took the position that the payment claim was invalid and therefore denied that a payment schedule was required. However, before the court the respondent conceded that the payment claim was valid and contended that its Email constituted a payment schedule (although not formally described as such), because it intended to serve the purpose of identifying the respondent's response to the payment claim and described the elements of the payment claim that the respondent disputed.

The respondent contended in the alternative that the claimant should be estopped from taking advantage of the SA Act as the parties had agreed to a different course.

## DECISION

The claimant was successful in its application, and the court entered summary judgment in its favour.

Muecke ADCJ took into account the fact that the claimant had initially strenuously denied the payment claim was valid and considered that, in the circumstances, it followed that the respondent could not have intended to respond with a valid payment schedule.

Further, his Honour canvassed established authorities regarding what the courts will look at when considering whether documents purporting to be payment claims or payment schedule comply with the relevant mandatory requirements of the legislation. The court emphasised that it will approach the matter in a practical, non-technical and common sense way. However, at a minimum, a payment schedule must identify with sufficient detail how much the party intends to pay so that the claiming party will be on notice. This will require clear identification of:

- the payment claim to which the payment schedule relates; and
- the amount that the party making payment intends to pay and, if the amount is less than that set out in the payment claim, reasons for the reduction.

The court noted that the Email did not identify the payment claim to which it related, or identify the amount that the respondent intended to pay in order to satisfy the payment claim, and it could not therefore be seen to be a valid payment schedule.

Muecke ADCJ found there was no factual basis for the estoppel alleged and as a consequence did not consider it necessary to decide whether the respondent was entitled to maintain that defence pursuant to section 15(4)(b)(ii) and section 33 of the SA Act.

# *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5

**On 14 February 2018 the High Court delivered this landmark judgment and *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 (*Probuild*) which unequivocally confirm that both the NSW Act and the SA Act remove a court's jurisdiction to overturn an adjudicator's determination infected by non-jurisdictional errors of law. Read our analysis of the *Probuild* decision here.**

**The High Court also held that provisions relating to the release of retention under a subcontract contingent on an event under a head contract are void under the 'pay when paid' prohibition contained in the SA Act. The broad view taken by the High Court of 'pay when paid' provisions is important because:**

- **many head contractors rely on retention amounts from subcontractors for security;**
- **often, the release of retention (and even payment generally) is tied to certain events occurring under a head contract, such as practical completion; and**
- **the Security of Payment legislation in all Australian jurisdictions contains 'pay when paid' prohibitions (although the particular wording may affect the application of the decision in some jurisdictions).**

**Industry participants should carefully review the retention provisions in their subcontracts to ensure that they do not unintentionally fall foul of the 'pay when paid' prohibition in the Security of Payment legislation.**

## FACTS

Maxcon Constructions Pty Ltd (**head contractor**) and Mr Vadasz (**subcontractor**) entered into a subcontract under which the subcontractor was to design and construct the piling for an apartment development. The subcontractor was required to provide security in the form of cash retention of 5% of the contract sum. The security was to be released when the Certificate of Occupancy (**CFO**) under the *Development Act 1993* (SA) being issued. The head contractor deducted retention amounts from the payment schedule, which the subcontractor disputed in an adjudication. The adjudicator accepted that the head contractor was not entitled to deduct the retention sum, finding that the retention provisions amounted to 'pay when paid provisions' under the SA Act.

The head contractor commenced proceedings to have the determination set aside. The head contractor alleged that the adjudicator made an error of law in deciding that the relevant clauses were 'pay when paid' provisions. The High Court granted special leave to hear appeal from the head contractor to overturn the Full Court of the SA Supreme Court's decision, which had followed the NSW Court of Appeal's decision in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379 (analysed in our Roundup of 2016 cases).

## DECISION

Having reached its decision in the *Probuild* the High Court consistently dismissed the head contractor's appeal.

Interestingly, the High Court held that, in any event, the adjudicator did not err in law in determining that the retention provisions were 'pay when paid provisions'

The High Court reasoned that the due dates for payment of the retention sum were dependent on something unrelated to the subcontractor's performance. That is, payment of the retention sum was dependent on the completion of the head contract, which in turn would have enabled a CFO to be issued. It followed that, under the SA Act, the head contractor had no right to deduct the retention sum from the scheduled amount.

Relevantly the High Court found that, even if the adjudicator had fallen into error, it would have been non-jurisdictional error. As analysed in the above analysis, this meant that the court did not have jurisdiction to set aside the adjudicator's determination.

# *Maxcon Constructions Pty Ltd v Vadasz (No 2)* [2017] SASCFC 2

**The Full Court of the Supreme Court of South Australia has confirmed the finding at first instance that a contract is not void merely by reason of a contractor's failure to disclose his or her bankruptcy in the course of business carried on under another name in breach of the *Bankruptcy Act 1966* (Cth). As a consequence, no jurisdictional error was found on this point.**

**The Full Court also overturned the first instance finding that the adjudicator's error in concluding retention sum provisions were unlawful 'pay when paid' provisions was not an error on the face of the record, however, and significantly, found that certiorari on the ground of error of law on the face of the record was impliedly excluded by the SA Act.**

**This decision has been affirmed by the High Court in *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5.**

## FACTS

The facts of this case are summarised in set out in *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5.

Relevantly, Maxcon (**respondent**) had brought an application for judicial review seeking to have an adjudication set aside on the basis that, inter alia, the adjudicator lacked jurisdiction because Vadasz (**claimant**) failed to disclose to the respondent that he was an undischarged bankrupt before entering the contract, rendering the contract void and unenforceable. Stanley J dismissed the application on the basis that:

- the claimant's failure to disclose the bankruptcy did not render the contract void; and
- whilst the adjudicator fell into error in holding that the retention provisions of the contract were 'pay-when-paid provisions', such an error was neither jurisdictional, nor on the face of the record – and consequently judicial review does not lie.

The respondent appealed. The claimant brought an alternative contention, asserting that Stanley J failed to have regard to relevant considerations in finding that the claimant did not disclose his bankruptcy to the respondent.

## DECISION

The Full Court of South Australia dismissed the appeal and upheld Stanley J's decision that the claimant's failure to disclose his bankruptcy did not render the contract void or unenforceable.

In upholding Stanley J's decision, the Full Court considered that it was very unlikely that the legislature intended a contravention of the *Bankruptcy Act 1966* (Cth) in this way should have such variable, capricious and adverse consequences for parties to a contract, as well as wider consequences for creditors in the bankruptcy.

Further, the Full Court held that the adjudicator erred in concluding that a provision of the contract constituted a 'pay-when-paid' provision within the meaning of section 12 of the SA Act and therefore unenforceable under the SA Act. However, the Full Court did not consider this error amounted to jurisdictional error, determining that the adjudicator had jurisdiction to determine matters of law.

The Full Court overturned the trial judge's finding that it was not an error of law on the face of the record, but found that certiorari for such an error was impliedly excluded by the SA Act. In doing so, the Full Court considered it was bound by the NSW Court of Appeal in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379 (also analysed in our Roundup of 2016 cases), as the Full Court could not be satisfied the *Shade Systems* decision was plainly wrong. Interestingly, Blue and Hinton JJs both indicated in their reasons that, absent persuasive authority on the point, they would have, from first principles, concluded that certiorari was available for error of law on the face of the record.

# Tasmania

◄ CONTENTS ►

## CASE INDEX

- *Modscape Pty Ltd v Francis* [2017] TASSC 55
- *Modscape Pty Ltd v Sive* [2017] TASSC 71

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

# Tas overview

## EMERGING TRENDS

Jurisprudence on the Tas Act is growing slowly, with NSW authorities continuing to provide guidance.

## DEVELOPMENTS

In 2017 two related cases concerning the Tas Act were considered in the Supreme Court.

The decisions of *Modscape Pty Ltd v Francis* [2017] TASSC 55 and *Modscape Pty Ltd v Sive* [2017] TASSC 71 provide useful guidance on when an adjudicator will breach the requirements of natural justice.

As a general rule, where the adjudicator contemplates making a determination on a different basis from that which is advanced by either of the parties, he or she must inform the parties so that they have an opportunity to address any new or challenged issues that may arise. If the adjudicator fails to do so, this will ordinarily result in a denial of procedural fairness and a denial of natural justice. However, an adjudicator need not disclose his or her provisional conclusions for the parties to criticise.

Interestingly, in *Modscape Pty Ltd v Sive* [2017] TASSC 71, Blow CJ left open the question of whether the failure of an adjudicator to adequately state the reasons for a determination, as required by section 25(4)(b) of the Tas Act will warrant an order quashing the determination.

## FUTURE

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

# *Modscape Pty Ltd v Francis* [2017] TASSC 55

**This decision confirms that:**

- **an adjudicator will breach the requirements of natural justice where an application is determined on a basis for which neither party contended;**
- **the rules of natural justice do not require an adjudicator to afford parties the opportunity to comment on his or her provisional conclusions.**

## FACTS

Modscape Pty Ltd (**respondent**) was engaged by Fairbrother Pty Ltd (**head contractor**) to construct and install certain modules as part of the redevelopment of the Royal Hobart Hospital. The respondent subcontracted the electrical part of the works to Stowe Australia Pty Ltd (**claimant**).

A dispute arose between the head contractor and the respondent, which resulted in the head contractor taking work out of the respondent's hands. The head contractor engaged the claimant directly to perform this work.

On 19 September 2016, the claimant served a payment claim on the respondent, claiming payment for work performed after 26 May 2016 under the subcontract. The respondent disputed the payment claim on the grounds that all of the work carried out after 26 May 2016 was performed under the claimant's contract with the head contractor and not the subcontract. The payment claim was referred to adjudication (**first adjudication**) and the adjudicator, Mr Martin, determined that the claimant was entitled to a progress payment of the amount it had claimed. On 24 February 2017, the claimant served a further payment claim on the respondent, which was subsequently referred to adjudication (**second adjudication**).

In the second adjudication, the adjudicator, Mr Francis, invited and received submissions from the parties on the question of whether the respondent was 'seeking to re-agitate issues which were determined' in the first adjudication and as such, whether an issue estoppel arose. The adjudicator relied on the case of *Kuligowski v Metrobus* [2004] HCA 34 (***Kuligowski***) in holding that the respondent was precluded from re-agitating issues determined in the first adjudication. *Kuligowski* was not referred to by either party in their submissions. The respondent sought to quash the determination by contending that the adjudicator denied the parties natural justice by making his determination upon a basis not advanced by either party.

## DECISION

The court held that the adjudicator did not deny the parties natural justice.

Blow CJ cited a number of authorities which confirm that an adjudicator will breach the requirements of natural justice where the adjudicator makes a determination on grounds not submitted by either party. However, in the current circumstances his Honour held that by seeking submissions on issue estoppel, the adjudicator had in fact determined the matter on a basis advanced by the claimant.

The parties did not rely on *Kuligowski*; however, the duty to afford the parties natural justice did not require the adjudicator to invite further detailed submissions on the case law. In addition, an adjudicator is not required to disclose his or her provisional conclusions for the parties to criticise.

While Blow CJ considered that the adjudicator had misconstrued *Kuligowski*, this error did not affect the validity of the determination.

# *Modscape Pty Ltd v Sive* [2017] TASSC 71

**An adjudication determination under the Tas Act will be quashed where an adjudicator fails to consider a respondent's adjudication response, fails to act in good faith or decides a payment dispute on points not contended for by either party without inviting further submissions from the parties.**

## FACTS

Fairbrother Pty Ltd (**claimant**) as head contractor subcontracted Modscape Pty Ltd (**respondent**) to provide construction works, including joinery works, in relation to the redevelopment of the Royal Hobart Hospital.

The respondent then entered into a sub-sub-subcontract with the claimant that required the claimant to undertake the joinery works (**sub-sub-contract**).

The claimant, acting in its capacity as sub-subcontractor, served a payment claim under the Tas Act and in relation to the sub-sub-contract on the respondent. The respondent disputed the payment claim and the claimant made an adjudication application under the Tas Act. The adjudicator determined that the payment claim should be allowed in full.

The respondent sought judicial review of the adjudication determination.

## DECISION

The court found that the adjudicator had fallen into jurisdictional error and quashed the adjudication determination.

Blow CJ held that:

- the adjudicator failed to consider the adjudication response;
- to the extent that the adjudicator did consider the adjudication response, he did not act in good faith because he did not make a bona fide attempt to consider the adjudication response; and
- the adjudicator denied the respondent natural justice by making a series of findings that were material to the outcome of his determination without first inviting further written submissions from the respondent in circumstances in which submissions should have been invited.

Blow CJ found that there was an element of originality in a number of the adjudicator's conclusions that were not based on the contentions advanced by the parties or on any evidence provided by the parties.

His Honour observed that it is a general rule in any civil litigation that if a decision-maker contemplates making a determination on a different basis from that which is advanced by the parties, he or she must inform the parties so that they have an opportunity to address any new or challenged issues that may arise. Failure to do so will ordinarily result in a denial of procedural fairness and a denial of natural justice.

Blow CJ identified areas of the adjudication determination where the adjudicator's reasons for a conclusion were inadequate. However, his Honour observed that it was unclear whether the failure of an adjudicator to adequately state the reasons for a determination, as required by section 25(4)(b) of the Tas Act will warrant an order quashing the determination. Because of the conclusions his Honour reached above there was no reason for him to reach a conclusion regarding section 25(4)(b) of the Tas Act.

# Northern Territory

◄ CONTENTS ►

## CASE INDEX

- *ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited & Ors* [2017] NTSC 1
- *INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor* [2017] NTSC 45
- *INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor (No 2)* [2017] NTSC 61

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 2017, the NT is continuing to develop 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 found that a payment claim must be compliant with the terms and conditions of the construction contract to which it relates in order for the payment claim to be a valid claim under the NT Act. A payment claim which is contractually invalid does not become 'due to be paid under the contract' and therefore does not give rise to a payment dispute when refused or revised by the respondent (*ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited & Ords* [2017] NTSC 1).

The NT Supreme Court quashed the determination of an adjudicator on the grounds of a denial of natural justice in circumstances where the adjudicator failed to request submissions on the particular point on which his decision was based (*INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor* [2017] NTSC 45).

Subsequently, the NT Supreme Court also confirmed that that an adjudicator cannot extend time for making a determination *after* the time for making that determination has expired (*INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor (No 2)* [2017] NTSC 61).

## FUTURE

- The NT can expect a round of reform following the release of an issues paper on the '*Review of the Construction Contracts (Security of Payments) Act (NT)*' in late 2017.
- The paper identifies issues and poses questions concerning the operation of the NT Act. Particular issues raised in the paper include:
  - changing the name of the NT Act;
  - extending the times for responding to payment claims;
  - including a contracting out procedure for complex claims;
  - including additional requirements regarding the suitability of adjudicators for complex disputes;
  - removing the implied requirement that a payment claim be signed; and
  - publication of decisions.

# *ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited & Ors* [2017] NTSC 1

**A payment claim must be compliant with the terms of the construction contract to which it relates in order for the payment claim to be a valid claim under the NT Act. A payment claim which is contractually invalid does not become 'due to be paid under the contract' and therefore does not give rise to a payment dispute when refused or revised by the respondent.**

## FACTS

On 19 February 2016, ABB Australia Pty Ltd (**contractor**) submitted a payment claim to CH2M Hill Australia Pty Limited (**principal**) claiming payment of $2,418,603.99 under a construction contract between the parties (**contract**).

On 2 March 2016, the principal wrote to the contractor advising that the contractor was in breach of the requirement to provide security under the contract and as a result had not met a condition precedent to the right to deliver a payment claim under the contract. The letter requested that the contractor replace the security and resubmit the payment claim.

On 7 March 2016, after providing the replacement security, the contractor resubmitted the payment claim to the principal on identical terms to the initial payment claim.

On 15 March 2016, the principal advised it would not be making any payment in connection with the contractor's revised payment claim, and on 10 June 2016 the contractor made an application to have the payment dispute adjudicated.

The adjudicator dismissed the application on the ground that the payment dispute had arisen on 2 March 2016 upon the rejection of the initial payment claim and the application had not been made within 90 days as required by section 28(1) of the NT Act.

The adjudicator found that even though the initial payment claim was not a valid payment claim under the contract, it was nevertheless a valid payment claim under the NT Act, and the contractual defect present at the time of submission was not relevant for establishing the validity of the payment claim under the NT Act.

## DECISION

The court allowed the appeal, declaring that the initial payment claim was not a valid payment claim under the NT Act, and the letter of 2 March 2016 did not give rise to a payment dispute on the basis that a payment claim must be validly issued under the construction contract to which it relates in order for it to be 'due to be paid under the contract'.

Kelly J considered the meaning of 'under a construction contract' in the context of section 4 of the NT Act and concluded that the ordinary meaning of this phrase requires a payment claim to comply with the provisions of the relevant construction contract in order for the payment claim to be valid.

# *INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor* [2017] NTSC 45

**The Supreme Court of the Northern Territory has quashed the determination of an adjudicator on the grounds of a denial of natural justice in circumstances where the adjudicator failed to request submissions on the particular point on which his decision was based.**

## FACTS

INPEX Operations Australia Pty Ltd (**respondent**) engaged JKC Australia LNG Pty Ltd (**claimant**) to perform engineering, procurement, supply, construction and commissioning of onshore facilities for in relation to the respondent's gas field development (**Contract**).

On 3 November 2016, the claimant issued two invoices to the respondent – one for US$205,825,452, and a separate invoice for the GST component.

On 24 November 2016, the respondent issued a notice of dispute, disputing US$133,501,780 of the first invoice and US$17,510,093 of the GST claimed.

On 3 January 2017, the claimant made an adjudication application under the NT Act in relation to US$83,933,837, being a portion of the disputed amount.

The adjudicator alerted the parties by email to an issue that he considered relevant, and invited the parties' submissions as to '*whether the provisions implied into deficient construction contracts by section 20 of the NT Act should or should not be imported into the [Contract]*'. The parties provided submissions to the effect that neither considered section 20 of the NT Act to apply.

The adjudicator determined that the respondent pay the claimant USD$83,933,837 (**Determination**) on the basis that section 20 of the NT Act did operate to insert implied terms into the Contract, relevantly, that the respondent ought to have provided a notice of dispute within 14 days. As the respondent in fact issued its notice of dispute 21 days after the invoices were served, the adjudicator determined that the respondent was consequently obliged to pay the whole amount of the invoice.

The respondent sought judicial review of the adjudication determination on the basis, inter alia, that there was a substantial failure to accord natural justice.

## DECISION

The court held that there had been a substantial denial of natural justice and quashed the determination.

Whilst both parties had disagreed with the adjudicator that section 20 of the NT Act had any operation upon the Contract, Kelly J noted the real question to be tried was whether the adjudicator afforded the parties reasonable notice of the basis on which he intended to make his decision and an opportunity to address that proposition.

Whilst the adjudicator did alert the parties as to the issue of the application of section 20 of the NT Act, he did not indicate his view during the adjudication process, or what he considered the consequences of application of section 20 of the NT Act would be upon the parties.

Further, he did not warn the parties that he was contemplating making his determination on the basis that the respondent had failed to issue its notice of dispute within 14 days.

Whilst the claimant argued this issue was implicit in the question asked, his Honour held that the adjudicator's communication did not fairly put the claimant on notice, and, that, in any event, the terms of the adjudicator's email specifically precluded the respondent from making any submissions about what would be the consequences of implying the terms into the Contract. This amounted to a substantial denial of natural justice, depriving the respondent of the possibility of a successful outcome.

# *INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor (No 2)* [2017] NTSC 61

**An adjudicator is under a time limit to decide if he or she needs more time to make a determination. An adjudicator cannot extend time for making a determination under the NT Act after the time for making that determination has expired. Further, an order in the nature of mandamus is unlikely to be consequential to an order in the nature of certiorari.**

## FACTS

On 15 June 2017, the Supreme Court of the Northern Territory made an order in the nature of certiorari which quashed a determination by the adjudicator in a payment dispute application under the NT Act between INPEX Operations Australia Pty Ltd (**claimant**) and JKC Australia LNG Pty Ltd (**respondent**) (*INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor* [2017] NTSC 45). The court sought submissions from the parties in relation to any ancillary orders that should be made as a consequence of that order.

The respondent submitted that the court remit the application back to the adjudicator by making an order in the nature of mandamus and orders ancillary to allow the adjudicator to perform its functions and make a decision to dismiss or make a determination as to liability to be made within certain time limits under the NT Act (section 33(1)(b)).

In order for this to be effected, the respondent sought an order requiring the adjudicator to seek the consent of the Construction Contracts Registrar under section 34(3)(a) of the NT Act to extend the time for the adjudicator to perform its functions under section 33(1) of the NT Act.

## DECISION

The court held that it would not be appropriate to attempt to refer to the matter back to the adjudicator to make a determination on the merits on the orders sought by the respondent.

Of primary interest, the court found that section 34(3) of the NT Act does not allow an adjudicator to extend time after the expiry of the prescribed time (as defined by section 33(3) of the NT Act). The court noted that to decide otherwise would require an assumption the legislature intended the adjudicator to be able to extend the time for making a decision after the NT Act deemed them to have already made one.

The court also found that it was not open for the respondent to seek orders for mandamus in the proceedings, noting that the respondent could have, at the outset, brought a counterclaim seeking orders in the nature of mandamus.

The court also observed that the orders sought did not reflect how the respondent ran their arguments at trial, in which the respondent contended that it, and its subcontractors, would have no way of obtaining payment on an interim basis if the order for certiorari was granted.

- Further, any available remedy would depend on the willingness of the adjudicator to extend the time for making the determination and the willingness of the registrar to consent to any such extension.

# Contact us


Richard Crawford
Partner
**T** +61 2 9921 8507
**M** +61 417 417 754

Pamela Jack
Partner
**T** +61 2 9921 8700
**M** +61 421 059 844

Michael Creedon
Partner
**T** +61 7 3119 6146
**M** +61 402 453 199

Jennifer McVeigh
Consultant
**T** +61 7 3119 6519

David Pearce
Partner
**T** +61 7 3119 6386
**M** +61 422 659 642

Peter Wood
Partner
**T** +61 3 8608 2537
**M** +61 412 139 646

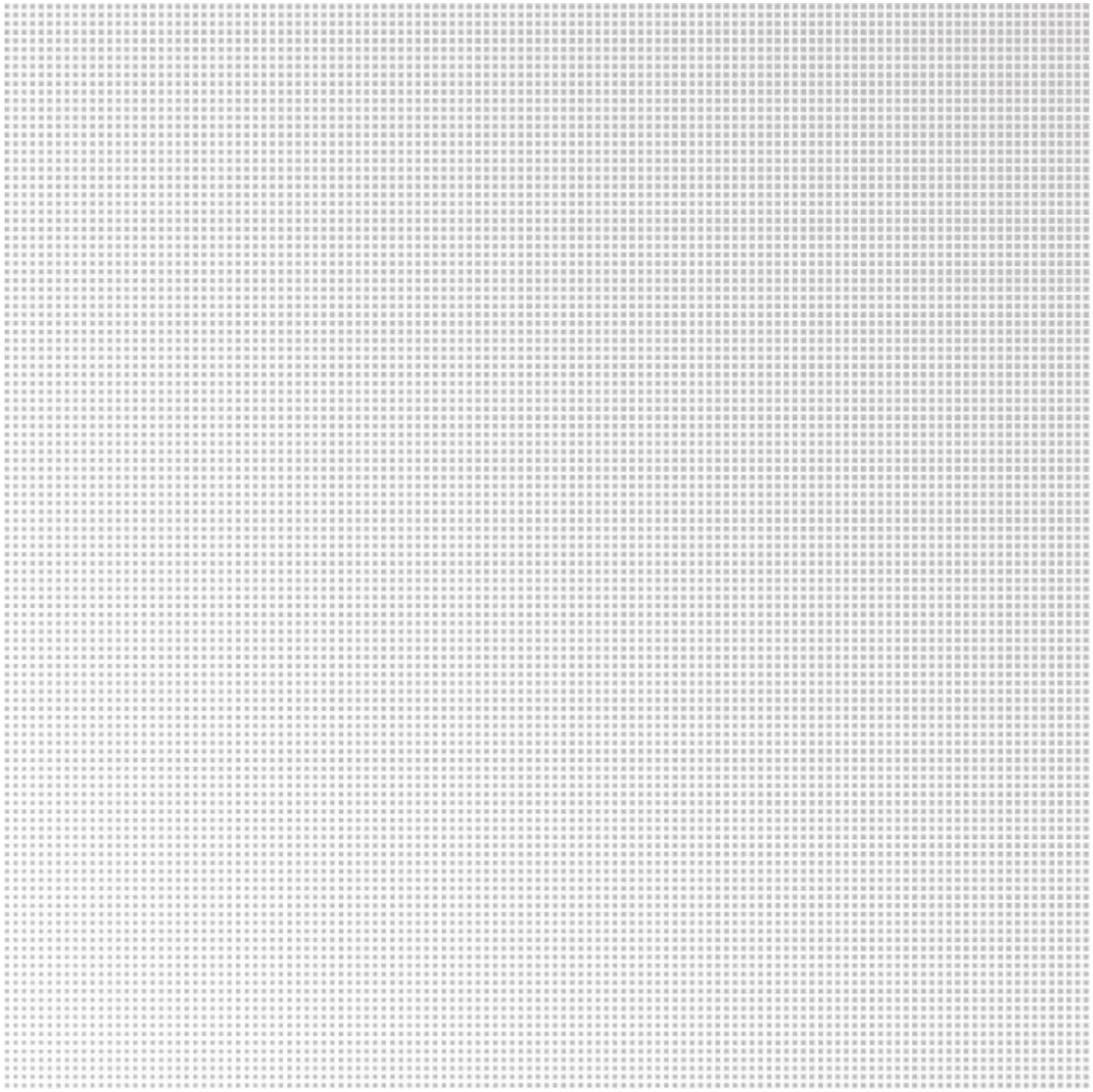
Cameron Ross
Partner
**T** +61 3 8608 2383
**M** +61 401 148 664

James Kearney
Partner
**T** +61 8 8233 5685
**M** +61 401 132 148

Geoff Shaw
Partner
**T** +61 2 6225 3246
**M** +61 407 932 731

Tom French
Partner
**T** ++61 8 6189 7860
**M** +61 423 440 888

**Email** firstname.lastname@minterellison.com



MinterEllison