Security of Payment Roundup

A comprehensive review of cases in 2018

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National Overview

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CHERRY PICKING THE MURRAY REPORT – IS THAT REALLY WHAT WAS INTENDED?

2018 saw the long awaited release of the final Murray Report on the National Review of Security of Payment Laws. There were some valued recommendations in the report but there appears to have been no take up of the proposal to have uniform laws. Instead the last quarter of 2018 heralded amendments to the SOP legislation in New South Wales and in Queensland and the Fiocco Report in Western Australia with the legislative changes in NSW clearly cherry picking what the NSW parliament considered to be the best of the Murray Report recommendations. Surely this is not what was intended.

Overall, the case law developments demonstrate the imperative to comply with the requirements of, and timeframes prescribed in, the SOP legislation. Judges continue to reiterate the underlying purpose of the SOPA framework to 'pay first, argue later'.

In New South Wales, the year kicked off with the High Court's decision in *Probuild*. The effects of the Murray report manifested in amendments to the NSW Act such that recovering a progress payment has become simpler because the amendments removed entitlements based on reference dates.

In Queensland, challenging times are ahead for respondents with the transition to the more claimant-friendly Qld BIF Act. The need to respond to payment claims within time and with brimful reasons is more important than ever. We forecast an increase in claimants accessing the SOP process.

In Victoria, notable decisions were delivered by Digby J in his first full year in the Supreme Court, particularly the treatment of 'excluded amounts' which is a concept unique to the Vic Act. We are also seeing other Victorian Supreme Court judges handing down SOP decisions (Riordan J and Kennedy J).

In Western Australia, there was no opportunity for the courts in the cases that came before them to interpret and apply the substantial amendments to the WA Act that came into effect in mid-December 2016. It will be interesting when the ability to 'recycle' claims by re-issuing disputed invoices eventually comes before the courts. In our 2017 report, we had noted the trend of the WA courts to follow the East Coast decisions on errors of law going to jurisdiction and excluding claims for damages for breach. We expect that the WA Act will also mirror this trend if the McGowan Government adopts recommendations in the Fiocco Report.

In South Australia, following the *Maxcon* decision in the High Court industry participants should remain mindful of the 'pay when paid' probation in the SA Act and be vigilant regarding the retention provisions in their subcontracts. We also expect a continuation of the trend of judicial review proceedings focusing on reference dates. We haven't seen any indication that the amendment bill to the SA Act—that lapsed while awaiting consideration in the Legislative Council—will be re-introduced.

We hope you find our comprehensive analysis of the key 2018 security of payment developments useful. We would love to hear from you if you have any questions or feedback.

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The *Building and Construction Industry Security of Payment Act 1999* (NSW) is referred to as the **NSW Act**.

New South Wales overview

EMERGING TRENDS

The trend for cases to continue to flow through the NSW courts has continued from previous years. Changes to the NSW legislation are set to simplify the processes for claimants, but until a date is set for the commencement of regulations and the amendment Act we expect the rate of claims to continue.

DEVELOPMENTS

The year started off with a flurry of excitement with the High Court handing down two landmark security of payment decisions, *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 and *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5. In both decisions the High Court confirmed that an adjudicator's non-jurisdictional error of law will not be overturned.

In November 2018 the NSW Government finalised the amendment bill to the NSW Act and the amendment Act was passed and assented to before Christmas 2018. The changes reflect outcomes of the Murray Report and the significant stakeholder feedback which was received from the industry. The amendments abolish any entitlements based on reference dates and have simplified the process for recovering a progress payment.

In the courts we saw:

- The continuing trend towards limiting the circumstances where an aggrieved party can seek judicial review of an adjudication determinations.
- Reasons for adjudications must be included in a determination, but if they are inadequate or insufficient it will not be grounds for a court to review. See *Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd* [2018] NSWCA 107.
- Supporting statements, their adequacy and whether they are actually required or not came before the courts again. The outcome being that courts will take a common sense approach and the Supreme Court has reiterated that principals will not be able to rely on technical arguments to seek to invalidate a claim. See for example *Central Projects Pty Ltd v Davidson* [2018] NSWSC 523 and *Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd* [2018] NSWSC 1229.
- If there is no supporting statement attached to a progress claim, it will however, be void as confirmed in *Greenwood Futures v DSD Builders* [2018] NSWSC 1471.

FUTURE

We await the draft consultation bill for regulations following the amendments to the NSW Act.

It is expected that cases will continue to flow through the courts without a slowdown, as parties adapt to the changes and the courts interpret the amended legislation.

As always, parties will need to be particular in ensuring they meet timeframes and respond fully to all payment claims.

Brefni Pty Ltd v Specific Industries Pty Ltd [2018] NSWSC 578

Even though costs were awarded on an indemnity basis, the successful party was denied the costs of retaining both senior and junior counsel. If the issues to be determined in an application to set aside an adjudication application do not warrant the retention of senior and junior counsel, it is unlikely that the successful party will be awarded costs of senior counsel.

FACTS

Brefni Pty Ltd (**Contractor**) entered into a subcontract with Specific Industries Pty Ltd (**Subcontractor**) for the supply and installation of material for a construction project. The Contractor served two payment schedules in response to a payment claim made by the Subcontractor. In a subsequent adjudication, the Contractor failed to lodge a response to the adjudication application served by the Subcontractor within the time allowed by the NSW Act. Consequently, the adjudicator was not entitled to consider the submissions set out in the adjudication response.

The Contractor commenced proceedings seeking to set aside the adjudicator's determination on the basis that the adjudicator had erred by considering the revised payment schedule instead of the first payment schedule served on the Subcontractor. The Contractor also pleaded that it had somehow been misled, by a representation attributable to the Subcontractor, into thinking that the adjudication application had not been served until four days after the stated date of service.

Following the commencement of proceedings, the Subcontractor served two *Calderbank* letters offering to settle the proceedings on the basis that the adjudicated amount be paid in full within seven days, and that the proceedings thereafter be dismissed with no order as to costs. An important point to note in relation to the question of costs was that the Subcontractor had retained senior counsel and junior counsel in relation to the proceedings.

DECISION

The court found that there was no evidence to support the Contractor's explanation for its delayed adjudication response and that the Contractor's complaint about the adjudicator considering the revised payment schedule was unfounded. Additionally, the court found that the Contractor ought to have reconsidered its position as a result of the *Calderbank* letters.

Cost of two counsel

In principle, the court found that costs should be payable on an indemnity basis from the date the second *Calderbank* offer expired. However, the court stated that *'this is not, and never was, a case for senior counsel, or for two counsel. It was a case that could and should have been conducted by competent junior counsel'*.

Therefore in relation to costs, the court ordered that subject to any view to the contrary taken by a costs assessor, the indemnity costs awarded were not to include the costs of senior counsel nor the costs of two counsel. What was allowed were *'the reasonable costs of briefing competent junior counsel, to be assessed so far as possible on the indemnity basis'*.

Central Projects Pty Ltd v Davidson [2018] NSWSC 523

Service of a payment claim is valid even if the accompanying head contractor supporting statement contains errors and inaccuracies.

Principals will not be able to rely on technical arguments regarding deficiencies in a head contractor supporting statement to impugn the validity of a payment claim.

Ball J also provides an interesting insight into his Honour's position on supporting statements by stating (in obiter) that a payment claim may be capable of being validly served even where it is not accompanied by a supporting statement, contrary to previous authority on the issue.

FACTS

Mr Stephen Davidson (**Developer**) entered into a contract with Central Projects Pty Ltd (**Contractor**) for the construction of a mixed-use development on Curlewis Street in Bondi (**Contract**). On 5 January 2018 (whilst the works were suspended by the Developer), the Contractor served 'progress claim 24' together with supporting documents which included a 'supporting statement by head contractor' (**Payment Claim**). The supporting statement accompanying the Payment Claim (**Supporting Statement**) contained certain errors and deficiencies, including by:

- inserting the name of the Developer instead of a subcontractor at item 1 of the supporting statement, which is intended to identify the contract with a relevant subcontractor (if only one subcontractor performed work covered by the Payment Claim); and
- failing to list, in the accompanying subcontractors schedule, several subcontractors who had supplied goods to the Contractor during the period covered by the Payment Claim.

The Developer failed to serve a payment schedule in response to the Payment Claim, and the Contractor subsequently commenced proceedings against the Developer on 26 February 2018 seeking judgment under section 15 of the NSW Act.

DECISION

Ball J held that the Developer was liable to pay the full amount of the Payment Claim, together with interest and costs, on the basis that the Supporting Statement was a supporting statement within the meaning of section 13(9) of the NSW Act.

Arguments

In reaching its decision, Ball J addressed two issues:

- Was the Supporting Statement a supporting statement within the meaning of section 13(9) of the NSW Act (**Valid Supporting Statement**)?
- If it was not, is the consequence that the Payment Claim was not validly served on the Developer?

In addressing the first issue, the court accepted the Contractor's submissions that:

- for a supporting statement to be valid, it must meet two requirements:
  - it must be in the prescribed form; and
  - it must contain a declaration required by section 13(9) of the NSW Act;
- if it is implicit in section 13(7) of the NSW Act that a supporting statement must be accurate and complete, section 13(8) of the NSW Act (which imposes a penalty for knowing the statement is false or misleading in a material particular) would have no work to do, or at the very least make little sense; and
- as there is nothing in section 13(9) of the NSW Act that requires a supporting statement to list all of the subcontractors, the Supporting Statement was a Valid Supporting Statement.

Ball J rejected the Developer's argument that, for the purpose of section 80 of the *Interpretation Act 1987* (NSW) (**Interpretation Act**), the Supporting Statement was not in the prescribed form because it did not contain all the information that was required. This was rejected on the basis that section 80 of the Interpretation Act concerns itself with the form of a prescribed form and not the accuracy of the contents.

Judicial commentary

In developing reasons for the decision in this case, Ball J expressed an opinion on the interpretation of sections 13(7), 13(8) and 13(9) of the NSW Act. The following comments may be useful in considering the future judicial interpretation of these clauses:

- False or misleading in a material particular:
  - a supporting statement will be false or misleading in a material particular if it omits one or more subcontractors from the list of subcontractors and that omission is material;
  - a supporting statement will be false or misleading in a material particular if, contrary to the declaration, not all subcontractors have been paid and the amount owed to an unpaid subcontractor is material; and
  - in either case, if a head contractor knows that the supporting statement is false or misleading, the head contractor will commit an offence by serving the statement.
- Valid service of a progress claim

Whilst the court was not required to answer the question of validity of service, his Honour nonetheless provided some commentary on the issue. Notably:

- his Honour stated that had there been no authority on the consequences of a supporting statement not being a Valid Supporting Statement, the court would have concluded that the failure to serve a supporting statement did not render the Payment Claim invalid;
- this opinion is in opposition to the current judicial position that a payment claim will not be validly served if is not accompanied by a supporting statement (as concluded by McDougall J in *Kitchen Xchange v Formacon Building Services* [2014] NSWSC 1602 (analysed in our Security of Payment Roundup of 2014 cases) and affirmed in later judgments); and
- whilst his Honour is of this opinion, it was not necessary to decide this issue given the conclusion that the Supporting Statement was a Valid Supporting Statement.

Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd [2018] NSWCA 107

The New South Wales Court of Appeal has overturned the Supreme Court's decision that an adjudication determination was void due to allegedly insufficient reasons given by the adjudicator. The trend towards confining the circumstances in which an aggrieved person may judicially review an adjudication determination has continued. The NSW Court of Appeal has confirmed that an adjudicator's obligation under section 22(3) of the NSW Act to *'include the reasons for the determination'* does not require the reasons to be adequate or sufficient.

FACTS

On 26 February 2018, the respondent (**head contractor**) to the appeal, Fulton Hogan Construction Pty Ltd (**Fulton Hogan**), applied to the Supreme Court seeking a declaration that an adjudication determination in the amount of $8,189,348.54 made in favour of the appellant (subcontractor), Cockram Construction Ltd (**Cockram**), should be set aside.

The adjudicator determined that a relevant subcontract clause was not a valid condition precedent to Cockram's entitlement to an extension of time under the subcontract, such that Fulton Hogan's claim for liquidated damages as set-off to the payment claim failed. The condition precedent in question was that Fulton Hogan had *'received an equivalent extension of time'* under its head contract with Transport for NSW and was rejected by the adjudicator on the basis of the *'pay when paid'* prohibition in the NSW Act.

At first instance – adjudicator had fallen into jurisdictional error

At first instance, Fulton Hogan argued that the adjudication determination rejecting the set-off claim was void as the adjudicator had failed to perform her statutory function by allegedly refusing to apply what she considered to be the correct construction of the condition precedent clause because she found that it was not *'legitimate'*.

Ball J agreed with Fulton Hogan that the adjudication determination should be set aside. His Honour noted that Fulton Hogan's argument on the condition precedent ground had developed at hearing into (at [22]) *'the question whether the Adjudicator gave adequate reasons for refusing to apply that clause of the Subcontract'*.

Cockram contended that the condition precedent clause was void due to section 12 of the NSW Act (concerning 'pay when paid' provisions). Ball J disagreed, finding (at [28]) that the adjudicator did not expressly refer to section 12 of the NSW Act and her reasons were *'simply a matter for speculation'*. The adjudicator had therefore fallen into jurisdictional error by the failure to comply with section 22(3)(b) of the NSW Act.

Contentions put forward to Court of Appeal

Cockram contended that any failure to comply with the requirement for reasons involved jurisdictional error. Fulton Hogan's position was that:

- the adjudicator's reasons for refusal to deny Cockram's extension of time claim indicated a refusal to apply the condition precedent, thereby resulting in failure to comply with section 22(3)(b) of the NSW Act; and
- the adjudicator must have had additional and unstated reasons for upholding the extension of time claim and, accordingly, failed to comply with section 22(2)(b) of the NSW Act (for not considering the terms of the contract in so far as they were relevant to an issue in dispute and relied on by a party).

DECISION

On appeal – adjudication determination reinstated

The Court of Appeal overturned the Supreme Court decision, reinstating the adjudication determination.

Meagher JA, with whom Barrett AJA joined, held:

- section 22(3)(b) of the NSW Act does not require reasons to *'be adequate according to any objective criterion'* (at [34]). The adjudicator had visibly based her finding on the premise that the condition precedent depended upon something happening under a different contract and that the clause was not *'legitimate'* and *'workable'*; and
- the descriptions the adjudicator gave the condition precedent were capable of amounting to reasons and constituted consideration of the required matters. The adjudicator had not fallen foul of section 22(2) of the NSW Act merely because her conclusion was that a provision of the contract was not to be applied, whether or not that was legally correct.

Basten JA:

- dismissed Fulton Hogan's primary challenge as placing a *'gloss'* on section 22(3) of the NSW Act and being *'misconceived'* because it required speculation as to the adjudicator's true reasoning process which is irrelevant to the question of whether the adjudication determination provided constituted written reasons; and
- found that the adjudicator had in fact considered the condition precedent, complying with section 22(2) of the NSW Act. Fulton Hogan's submission required an *'illegitimate assumption'* that the adjudication determination was legally incorrect, thereby allowing the conclusion to be made that her reasons were legally inadequate to justify the decision.

Forte Sydney Construction v Lin Betty Building Group [2018] NSWSC 1429

When a claimant serves a payment claim under section 13 of the NSW Act, a respondent may reply by providing a payment schedule under section 14 of the NSW Act. If the respondent fails to provide a payment schedule within the time required by the NSW Act, a claimant may make an adjudication application under section 17(1)(b) of the NSW Act in relation to the payment claim. However, the claimant cannot proceed to adjudication without first giving the respondent notice of its intention to apply for adjudication and a further opportunity to provide a payment schedule within five business days of receiving the claimant's notice.

A previous, out of time, payment schedule purportedly provided by a respondent under section 14 of the NSW Act will not be a valid payment schedule for the purpose of responding to a claimant's notice of its intention to apply for adjudication. A respondent must provide a separate payment schedule in response to the claimant's notice of adjudication. Accordingly, the court held that the respondent lost its right to lodge an adjudication response under section 20(2A) of the NSW Act.

The court also confirmed that an adjudicator is not discharged from considering the merits of a claim simply because no payment schedule has been provided or because no arguments have been validly put forward by a respondent.

FACTS

Forte Sydney Construction (**FSC**) was the head contractor for the construction of a residential apartment project at Ryde. By subcontract, FSC engaged Lin Betty Building Group (**LBBG**) to perform hebel block and gyprock works.

On 25 May 2018, LBBG served a payment claim on FSC. The time for providing a payment schedule in response to that payment claim expired on 8 June 2018. FSC did not provide a payment schedule within the time required by the NSW Act but instead provided a later payment schedule on 15 June 2018 (**15 June payment schedule**).

On 17 July 2018, pursuant to section 17(2) of the NSW Act, LBBG issued a notice to FSC of its intention to apply for adjudication of the payment claim(**section 17(2) notice**). Under section 17(2)(b) of the NSW Act, FSC had five business days after service of that notice to respond with a payment schedule. FSC did not provide a payment schedule within this time. LBBG subsequently made an adjudication application and served its application on FSC.

Section 21(1) of the NSW Act provides that an adjudicator must not determine an adjudication application until after the end of the period which the respondent may lodge an adjudication response. On 10 August 2018 (which was before the end of the period which FSC had to lodge an adjudication response pursuant to the timing under the NSW Act), the adjudicator issued his determination in favour of LBBG. The adjudicator noted that:

- although a payment schedule had been issued by FSC on 15 June 2018, it was invalid because it had not been issued within ten business days after the service of LBBG's payment claim; and
- because FSC failed to provide a valid payment schedule under either sections 14 or 17(2)(a) of the NSW Act in response to LBBG's section 17(2)(a) notice, FSC was not entitled to serve an adjudication response pursuant to section 20(2A) of the NSW Act, an adjudication determination could be made without waiting out the prescribed period under section 21(1) of the NSW Act.

FSC commenced proceedings in the Supreme Court seeking to quash the adjudicator's determination. FSC raised three grounds to support its case:

- The adjudicator denied FSC natural justice by failing to consider the 15 June payment schedule, arguing that the 15 June payment schedule (which was ineffective for the purposes of section 14(4) of the NSW Act) nonetheless stood as a payment schedule that was to be taken as an answer to the claimant's subsequent section 17(2)(a) notice.
- The adjudicator had determined the application before he was entitled to do so, contrary to section 21(1) of the NSW Act.
- The adjudicator failed to carry out his statutory functions under the NSW Act.

DECISION

The court found that each of the grounds raised by FSC failed. The court dismissed the summons and ordered that LBBG be paid $314,463.49.

In relation to the first ground, the court held that on a proper construction of the language of section 17 of the NSW Act, a respondent is required to provide a separate payment schedule expressly in response to the claimant's section 17(2)(a) notice. The court concluded that an out of time payment schedule, such as the 15 June payment schedule provided by FSC, cannot stand as an answer to a claimant's notice.

The court also held that since the first ground was decided against FSC, the second ground did not arise.

In regards to the third ground, the court concluded that the adjudicator had properly considered the material submitted in support of the payment claim, and that the material satisfied him that the claim had been validly made. Therefore, the court found that the third ground also failed.

Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd [2018] NSWSC 1229

Three key points can be derived from this decision:

- **a common sense approach to the construction of supporting statements is preferred;**
- **an adjudicator's requirement to 'have regard to' something is effectively the same as the requirement to 'consider' something; and**
- **risk of recovery alone is not enough to justify a stay to an adjudication determination.**

FACTS

On 10 July 2017, Goodwin Street Developments Pty Ltd (**Goodwin**) entered into a construction contract (**contract**) with DSD Builders Pty Ltd (**DSD**) as head contractor. Goodwin purported to terminate the contract in March 2018. DSD served a payment claim on 30 April 2018. Goodwin then provided a payment schedule which denied liability, claimed that DSD owed it a substantial amount of money, and provided that the scheduled amount was nil.

Shortly after, DSD made an adjudication application to the Australian Building and Construction Dispute Resolution Service which was referred to, and accepted by, the adjudicator. Despite being notified that the adjudication application had been accepted by the adjudicator, Goodwin failed to lodge its adjudication response in time, and the adjudicator dealt with the matter 'on the basis that the relevant dispute was constituted by the payment claim and the payment schedule'. The adjudicator ultimately determined that DSD was entitled to $265,000.

Goodwin commenced proceedings to quash that determination on the basis that:

- the payment claim was invalid because it did not include the supporting statement referred to in section 13(9) of the NSW Act; and
- the adjudicator did not exercise her statutory function, or did not perform it in good faith, because she did not value the construction work and reach conclusions on the question of defects, as required by section 10(1)(b)(iv) of the NSW Act.

The document put forward as the 'supporting statement' for the purposes of the NSW Act stated that DSD is the head contractor and had contracted with a subcontractor, BH Australia Constructions Pty Ltd. The document also included a statement that *'all amounts due and payable to subcontractors have been paid (not including any amount identified in the attachment as an amount in dispute)'* but did not include any attachment.

In the event that those challenges failed, Goodwin submitted that the court should, in any event, prevent DSD from *'enjoying the fruits of its success in the adjudication'* and stay the enforcement of the adjudication determination on the basis that Goodwin may suffer irreparable prejudice by reason of DSD's financial position.

DECISION

The court held that each of Goodwin's jurisdictional challenges failed and that there was not sufficient evidence, beyond the existence of the risk of recovery alone, to justify a stay of enforcement of the adjudication determination. As a result, the court dismissed the proceedings with costs and ordered the payment to DSD of the amount paid into the court by Goodwin.

Validity of the supporting statement

Goodwin submitted that the subcontractor had to be identified in some form of supporting schedule and, in the absence of any attachment to the supporting statement, there was no identification of whether any amounts were owing.

The court did not agree with either submission, instead finding that the document put forward as the supporting statement, when looked at as a whole, clearly identified there was only one subcontract, listed the name of the subcontractor and specified that no money was owing. Further, if any amounts owing were to be identified by means of an attachment, then the absence of such an attachment would suggest that no amounts were said to be owing.

Exercise of adjudicator's statutory function in good faith

The court held that the adjudicator was required to have regard to the matters set out in section 10(1)(b) of the NSW Act. McDougall J, citing *Zhang v Canterbury City Council* [2001] NSWSC 167, provided that the obligation to *'have regard to something'* required that *'the specified considerations be given weight as fundamental elements in the determination; that they be considered as the focal points by reference to which the relevant decision is to be made'*. That is, the requirement to *'have regard to'* something is effectively the same as the requirement to *'consider'* something.

His Honour also reiterated his previous statements from *Laing O'Rourke Australia Construction Pty Ltd v H&M Engineering and Construction Pty Ltd* [2010] NSWSC 818 (***Laing O'Rourke***) that the obligation to exercise the statutory function in good faith 'r*equires at least that adjudicators should turn their minds to, grapple with and form a view on all matters that they are required to "consider"'.*

Further, and in keeping with the findings of Vickery J in *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631 (***SSC Plenty***) (analysed in our Security of Payment Roundup of 2015 cases), the critical findings to be made by the adjudicator should include whether the construction work had been performed and, if it had, the value of the same. That task, according to McDougall J, required the adjudicator to assess fairly and weigh the whole of the evidence, including by drawing necessary inferences from the absence of supporting material, to arrive at a rational conclusion.

While the judgment of Vickery J in *SSC Plenty* sets out the full analysis of what is required of an adjudicator when making determinations in NSW, McDougall J took the view that it is not necessary to *'serially and mechanically'* apply those requirements in every case, and that doing so may lead the court to base its review on the merits, as opposed to jurisdictional error and want of good faith as required. For that reason, McDougall J's simpler description of the fundamental requirement of good faith given in *Laing O'Rourke* is preferred.

His Honour highlighted that it is necessary to consider an adjudicator's reasoning in light of the compressed time constraints in which it is created.

The court opined that the fundamental problem with the adjudicator's reasons was that it showed she was well aware of Goodwin's claim for defective work, but made no precise finding on the topic. His Honour stated that 'it would have been helpful for the adjudicator to express a clear view in clear terms as to what she found and why'.

However, despite these comments, McDougall J ultimately held that it was clear that the adjudicator proceeded on the basis that it was for Goodwin to satisfy the adjudicator of the amount of any offsetting claim and drew inferences from Goodwin's failure to adduce sufficient supporting evidence. The court stated that *'in circumstances where a party who raises an issue adduces no evidence on it, it is appropriate for the adjudicator to draw inferences from the absence of supporting material'* and found that this is what the adjudicator had tried to do in her reasons.

When reading the relevant part of the adjudicator's reasons as a whole and in context, and without any predisposition to find error in them, the court found that the adjudicator had:

- adequately dealt with the dispute before her;
- said that she was not satisfied that there was defective work; and
- given substantive reasons why.

Irreparable prejudice

As each of Goodwin's jurisdictional challenges had failed, the court turned to the stay of the adjudication determination sought by Goodwin.

McDougall J applied the decision of *R J Neller Building Pty Ltd v Ainsworth* [2009] QCA 397, particularly the comments of Keane JA that:

- the mere existence of the risk that a builder might ultimately be required to refund cash to an owner and be unable to do so due to financial failure is not enough, without something more, to justify a stay of enforcement of an adjudication; and
- pending final determination, the NSW Act in effect transfers risk from the builder to the owner.

While his Honour did accept that there was, at least, a possibility that the builder would be unable to satisfy a verdict in favour of Goodwin, in the absence of any evidence that DSD had taken steps to arrange its affairs to defeat any claim that may be made against it or engaged in delaying tactics, McDougall J held that there was nothing more than the risk of recovery alone in this case and therefore there were no circumstances to justify the imposition of a stay.

Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd [2018] NSWSC 1647

The terms of relief in this case reiterate the NSW Act's 'pay first, litigate later' imperative. However, if a party seeks to use a statutory demand under section 459G of the *Corporations Act 2001* (Cth) as a way of recovering a judgement under the NSW Act, the court will still determine whether an offsetting claim exists even though the offsetting claim was not raised in a payment schedule. This is because the statutory demand regime is not a debt recovery mechanism but a precursor to winding up.

A company facing a statutory demand which it contests on the ground of an offsetting claim should be expected to take immediate action to bring that claim forward for determination in the proper forum.

Additionally, when calculating 'days' for the purpose of assessing liquidated damages, it is important to stipulate whether it be 'calendar days' or 'working days'. Failure to do so may leave a client exposed to a greater liability period than originally contemplated.

FACTS

Budget Demolitions Pty Ltd (**Budget**) served on Grandview Ausbuilder Pty Ltd (**Grandview**) a statutory demand in respect of two unpaid progress claims made under the NSW Act. Grandview sought to set aside the statutory demand under section 459G of the *Corporations Act 2001* (Cth).

Grandview issued a payment schedule for the first payment claim, providing for payment of the full amount claimed, but never paid the sum. Grandview did not respond to the second payment claim within the ten day period allowed under section 14(4) of the NSW Act.

Despite Grandview's admission that Budget was owed the sums contained within the payment claims, Grandview maintained that it had three separate offsetting claims cumulatively exceeding the amount of the statutory demand, being:

- a liquidated damages claim for delay in completion;
- a claim for liquidated milestone damages for failure to perform certain works at certain times; and
- a damages claim for costs to complete the works.

DECISION

The court found that Grandview had established the existence of an offsetting claim but only for $220,000 in relation to liquidated damages for delay in completion but dismissed Grandview's other offsetting claims.

Liquidated damages for delay

Parker J was prepared to order the statutory demand be reduced by $220,000 but only on terms that Grandview undertake to commence proceedings as quickly as reasonably practicable to assert its offsetting claim.

His Honour assessed the potential right to liquidated damages for delay to be at $220,000, far less than Grandview had calculated. The damages should have been calculated per day of delay after the specified date of practical completion and should not have included any period of time that Grandview excluded Budget from the site by its own actions.

As part of an offsetting claim, the court should only be concerned with whether the claim for liquidated damages is 'genuine and sustainable', and not the likelihood of it being sustained at a hearing. Accordingly, the potential right to liquidated damages for delay were measured from the date of practical completion until the date on which Budget suspended works.

As Budget was unable to point to any provision of the contract expressly limiting the phrase 'per day' to working days, Budget was exposed to liability for 50 calendar days.

Liquidated milestone damages

The claim for liquidated milestone damages ($3.816m) failed in its entirety. The subcontract did not prescribe a day rate for failure to reach milestones, leaving the claim without proper justification. Grandview failed in its attempt to rectify the contract to include the appropriate rate after his Honour applied the *Graywinter* principal *(Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund* (1996) 70 FCR 452; [1996] FCA 822). That is, it is not open to the plaintiff seeking to set aside a statutory demand to introduce a new ground not supported by the original accompanying affidavit.

Cost to complete works

The claim for costs to complete works failed in its entirety as the figure for loss of bargain damages was negative. If Grandview had validly terminated the contract, it would be entitled to damages which would put it in the position it would have been had the contract been completed with its terms. His Honour calculated the figure as follows:

$1.1 million	(cost to complete works)
+	
$1.2 million	(amount already paid under the contract
-	
$2.5 million	(the total contract price – as noted above, it is necessary to include what Grandview would have had to pay under the contract if the terms were fulfilled as this would have been their final position).

Greenwood Futures v DSD Builders [2018] NSWSC 1407

A payment claim served unaccompanied by a supporting statement is void.

Multiple payment claims for progress payments may be issued in the same terms where the contract has no express reference date and the milestone has been reached.

Adjudicators should not account for defects where a milestone has been reached and the contract expressly determines the amount owed for that milestone.

FACTS

On 4 September 2017, Greenwood Futures Pty Ltd (**Greenwood**) entered in a construction contract (**Contract**) with DSD Builders Pty Ltd (**DSD**). DSD was entitled to progress payments at designated milestones of construction.

DSD took the following actions in succession by:

- on 12 March, submitting a payment claim for $220,000 for the completion of the fourth milestone and, on 7 April, submitting a second identical payment claim (both claims omitted a supporting statement), to which, on 16 April, Greenwood provided a payment schedule amounting to '$nil';
- on 17 April, lodging its first adjudication application with The Australian Solutions Centre (**TASC**);
- on 29 April, seeking to withdraw its application, and formal withdrawal occurred on 3 May;
- on 30 April, serving a third payment claim, identical in form to the first two but accompanied by a supporting statement pursuant to section 13(7) of the NSW Act; and
- lodging a second adjudication application which was withdrawn on 15 May.

On 14 May, Greenwood provided a payment schedule relating to the third payment claim, asserting that:

- the Contract had been terminated;
- the construction work had not reached the fourth milestone;
- in those circumstances, there was no reference date and therefore the payment claim was invalid;
- DSD was not entitled to any payments; and
- Greenwood was therefore entitled to set off, against any amount owing, the cost of completing the works and rectifying defects.

On 15 May, the Contract came to an end and DSD lodged a third adjudication application. On 1 June, this adjudication application timed out, and DSD exercised its right pursuant to section 26 of the NSW Act to withdraw its third application and lodge a fourth adjudication application. On 20 June, the adjudicator made his determination that DSD was entitled to be paid $220,000.

DECISION

The court upheld the adjudicator's determination and ordered the amended summons to be dismissed. It further ordered that the amount paid into court by Greenwood was to be paid to DSD. The court made no order as to costs.

Payment claims

The first issue confronting the court regarded the validity of the two payment claims submitted without supporting statements. DSD submitted that the claims were valid and relied on the decision of Ball J in *Central Projects Pty Ltd v Davidson* [2018] NSWSC 523, his Honour considered that, as the consequences of contravention were provided in the NSW Act, further invalidation was unnecessary.

The court did not agree and instead chose to follow the weight of first instance authority in *Kitchen Xchange v Formacon Building Services* [2014] NSWSC 1602 and *Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd* [2016] NSWCA 288. (Both of these cases are analysed in our Security of Payment Roundup of 2014 cases and Security of Payment Roundup of 2016 cases respectively.) McDougall J found the first two payment claims invalid as they were not accompanied by the requisite supporting statements. This matter needs to be finally determined by the Court of Appeal.

Reference date

The Contract provided no express reference date upon which a progress payment could be made. As such, the second issue to be determined by the court was the date at which DSD became entitled to claim a progress payment and whether it could serve more than one payment claim in respect of this date. Resolution of this issue required construction of sections 8 and 13(5) of the NSW Act which concern the right to progress payments and a prohibition on submitting multiple payment claims respectively.

Greenwood submitted that the reference date was the date of achievement of the milestone. This date coincided with the first payment claim. The second and third payment claims were argued as invalid by virtue of the operation of section 13(5) of the NSW Act.

DSD submitted that the milestone was reached on the date of the third payment claim as work was still being carried out in the month of April. It argued that section 13(5) of the NSW Act invalidated the first two payment claims, whereas the third remained valid.

McDougall J disagreed with both these submissions and found no need to establish an exact reference date. His Honour noted that the phrase *'on and from each reference date'* in section 8(2)(b) of the NSW Act theoretically allowed for multiple reference dates. His Honour found no contravention of section 13(5) of the NSW Act and held that the third payment claim was valid as it was supported by an available reference date.

Set-off for defects

Greenwood submitted that the adjudicator was required to value the construction works in accordance with section 10(1)(b) of the NSW Act. As the adjudicator had not done so, Greenwood considered this a failure to perform an essential element of his statutory function. Greenwood also took the view that it was entitled to set off the costs of rectifying any defects against the claimed amount.

The court found no failure of statutory function in the adjudicator's valuation. As the terms of the Contract awarded a fixed sum for the achievement of the milestone, the process of valuation fell within the ambit of section 10(1)(a) of the NSW Act. With the valuation process being determined in accordance with the terms of the Contract, the only relevant question for the adjudicator was whether the milestone had been reached. McDougall J stated that a consideration of defects may have been required if there was a claim for adjustments or variations, but as there was no such claim there was no room for section 10(1)(b) of the NSW Act to operate.

Greenwood Futures v DSD Builders (No 2) [2018] NSWSC 1471

The ordinary risk of insolvency and the existence of a counterclaim are insufficient to stay an order to pay under the NSW Act but if there are additional factors it may be possible to obtain a stay notwithstanding there is no actual insolvency.

FACTS

In *Greenwood Futures v DSD Builders* [2018] NSWSC 1407, one of the court's orders—that the amount of $220,000 paid into court by Greenwood be paid to DSD—was an order to stay that payment to DSD.

Greenwood sought the continuation of the stay on the ground that it had commenced a counterclaim against DSD in the NSW Civil and Administrative Tribunal (**NCAT**). Greenwood submitted that if the stay was not granted and the counterclaim succeeded (which was for more than $220,000), there would be a real risk that DSD would be unable to pay any amounts should Greenwood succeed in its counterclaim.

DECISION

The court granted a continuation of the stay.

The risk of insolvency

The court found that the ordinary risk of insolvency was itself insufficient to justify the granting of a stay. However, McDougall J found that additional factors together with this ordinary risk could be sufficient.

In its submissions, Greenwood tendered evidence of DSD's finances and historic corporate dealings in an effort to demonstrate the high likelihood of its insolvency in the immediate future:

- DSD had issued shares in the sum of $165, 000 but had failed to record this transaction as reducing its own equity position.
- DSD had subcontracted out the entirety of its role in the project and had not yet paid its subcontractors.
- DSD had substantial tax liabilities.
- The principals of DSD had a history of corporate dealings which implied the use of 'phoenix companies' in order to avoid liabilities.

The court was satisfied that the submissions of Greenwood were factors which demonstrated a risk well over and above the normal risk of insolvency, and also that there was very strong evidence that DSD's principals engaged in structuring their affairs in such a way so as to avoid, wherever possible, paying their liabilities. The court granted the stay on the basis that were Greenwood to recover a verdict in NCAT there was a high likelihood it may not be paid.

The existence of the counterclaim

The mere existence of a counterclaim did not influence the court's decision to grant the stay. McDougall J noted that the dispute was in the process of being resolved at NCAT and that DSD had yet to file evidence in reply. Despite attempts by Greenwood to convince his Honour otherwise, the court was reluctant to draw unfavourable conclusions from DSD's lack of submissions while the dispute was still in its infancy.

Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd [2018] NSWCA 339

This case is the appeal of *Australia Avenue Developments Pty Ltd v Icon Co (NSW) Pty Ltd* [2018] NSWSC 1578.

In setting aside the Supreme Court's decision, the NSW Court of Appeal confirmed that an error in construing the contract or in understanding the payment claim does not constitute jurisdictional error by an adjudicator, and therefore cannot form a basis upon which the adjudication can be quashed.

The NSW Court of Appeal emphasised that it is not appropriate for the court analyse the manner in which an adjudicator deals with the payment claims in their determination.

FACTS

The dispute concerned both the validity and sum of a payment claim for $3.66 million by Icon Co (NSW) Pty Ltd (**contractor**) in relation to the construction of the Opal Tower in Sydney. The superintendent, acting on behalf of Australia Avenue Developments Pty Ltd (**principal**), reviewed the claim and issued a combined progress certificate and payment schedule for the lower price of $1.16 million. The contractor lodged an adjudication application and the adjudicator determined that the amount to be paid was $2.64 million.

The principal challenged the adjudicator's determination on two grounds:

- The principal disputed the validity of the payment claim because the supporting statement predated service of the payment claim. The adjudicator had dismissed this contention because the reference date on the payment claim covered the same period as the supporting statement.
- The principal disputed the sum of the payment claim because, when issuing a combined progress certificate and payment schedule, the superintendent had allowed for previous deductions from the contract works price (**backcharges**). The adjudicator had made allowances in favour of the contractor on these items. The principal disputed this and argued that these allowances fell outside the scope of the payment claim and that the adjudicator had thereby exceeded her jurisdiction.

Supreme Court decision

Parker J ordered that the determination by the adjudicator be quashed.

Validity of the payment claim where signature of the claim and supporting statement predated service

The principal contended that the payment claim did not comply with the requirements of the NSW Act because the supporting statement did not include a declaration concerning payment of subcontractors in the appropriate form. Specifically, the principal argued that a payment claim is not 'made' until it is actually served, and hence the supporting statement was invalid as it predated service by 5 days.

Parker J disagreed. His Honour held that sections 13(7) and (9) of the NSW Act should not be construed so as to impose an obligation to ensure that the supporting statement is up to date at the point of service. Instead, the proper construction of section 13(9) of the NSW Act merely requires that the declaration must refer to the work the subject of the payment claim and state that all of the subcontractors have, at the date of the declaration, been paid. Hence, where the payment claim and supporting statement have concurrent reference dates, it is inconsequential that service occurs later.

In arguing for this construction, Parker J emphasised that, otherwise, a one-day delay in service after signing a supporting statement would result in non-compliance with the NSW Act – a 'draconian consequence'. Further, as a contractor has twelve months after construction work is finished to lodge a payment claim for that work, it is unreasonable to expect that the claim may be non-compliant due to a one-day delay in signature and service.

Interestingly, his Honour acknowledged a 'lacuna in the legislation': where a subcontractor has undertaken work but is not contractually entitled to payment until a date after the contractor is entitled to payment for that work, it is permissible for the contractor to make a claim and enforce payment despite not having paid the subcontractor's amount.

Inclusion of backcharges in sum of payment claim

Further, the principal argued that the adjudicator erred in entertaining a challenge to the backcharge items, as those items were not part of the payment claim and hence not part of the adjudication process. Parker J agreed, stating that the backcharge items should not have been raised in the payment schedule. Rather, where a payment claim is made up of a number of individual items for which an amount is claimed, the adjudication must be limited to those items and those amounts.

His Honour next considered whether this error was a jurisdictional one which invalidated the determination. Parker J determined that it was. This was based on a distinction his Honour drew between an adjudicator determining what is claimed in the payment claim, and an adjudicator determining the grounds, factual or legal, upon which the contractor's claim is based. Here was the former; determining whether the backcharges were to be included in the claim is an anterior point to the determination of the dispute and is not a matter which requires adjudicatory expertise. Essentially, the adjudicator had given a determination in favour of a contractor which went beyond what the contractor claimed in the payment claim. This was a jurisdictional error which invalidated the adjudicator's determination.

The contractor appealed that decision on the grounds that:

- the court erred by examining the approach adopted by the adjudicator when forming an opinion as to the meaning of the contract; and
- the principal did not identify error in how the adjudicator addressed the issues; rather it submitted that the adjudicator should not have addressed the issues otherwise than by accepting the principal's position.

DECISION

The New South Wales Court of Appeal upheld the appeal and set aside the original judgment of Parker J in the Supreme Court.

Basten JA followed the reasoning set out by Giles JA in *Downer Construction (Australia) Pty Ltd v Energy Australia* [2007] NSWCA 49 and found that it was within the adjudicator's power to form an opinion as to the meaning of the contract and the payment claim. As such, there was no reviewable error by the adjudicator. It was therefore not appropriate for the primary judge to have engaged in an analysis of the manner in which the adjudicator dealt with the payment claim in her determination.

In reaching this conclusion the court made the following observations:

- the NSW Act does not provide a right to appeal adjudicators' findings with respect to matters of fact – so long as they are within jurisdiction. In addition, there is no review for errors of law on the face of the record, and thus the adjudicator's determination of legal issues will also be unreviewable;
- while the construction of a contract will usually involve questions of law, the NSW Act implicitly confers on the adjudicator the power to form an opinion as to the meaning of the contract for the purposes of an adjudication; and
- the NSW Act requires that the adjudicator 'is to consider' the provisions of the construction contract and the payment claim. However, an error in construing the contract or in understanding the payment claim does not constitute jurisdictional error and therefore cannot form a basis upon which the adjudication can be quashed.

In the matter of Powerpark Systems Pty Ltd [2018] NSWSC 793

Parties must give prompt consideration to their rights to challenge an adverse adjudication to avoid being time-barred from making certain arguments. In NSW, a party has three months to seek judicial review of a resulting judgment on the basis of jurisdictional error.

FACTS

Powerpark Systems Pty Ltd (**Powerpark**) is an installer of solar panels. Powerpark engaged Shoemark Electrical Pty Ltd (**Shoemark**) to undertake various supervisory roles on projects in NSW and Queensland.

Shoemark issued a payment claim under the NSW Act for $44,811.11 in respect of services at two NSW sites and one Queensland site.

Powerpark responded with a payment schedule alleging defective work undertaken by Shoemark at one of the NSW sites, agreeing to pay $24,956.97 and noting that it would be pursuing Shoemark for rectification costs if the matter was not resolved.

Shoemark applied for adjudication of its claim, describing the project location as 'Sydney, Central Coast' but the project name as 'Sunny Queensland LAFHA' – an apparent reference to a disputed Queensland project which is outside of the jurisdiction of the NSW Act.

On 11 October 2017, the adjudicator determined that the amount payable by Powerpark to Shoemark was $44,811.11 but it was clear from the adjudicator's reasons that he proceeded on the basis that Shoemark's claim was for construction work at project sites within NSW. Powerpark subsequently issued invoices to Shoemark for the rectification costs of the alleged defects in the work performed by Shoemark.

On 25 October 2017, Shoemark served a creditor's statutory demand on Powerpark for $48,230.74 and, on 27 November 2017 judgment pursuant to section 25 of the NSW Act was entered in the Local Court for Shoemark in respect of that demand for the amount of $48,230.74 (comprising the adjudicated amount, adjudication fees and interest).

Basis of action against Shoemark

Powerpark sought an order under section 459G of the *Corporations Act 2001* (Cth) (**CA**) to set aside the demand on three grounds:

- there was a 'genuine dispute' about the existence or amount of debt pursuant to section 459H(1)(a) of the CA because one of the contracts was performed in Queensland, which is outside of the jurisdiction of the NSW Act, thus affecting the adjudication certificate and subsequent judgment by jurisdictional error;
- this jurisdictional error constituted 'some other reason' why the demand should be set aside pursuant to section 459J(1)(b) of the CA; and
- there was also an offsetting claim against Shoemark pursuant to section 459H(1)(b) of the CA for its defective work and for Powerpark's loss of profits.

DECISION

Gleeson JA held that Powerpark had failed to establish that the statutory demand should be set aside on the basis of the first and second grounds. However, there were some glimpses of sun for Powerpark as it was successful in establishing an offsetting claim resulting from Shoemark's defective workmanship. The demand was reduced from $48,230.74 to $21,483.14.

No 'genuine dispute'

Notwithstanding a concession from counsel for Shoemark that the NSW Act did not apply to the work performed in Queensland, his Honour held that once the adjudication certificate had been filed pursuant to section 25 of the NSW Act, the resulting judgment was not void.

His Honour pointed out that as such a judgment may be quashed by judicial review on the basis of jurisdictional error, but since Powerpark had not made such an application (or an application to extend the time for commencing such proceedings), it was out of time to commence such proceedings (the relevant limitation period in NSW being three months from the date of the decision).

'Some other reason' to set aside the claim

His Honour referred to previous authority which held that the power under section 459H(1)(b) of the CA should not be activated unless the decision to do so is supported by a sound or positive ground or good reason relevant to the purpose of the power. His Honour remarked that generally there will not be 'some other reason' for setting aside the statutory demand if to do so would have the practical effect of granting a stay of the judgment. However, his Honour did accept on authority that there was no rigid rule to confine the scope of exercising this power.

In the present case, his Honour was not persuaded to exercise this power as Powerpark had not applied to stay the judgment in the local court or applied for an extension of time to commence proceedings for judicial review seeking relief to quash the adjudicator's determination.

Further, no evidence had been led relevant to the exercise of the court's power to grant an extension of time for the commencement of judicial review proceedings.

Offsetting claim

The test for an offsetting claim is whether the court is satisfied that there is a serious question to be tried where there is such a claim, or that the claim is not frivolous or vexatious.

His Honour held that there was a plausible, cogent and quantifiable offsetting claim for defective work carried out by Shoemark.

However, Powerpark failed to adduce evidence beyond bare assertion to make out a claim for additional offset damages arising from the loss of chance for deprivation of commercial opportunity on other projects arising from Shoemark's defective work, hence the partial reduction of the demand amount rather than the dismissal of the whole demand.

Laing O'Rourke Australia Construction Pty Ltd v Monford Group Pty Ltd [2018] NSWSC 491

In any adjudication under the NSW Act, an adjudicator must properly consider the merits of the claimant's claim, even if the adjudicator rejects the respondent's contentions (or those contentions were not put forward in a payment schedule).

When making an adjudication application, a party must ensure they provide sufficient evidence of the validity of the claim including work carried out, value of the work carried out and the right to payment under the contract.

FACTS

Laing O'Rourke Australia Construction Pty Ltd (**respondent**) engaged Monford Group Pty Ltd (**claimant**) as a subcontractor in relation to the Transport Interchange Facility Project at Wickham.

On 22 September 2017, the claimant served a payment claim on the respondent for $3,476,977.33 (**Payment Claim**).

On 6 October 2017, the respondent served a payment schedule under which it did not propose to pay the claimant any amount pursuant to the Payment Claim.

On 20 October 2017, the claimant made an adjudication application in relation to the Payment Claim for $2,724,675.05 for contract works and variations.

On 28 November 2017, the adjudicator found that the claimant was entitled to a progress payment of $1,173,056.24.

The respondent challenged the adjudicator's determination on the basis that the adjudicator had not performed their statutory function and the determination must be set aside. The dispute before the court related to the amount awarded by the adjudicator to the claimant relating to variations, being $590,288.97. The respondent argued that the adjudicator allowed the claimant's claim in relation to 12 claimed variations without considering the merits of the claimant's claims.

DECISION

Stevenson J held that the adjudication determination was void. His Honour found that the adjudication determination was made without jurisdiction as, in failing to address the merits of the claimant's claim the adjudicator had not performed his statutory function.

His Honour referred to the relevant authorities which provide that an adjudicator making a determination under the NSW Act has a *'duty…to come to a view as to what is properly payable'* on the *'true merits of the claim'*. The adjudicator cannot simply award the amount of the claim without addressing its merits.

In this case, the adjudicator expressed his conclusions in relation to each of the claimed variations to be 'based on the above' in the adjudication determination. Stevenson J noted that:

> *'the 'words "based on the above" should be taken to mean, in relation to each variation considered by the adjudicator, the reasons set forth in the immediately preceding paragraphs concerning that particular variation.'*

However, nowhere in the earlier parts of the adjudicator's determination did the adjudicator demonstrate that he had come to a view as to whether the claimant had carried out the work, the value of that work or, for 6 of the 12 challenged variations, whether the work constituted a variation to the contract.

Owners of Strata Plan 80458 v TQM Design & Construct Pty Ltd [2018] NSWSC 1304

Within the law of New South Wales, the concept of 'temporary disconformity' in the dissenting judgment of Lord Diplock in *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] All ER Rep 121 (HL) (*P & M Kaye*) does not exist.

The court rejected the application of 'temporary disconformity' as a defence to a claim for breach of contract in respect of building defects as proposed by Lord Diplock in *P & M Kaye*. According to the senior counsel in this case for the builder: where a builder under a building contract does defective work, if the builder still has the opportunity to remedy it (which the builder can do at any time before it is to hand over the works or during any defects liability period), the builder is not in breach of the building contract until after the opportunity to remedy has passed. In the meantime, the defects would be noted as a 'temporary disconformity'.

FACTS

The owners' corporation and individual apartment owners of a residential apartment building in Narrabeen brought a claim for damages for defective building work against TQM Design & Construct Pty Ltd , the original builder (**TQM**) hired by the principal and developer of the strata scheme, PVD No.16 Lagoon Street Pty Ltd (**PVD**).

Beginning in April 2007, TQM had served a succession of payment claims under the NSW Act. A lack of response by PVD resulted in TQM's suspension of the works on the ground of PVD's failure to pay and shortly thereafter TQM stopped attending the site. PVD then claimed TQM wrongfully suspended the works and was in breach of contract and refused TQM any further access to the site and the contract was abandoned. PVD then hired a new contractor to complete the works.

The argument of temporary disconformity

TQM alleged that any defects in the works should have been noted as a 'temporary disconformity' as opposed to a breach of contract as it was denied any opportunity to fix the works when PVD had unlawfully taken the work out of its hands. Applying the rule of 'temporary disconformity' would have rendered the incomplete works as 'temporarily incomplete' and given TQM the opportunity to rectify the works rather than amounting to a breach of contract with a resulting damages award.

DECISION

In dismissing the notion of 'temporary disconformity', Hammerschlag J noted there is no such rule of law in NSW. His Honour took the view that Lord Diplock's comments in *P & M Kaye* did not formulate any such theory of 'temporary disconformity' but were made in the context of the particular standard form building contract between the parties where defective work was actually remedied before the relevant certificate was issued.

His Honour heard evidence and found that the nature of the defects in question would only have become apparent during mandatory tests ordinarily conducted for the issue of an occupancy certificate. Hammerschlag J concluded that it was therefore unlikely that these defects would have been rectified either before practical completion or during the defects liability period which meant that the builder of such defective work would be in breach of the building contract.

Pinnacle Construction Group Pty Ltd v Dimension Joinery & Interiors Pty Ltd [2018] NSWSC 894

The case highlights the difficulties in challenging an adjudicator's determination based on grounds such as a breach of natural justice and/or irrationality and unreasonableness. The judge echoed previous authorities to emphasise that adjudications are a form of 'rough justice' and adjudicators should be afforded 'very considerable latitude … as to the manner and form of the determination'.

FACTS

Pinnacle Construction Group Pty Ltd (**Pinnacle**), as head contractor, engaged Dimension Joinery & Interiors Pty Ltd (**Dimension**) on the development of a residential development comprised of 103 apartments in Dee Why. Pinnacle and Dimension entered into a contract on 17 January 2017 (**contract**) which stipulated that progress claims were only to be submitted once and on the 15th day of every month.

Pursuant to the NSW Act and the contract, Dimension submitted a payment claim on 12 December 2017 for the amount of $144,630.80. The payment claim encompassed works completed between 20 February 2017 and 10 November 2017 and specified a reference date of 15 November 2017. In response, Pinnacle scheduled an amount of '$Nil'.

Dimension proceeded to adjudication. The adjudicator determined that Pinnacle owed Dimension $111,470.80. Pinnacle challenged the adjudicator's determination on the following grounds:

- there was no reference date available to support the payment claim;
- it had been denied procedural fairness; and
- the adjudicator's findings were irrational or unreasonable.

DECISION

The judge dismissed each of the grounds and dismissed the proceedings with costs.

Reference date arose after completion of work and was available to support the claim

The payment clause in the contract stipulated that claims are to be submitted 'once' and on the 15th day of every month. Reference dates continue to arise after work ceases, unless the contract provides otherwise. Pinnacle contended that the payment clause could not be interpreted to mean that reference dates would continue to arise after work had ceased and therefore the payment claim the subject of the adjudication was in respect of a reference date that had already been used.

The court did not agree with Pinnacle's interpretation and found that the payment clause did not prevent the recurrence of reference dates after work had been completed and Dimension was entitled to submit a claim on 12 December 2017. Further, Dimension did defect rectification work during the relevant period. The performance of defect rectification work is sufficient to cause a further reference date to arise where, as in this case, the contractor is entitled to the release of monies withheld for such work under the contract.

Procedural fairness was not denied

Pinnacle contended that certain findings by the adjudicator were made without it being provided with the opportunity to respond. In relation to one finding, the court held that while the adjudicator had used 'colourful language' in criticising Pinnacle, there was no sinister implication in those words and the adjudicator was simply accepting Dimension's submissions. The judge recognised that whilst the adjudicator had also accepted other submissions of Dimension which did not accurately reflect the contents of the documents to which they related, Pinnacle did not take issue with these submissions in its response and there was therefore no denial of procedural fairness.

No absence of rationale or reasonable reasoning on adjudicator's part

Pinnacle's submissions that the adjudicator's findings were so irrational and unreasonable as to go beyond jurisdiction were based on its allegations of a breach of natural justice. As the judge did not accept those grounds it was unsurprising that this ground was also dismissed. Notably, the judge accepted that *'it would require a most extraordinary case for a court to find an adjudicator's decision to be unlawful because it is irrational …'*. This was understandable in the context of the NSW Act which promotes 'rough justice' with the main purpose of achieving an informal, summary, and quick outcome, aligning with a 'brutally fast' approach.

Primelime (NSW) Pty Ltd v B.A.E.C. Contracting Pty Ltd [2018] NSWSC 372

Before commencing an adjudication, be sure to check the party that you are adjudicating against is the party you entered into a contract with. If another arrangement or 'fresh contract' exists, for example, where a related entity was invoiced and paid for the works carried out by the party to the contract, as in this case, this issue will need to have been put to the adjudicator to be relied on in any challenge subsequently made.

FACTS

Primelime (NSW) Pty Ltd (**Primelime**) owned a quarry in Cudal, NSW, and sought assistance from 'B.A.E.C.' (to use a neutral term at this point of our analysis) to perform electrical recommissioning works.

On 9 May 2016, B.A.E.C. emailed Primelime attaching a schedule of rates for the requested works (**May email**). The email was neutral as to which particular B.A.E.C. company (B.A.E.C. Contracting or B.A.E.C. Electrical) was its author, however the attachment to the email specified B.A.E.C. Electrical as the author. On 12 July 2016, B.A.E.C. sent a subsequent email to Primelime, again, neutral as to the particular issuing B.A.E.C. company, adjusting a portion of the rates previously issued (**July email**). The May and July emails together formed the original contract (**Contract**).

B.A.E.C. commenced work on the quarry site on 14 July 2016 under an agreement to issue payment claims every 14 days and that payment was to follow 14 days later. On 22 August 2016, B.A.E.C. Electrical prepared site drawings to assist in the performance of the works. All invoices had been issued by B.A.E.C. Contracting.

On or about 20 January 2017, it was common ground that the Contract was terminated but the parties did not agree on how that occurred. Primelime said B.A.E.C. repudiated the Contract which was accepted by Primelime as a discharge of the Contract. B.A.E.C. Contracting claimed that the termination was by agreement and referred to a letter it had issued to Primelime on 23 January 2017 confirming the termination of the Contract while reinforcing their right to receive payment for works completed prior to the date of demobilisation.

Pursuant to an adjudication determination under the NSW Act, an adjudicator found in favour of B.A.E.C. Contracting.

Primelime challenged the adjudicator's decision, contending that the adjudicator had no jurisdiction as B.A.E.C. Contracting was not a party to the Contract and there was no available reference date following the termination of the Contract.

DECISION

The court allowed the appeal finding that the adjudicator did not have jurisdiction as there was no available reference date following the termination of the Contract.

Who are the parties to the contract?

The court held that the better view was that B.A.E.C. Electrical, rather than B.A.E.C. Contracting, was the party to the Contract because the schedule of rates accompanying the May email clearly identified B.A.E.C. Electrical.

The court took this view even though the invoices were issued by B.A.E.C Contracting, and Primelime's director had made a statutory declaration which stated that he entered into a verbal agreement with B.A.E.C Contracting. However, as Primelime was successful on the second issue, McDougall J considered it unnecessary to make an express finding on the first issue.

Reference date on and from which the payment claim could be made

The court found that nothing suggested the contractually determined reference date in the Contract survived termination of the Contract and, relying on *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52 (analysed in our Security of Payment Roundup of 2016 cases), held that there was no statutory right to make a payment claim on or after 20 January 2017.

Further, the court dismissed B.A.E.C. Contracting's argument that a 'fresh' contract was created between Primelime and B.A.E.C. Contracting based on the 23 January 2017 letter under which B.A.E.C. Contracting retained the right to payment as the fresh contract did not specify a reference date. His Honour noted that the 23 January 2017 letter simply conveyed consensual termination and B.A.E.C. Contracting's entitlement to payment for works completed up until the date of demobilisation. The letter did not extend to a suggestion that the work was completed under a contract other than the original contract so as to alter the requirements under section 8(2)(b) of the NSW Act. Further, this was not the way in which the matter was put to the adjudicator.

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

Together with the other landmark judgment of the High Court in *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5 (*Maxcon*), the High Court confirmed that each of the NSW Act and the SA Act removes a court's jurisdiction to overturn an adjudicator's determination infected by non-jurisdictional errors of law. The decision emphasises the interim nature of adjudication determinations. Parties can seek final determination by a court or other agreed alternative dispute procedures.

FACTS

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

Shade Systems served a payment claim on the subcontractor under the NSW Act in respect of which the subcontractor responded with a nil payment schedule. The adjudicator allowed Shade Systems the bulk of the payment claim and rejected the subcontractor's set-off for liquidated damages because:

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

The primary judge (Emmett AJ sitting in the Equity Division) set aside the determination holding that the adjudicator erred in finding that the subcontractor was not entitled to liquidated damages.

The NSW Court of Appeal unanimously rejected that decision and held that adjudication determinations are not open to judicial review for non-jurisdictional errors of law.

The High Court granted special leave to hear the subcontractor's appeal to overturn the NSW Court of Appeal's decision.

DECISION

The High Court unanimously dismissed the appeal and affirmed that an adjudicator's non-jurisdictional errors of law will not be overturned.

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 its 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.

Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq); Ostwald Bros Pty Ltd (in liq) v Seymour Whyte Constructions Pty Ltd [2018] NSWSC 412

The Supreme Court of New South Wales has stayed recovery proceedings under the NSW Act in light of the mandatory set off procedure under section 553C of the *Corporations Act 2001* (Cth).

Where a contractor goes into liquidation after receiving an adjudication decision, but before filing the adjudication certificate for enforcement, they remain a 'claimant' under Part 3 of the NSW Act. The court found that *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 (*Façade*) (analysed in our Security of Payment Roundup of 2016 cases) was plainly wrong in concluding the contrary on this point. However, recovery proceedings will nonetheless be stayed under the mandatory set off procedure in section 553C of the *Corporations Act 2001* (Cth).

The case also confirmed that the courts are prepared to rectify contractual errors where they are satisfied that they were a common mistake.

FACTS

Seymour Whyte Constructions Pty Ltd (**Seymour Whyte**), as contractor, entered into a contract with Ostwald Bros Pty Ltd (**Ostwald**), as subcontractor, to perform road works on the Pacific Highway. The contract, which comprised of three documents, contained inconsistent provisions about the time limit to pay after a payment claim was made. The Subcontract Conditions provided payment was due 'within 30 days of the end of month of claim', while the Special Conditions purported to displace this and provided payment was required within '15 business days'.

After Seymour Whyte terminated the contract, Ostwald made a successful adjudication application but was subsequently liquidated after a period of voluntary administration. Seymour White then commenced proceedings, seeking a declaration that the adjudication determination was void and a stay of any judgment arising from the filing of an adjudication certificate. The issues were:

- should the contract be rectified to delete the inconsistent clause in the Special Conditions;
- was Ostwald's adjudication application therefore made in time;
- did Ostwald lose its entitlement as 'claimant' under the NSW Act as a result of being in liquidation, following the Victorian Court of Appeal's decision of *Façade*; and
- whether recovery under the NSW Act should nonetheless be stayed because Ostwald was in liquidation.

DECISION

Stevenson J ordered rectification of the contract and for all recovery proceedings to be stayed until the process in section 553C of the *Corporations Act 2001* (Cth) was complied with. In coming to this decision, his Honour made the following findings:

- The contract should be rectified to refer only to *'within 30 days of the end of month of claim'*, in accordance with the actual and common intention of the parties ascertained by the pre-contractual evidence.
- Accordingly, Ostwald made its adjudication application in time.
- Ostwald remained a 'claimant' under Part 3 of the NSW Act despite being in liquidation. His Honour found the decision of *Façade* was 'plainly wrong' and should not be followed.

Southern Cross Electrical Engineering v Steve Magill Earthmoving [2018] NSWSC 1027

Even where a factual analysis may later demonstrate that calculations relied upon by an adjudicator to make a determination were wrong, this may not mean that an adjudicator's decision will be held to be unreasonable and invalid.

This decision demonstrates that courts are very reticent to interfere with an adjudicator's determination under the NSW Act. Head contractors need to ensure that they include sufficiently detailed reasons for withholding payment at the time of issuing a payment schedule.

FACTS

The contractor, Southern Cross Electrical Engineering (**Southern Cross**) engaged a subcontractor Steve Magill Earthmoving (**Earthmoving**) to perform excavation and trenching works.

A dispute arose when Earthmoving served a payment claim on Southern Cross for an amount which was substantially more than was originally quoted. The parties had agreed that Earthmoving was to be paid per lineal metre of trench dug. In its payment claim, Earthmoving had summed the total lineal metres dug and then doubled this number to account for the cost of making the trenches slightly wider than the width of the bucket attached to its excavator.

Southern Cross disputed the claim and took particular issue with the 'unjustified and unreasonable' method of calculation adopted by Earthmoving. The dispute went to adjudication and the adjudicator accepted Earthmoving's calculations.

Southern Cross sought ancillary relief and a declaration that the adjudicator's determination was void on the grounds that:

- the adjudicator had wrongly imposed an onus on Southern Cross to prove that there had been no variation or change to the scope of works required under the subcontract; and
- it was unreasonable to double the number of lineal metres as it did not reflect the value of the work performed and to that extent it constituted a jurisdictional error.

DECISION

The Supreme Court found that, while the adjudicator's approach was 'probably wrong', it was not so unreasonable as to invalidate his determination.

On the issues identified above, McDougall J found that:

- on a fair reading of the adjudicator's reasons, in the context of the evidence as a whole, there was no onus imposed on Southern Cross; and
- the accuracy of measurements had only been raised as an issue in its payment schedule and Southern Cross had not raised its objection to the nature, and the validity, of the measurement methodology. Therefore Southern Cross could not raise these matters subsequently in its adjudication response.

The court was reticent to interfere with an adjudicator's decision and would not use the concept of reasonableness to disguise an inquiry into the merits of an adjudication decision.

In giving reasons, McDougall J was at pains to note that the facts need to be considered in the context of the evidence as a whole and acknowledged that adjudicators work under considerable time pressures. Adjudicators are not legally trained, and in this case the adjudicator was given very little assistance by the parties in dealing with a complex claim. The NSW Act gives adjudicators a significant degree of discretion and, given the time constraints, the decision was not unreasonable and therefore the summons was dismissed with costs.

Trinco (NSW) Pty Ltd v Alpha A Group Pty Ltd [2018] NSWSC 239

After terminating a contract which had no provision for reference dates to accrue after termination, a subcontractor was left with no available reference date to claim for work performed prior to that termination. As earlier payment claims had already utilised the final available reference dates under the contract, the disputed payment claim including the relevant work was found to be invalid.

Contractors/subcontractors should insist on including a specific reference date that accrues on, or continues to accrue following, the termination of a contract (including termination for convenience).

FACTS

Trinco (NSW) Pty Ltd (**Trinco**) and Alpha A Group Pty Ltd (**Alpha**) were in dispute as to a determination made by an adjudicator pursuant to the NSW Act. The central issue was whether a payment claim issued by Alpha was made 'on or from a reference date', as required by the NSW Act.

On 6 March 2017, Trinco as head contractor and Alpha as subcontractor entered into a written subcontract for Alpha to perform tiling and silicone work on a project at Mascot (**Written Subcontract**). The Written Subcontract was a 'construction contract' for the purposes of the NSW Act. It provided for progress claims to be made on the 25th day of each month but made no provision for reference dates to accrue after termination.

From 6 June to 8 June 2017, after Alpha had carried out some of the work, the parties exchanged a series of emails relating to certain disputed work and the continuation of the Written Subcontract. It is unnecessary to go into the detail of these emails other than to note that, in a confusing exchange, the parties seemingly agreed, on 7 June 2017, to terminate the Written Subcontract, only for Trinco to purportedly 'reject' that termination on 8 June 2017 and insist that Alpha continue on the same terms but with an altered scope of works. Alpha then returned to the site on a number of days between 8 June and 11 August 2017 and performed the work.

The progress claims

Alpha served three progress claims during the course of their engagement with Trinco. The first, dated 25 May 2017, claimed $12,350. The second progress claim, dated 26 June 2017, was not in evidence and the amount claimed was unknown. Progress claim 3, dated 7 September 2017, was the payment claim the subject of the adjudication. While giving evidence, Mr Alizada of Alpha agreed that the disputed sum of $65,875 in progress claim 3 was the total amount claimed by Alpha *'for work under the Written Subcontract'*. The two remaining amounts claimed by progress claim 3 were $120,697.50 for lost profit (later withdrawn during adjudication) and $27,511 for *'extra work*', which Mr Alizada explained was for work *'performed by Alpha after 7 June 2017*'.

The adjudication

The adjudicator determined that, despite the purported termination on 7 June 2017, the work valued at $65,875 claimed in progress claim 3 was done pursuant to the Written Subcontract. He upheld this claim but found that the claim for extra work was not made out.

DECISION

McDougall J overturned the adjudicator's decision and found no available reference date existed for the amount of $65,875 in progress claim 3. Consequently, this aspect of progress claim 3 was not valid and the adjudicator lacked jurisdiction to determine the adjudication application. The analysis is broken down as follows.

Identification of the 'construction contract'

McDougall J found that, despite Trinco's attempted 'rejection' of the termination, the legal effect of the email exchange constituted, on 7 June 2017, a mutually agreed termination of the Written Subcontract and, on 8 June 2017, an offer by Trinco to engage Alpha to perform the work specified in the relevant email on the same terms.

On that basis, Alpha's conduct in returning to the site and performing the works specified in the email amounted to an acceptance of the offer. At that point, a fresh subcontract for the performance of those works came into existence (**New Subcontract**), in circumstances where Alpha's existing obligation to perform them had been discharged by termination of the Written Subcontract. McDougall J found, on that analysis, that work done prior to 7 June 2017 was performed under the Written Subcontract and work done from 8 June 2017 onwards was performed under the New Subcontract that came into existence on that day.

Was there a reference date?

As noted above, the Written Subcontract made no provision for reference dates to accrue after its termination. Therefore, the termination on 7 June 2017 had the effect of discharging both parties from further performance and, relevantly, limiting Alpha's rights under the Written Subcontract to those accrued at the date of termination. McDougall J noted that these points follow directly from the High Court's decision in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52 (***Southern Han***) (analysed in our Security of Payment Roundup of 2016 cases), where the form of contract considered by the High Court was not materially distinguishable from the Written Subcontract.

According to McDougall J's analysis, the New Subcontract did make provision for reference dates. As Alpha continued to perform work up until 11 August 2017, reference dates arose on 25 June, 25 July and 25 August 2017. The first of those could have been used to support the second progress claim, dated 26 June 2017. Relevantly, the third date was an available reference date for progress claim 3, dated 7 September 2017, but only in respect of its work performed under the New Subcontract.

Under what contract was the third progress claim made?

Trinco argued that, leaving aside the claims for extra work and loss of profit, the work that was the subject of progress claim 3 was all done under the Written Subcontract, which had been terminated. Alpha did not dispute that the Written Subcontract was terminated on 7 June 2017. Rather, Alpha's case was that the work in question had been done under the New Subcontract.

McDougall J held that the work that was the subject of progress claim 3 comprised two elements (ignoring the withdrawn claim for loss of profit). The first element was work done under the Written Subcontract prior to 7 June 2017, which comprised the work claimed at $65,875. This claim had been allowed by the adjudicator. The second element was work done under the New Subcontract after 7 June 2017, which comprised the 'extra work' valued at $25,711. That claim was not allowed by the adjudicator.

McDougall J cited *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 as authority for the principle that service of a valid payment claim is one of the basic and essential requirements for the existence of an adjudicator's determination. That is, if there were no valid payment claim here, the adjudicator lacked jurisdiction to entertain and determine the adjudication application (in relation to the $65,875 claim).

To the extent that progress claim 3 was made under the Written Subcontract, there was no available reference date to support it, because the contractual provision for reference dates did not survive termination. As the Written Subcontract was terminated on 7 June, the final reference date under that contract was 25 June 2017, which had already been used for the second progress claim dated 26 June 2017. Alternatively, to the extent that progress claim 3 was made under the New Subcontract, there would have been an available reference date, but the work in question – which, according to Mr Alizada, was performed on or prior to 7 June 2017 – was not performed under the New Subcontract. The absence of a reference date under the Written Subcontract was therefore fatal to the validity of progress claim 3 considered as a payment claim.

Queensland

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The *Building Industry Fairness (Security of Payment) Act 2017* (Qld) is referred to as the **Qld BIF Act**

and

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

Queensland overview

EMERGING TRENDS

Since 2014, amendments to the Qld Act have created a more respondent friendly adjudication process which has resulted in a steady decline in the number of payment claims being sent to adjudication.

This trend became more apparent in the lead-up to the commencement of the Qld BIF Act on 17 December 2018. This is because the Qld BIF Act process is considered to be more claimant-friendly and claimants elected to wait to proceed under the Qld BIF Act process.

With the Qld BIF Act now in force, we expect the number of adjudicated payment claims to rise again in 2019 as we see claimants take advantage of the amended adjudication process.

DEVELOPMENTS

The anticipation of the Qld BIF Act, along with lack of large infrastructure projects in Queensland last year, has resulted in a decline in the number of adjudication applications made in the past year. Statistics of the Queensland Building and Construction Commission recorded that only 240 adjudication applications were lodged last year, compared to:

- 274 applications in 2017
- 311 applications in 2016
- 353 applications in 2015.

After much fanfare, BIF finally came into force on 17 December 2018. The Qld BIF Act is more claimant-friendly than the Qld Act given that:

- there is no longer any need to endorse a payment claim;
- the claimant has a longer timeframe to bring an adjudication application; and
- a statutory reference date is created post termination.

The Qld BIF Act also presents new challenges for respondents such as:

- potential exposure to penalties and disciplinary actions under the *Queensland Building and Construction Commission Act 1991* (Qld);
- no second chance to provide a payment schedule; and
- no ability to raise new reasons in an adjudication response, even for complex claims.

FUTURE

Respondents will have to be even more vigilant in responding to payment claims in 2019 given that they do not need to be endorsed in order for a claimant to utilise the Qld BIF Act. All payment claims should be responded to within time and with fulsome reasons given the new challenges that respondents are facing.

We anticipate that the number of adjudicated payment claims will rise in 2019, as claimants take advantage of the more claimant-friendly nature of the Qld BIF Act.

We also anticipate an increase in the number of adjudication applications being litigated in the Queensland courts during the transition to the Qld BIF Act, while the courts interpret the new legislation.

Chapel of Angels Pty Ltd v Hennessy Builder Pty Ltd & Anor [2018] QDC 218

The Queensland District Court held that a builder, who carried out unlicensed building work, is entitled to reasonable remuneration such that the owner, despite being successful in its claim to recover payments made under the contract, owes the builder $67,492.88 (in addition to the payments made under the contract).

A builder can claim reasonable remuneration for work carried out which may be in excess of the contract price despite not holding the appropriate licence. It is crucial for owners to conduct a licence search, prior to contracting a builder, to ensure that the builder is licensed to carry out the whole of the works. A licence search can be conducted on the Queensland Building and Construction Commission website.

FACTS

Hennessy Builder Pty Ltd (**Builder**) was engaged by Chapel of Angels Pty Ltd (**Owner**) to construct a chapel.

On 6 December 2012, the parties executed the contract with an agreed contract sum of $652,312.79. After execution of the contract, problems emerged as a result of errors in the plans relevant to the scope of work. Importantly, the errors were not the fault of the Builder. The plans were revised multiple times. In May 2013, the final amended plans were provided to the Builder and both parties agreed to vary the contract to reflect the amended scope of work

In March 2014, the Owner took back possession of the project site by changing the locks to the chapel. Later that month, together with a payment claim for $98,316.24 pursuant to the Qld Act, the Builder delivered a notice of intention to terminate the contract.

On 8 April 2014, the Builder terminated the contract on the ground that the Owner failed to meet its payment obligations and on 9 May 2014, the Builder applied for an adjudication decision requiring the Owner to pay the Builder $96,526.24 plus interest (which was later successful).

On 23 October 2014, the Owner commenced proceedings against the Builder.

The Owner's claims

- **Unlicensed status breached Qld Act and invalidated the adjudication determination**: The Owner claimed that the chapel should be categorised under the Building Code of Australia (**BCA**) as a two-storey building, which fell outside the scope of the Builder's licence. As the scope of work under the contract included work for which the Builder was unlicensed, the Builder had contravened section 42(1) of the *Queensland Building Services Authority Act 1991* (Qld) (**QBSA Act)** (the precursor to the *Queensland Building and Construction Commission Act 1991* (Qld));
- **Entitlement to sums paid under the contract and cessation of further payment obligations, including the adjudicated amoun**t: As a result of the alleged breach of section 42(1) of the QBSA Act, the Owner was entitled to recover all sums paid under the contract because the Builder had undertaken and carried out unlicensed work in breach of the QBSA Act;
- **Breach of contract**: The Builder had breached the contract by failing to comply with the contract's requirements for articulating variations; and
- **Cost of resolving contract document errors**: The Builder was not entitled to a sum of $15,000 for the cost of resolving inconsistencies and errors in the contract documents.

The Builder's defence

- **Licensed under BCA and therefore not in breach of section 42(1) of the QBSA Act**: The Builder asserted that, on the proper construction of clauses 1.1 and 3.1 of the BCA, the chapel should be categorised as two one-storey buildings, which meant that it held the proper licence to carry out all the works under the contract and was not in breach of section 42(1) of the QBSA Act;
- **Entitlement to restitution on a quantum meruit basis**: The Builder conceded that if the court found it to be unlicensed and in breach of section 42(1) of the QBSA Act, the Owner would be entitled to recover payments it had made under the contract and the adjudication determination would be invalidated. However, the Builder claimed that it was still entitled to reasonable remuneration for the all the work, calculated on the alternate basis with or without regard to section 42(4) of the QBSA Act;
- **Denied the allegation of breach of contract**;
- **Entitled to cost of resolving errors**: The Builder maintained that it was entitled to $15,000 for resolving errors in the contract documents; and
- **Claim for outstanding amounts under the contract**: Counterclaimed for the remaining amount due under the contract plus interest and costs of $98,316.24.

DECISION

Both parties had partial success. The Owner was successful in its claim to recover payments under the contract and the invalidation of the adjudication decision, however, failed on its claim for breach of contract. The Builder was successful in its claim for reasonable remuneration for the works carried out on the chapel on a quantum meruit basis, however, was unsuccessful in its claim for payment under the contract.

In reaching this decision, the court found that the Builder's 'low-rise' building licence did not allow it to construct a two-storey building. The court found that the Builder was therefore not licensed to carry out the scope of work contained in the contract and in contravening section 42 of the QBSA Act, it was not entitled to any payment, meaning that the Owner was entitled to recover all monies paid under the contract, totalling $632,615.32.

Notwithstanding the Owner's success, the court accepted that the Builder was entitled to recover remuneration for part of the works carried out on a quantum meruit basis which totalled $700,108.20. As such, the net sum due between the parties was found to be $67,492.88 in favour of the Builder.

Civex Pty Ltd v Fredon (Qld) Pty Ltd [2018] QDC 208

The District Court of Queensland has confirmed that duplicate notices of claim of charge served under the *Subcontractors' Charges Act 1974* (Qld) (Charges Act), which included errors requiring amendment, are not necessarily void.

Incidental errors in the construction of a notice of claim of charge and serving duplicate notices of claim of charge for the same work do not necessarily render a charge void. The judicial inclination is to back the subcontractor, with minor errors in substance and form being remedied in consideration of the broader context. The court found that it is necessary to look beyond procedural error and establish a more substantive argument.

FACTS

Lendlease Building Pty Ltd (**Lendlease**) was engaged by the Department of Defence to carry out an upgrade of air traffic management infrastructure at the Amberley Air Base. Lendlease entered into a major works subcontract with Fredon (Qld) Pty Ltd (**Fredon**) to carry out electrical works and Fredon engaged Civex Pty Ltd (**Civex**) as a sub-subcontractor to undertake part of the electrical works.

On 17 August 2017, Fredon terminated the sub-subcontract with Civex for convenience. Clause 21 of the sub-subcontract obliged Fredon to pay Civex for work executed prior to the termination date; however, a dispute arose between Civex and Fredon as to the amount owing to Civex.

On 14 and 16 November 2017, Civex served notices of claim of charge on Lendlease and Fredon for the amounts of $486,850.66 (**first charged amount**) and $484,418.41 (**second charged amount**) respectively. On 13 December 2017, Civex commenced proceedings against Fredon and Lendlease as required under the Charges Act to perfect the second notice of claim of charge.

In April 2018, Lendlease paid the sum equal to the second charged amount into court pursuant to section 11(5) of the Charges Act and the proceedings against it were discontinued by Civex.

Fredon brought an application seeking to strike out parts of Civex's Statement of Claim and a finding that Civex's notice of claim of charge was void or invalid under the Charges Act. Fredon contended that:

1. Civex's claim and Statement of Claim were not proper proceedings constituted under section 15(3) of the Charges Act;
2. Civex's Statement of Claim was deficient in that its pleadings which referred to a 'Head Contract' were wrong both in fact and at law and the Statement of Claim was therefore void;
3. Civex's notices of claim of charge were not enforceable as no facts were put forward to support its claim that retentions are payable under the sub-subcontract;
4. Civex's notices of claim of charge were not enforceable due to the respective failures to explain why a charge in the sum of the first charged amount existed and to plead a cause of inaction in respect of that first charged amount;
5. Civex's use of the word 'building' was not defined or otherwise explained and therefore the Statement of Claim is void;
6. Civex's Statement of Claim incorrectly pleaded restitution if the sub-subcontract was found to be unenforceable as the Charges Act cannot apply if the relevant contract between the parties is unenforceable; and
7. Civex's second notice of claim of charge was not valid because it duplicated the charge for work already claimed in the first notice of claim of charge and the duplication is expressly prohibited by sections 10(7) and 10(8) of the Charges Act.

DECISION

Fredon's application was dismissed and costs reserved.

Paragraphs 1, 2, 4, 5 and 6 of Fredon's arguments were rejected and matters 3 and 7 were directed to trial for determination.

Cragcorp Pty Ltd v Qld Civil Engineering Pty Ltd & Ors [2018] QSC 203

An application to have a payment claim deemed void for jurisdictional error has failed in the Queensland Supreme Court in keeping with existing authorities which highlights the limited bases upon which decisions of adjudicators under the Qld Act may be set aside for jurisdictional error.

The mere absence of certain provisions in a contract or an adjudicator's failure to give precisely detailed reasons will not constitute jurisdictional error. In this case, the absence of a latent conditions provision did not preclude an adjudicator from making a determination on variations claimed in relation to latent conditions, and the absence of submissions in relation to a decision on liquidated damages did not constitute a denial of natural justice.

FACTS

Cragcorp Pty Ltd (**Cragcorp**) was engaged by the Brisbane City Council on a bridge construction project. Cragcorp engaged Qld Civil Engineering Pty Ltd (**QCE**) as a subcontractor for part of the works.

QCE served a payment claim for $250,649.69 on Cragcorp on 30 November 2017 in respect of its works.

Cragcorp served a payment schedule in the amount of $49,016.01, in response to that payment claim, disputing claimed amounts in respect of variations and applying set-offs for liquidated damages of $36,454.01 and the deduction of retentions in the sum of $36,454.01.

QCE lodged an application for adjudication listing the amount in issue as $212,297.85 (ie deducting the retention of $36,454.01).

Cragcorp provided an adjudication response and argued that QCE was not entitled to the progress payment claimed despite the fact the payment schedule had listed the scheduled amount as $49,016.01.

An adjudication decision was made which required Cragcorp to pay QCE $205,218.53.

Cragcorp argued that the payment claim was an impermissible claim for restitution under the Qld Act.

Cragcorp also sought to have the decision declared void, of no effect or quashed for jurisdictional error, arguing that two aspects of the decision were affected by jurisdictional error, namely:

- the decisions relating to two variations; and
- the decision relating to liquidated damages.

Cragcorp ultimately sought to have the decision declared void on these two broad bases.

Failure to perform statutory task of valuation

Cragcorp argued the variation claims did not properly arise under the contract, and the adjudicator therefore failed when assessing the payment claim to have regard to, and to apply, the contract. The variations related to latent conditions, and as the contract provided no entitlement to payment for latent conditions, QCE had no contractual basis for the payment claim. Regardless, the adjudicator determined the variations could be treated as variations under the contract, having regard to documentary evidence and the requirement that the parties deal in 'good faith'.

Cragcorp further argued in its adjudication response that QCE had no claim for a latent condition and could only make payment claims under the contract. Cragcorp had not previously disputed the existence of the variation claims in its payment schedule, listing them as 'Approved Variations', and listing one of the variations as 'paid on account'.

Denial of natural justice and failure to give proper written reasons

Cragcorp argued it was denied natural justice because the adjudicator interpreted the contract in a manner not contended for by either party, and Cragcorp thereby lost the opportunity to make an argument which might have persuaded the adjudicator to make a different decision. This was particularly in relation to the claim for liquidated damages, where Cragcorp asserted that the adjudicator made a decision in the absence of submissions from the parties.

QCE argued it was entitled to an extension of time and that the liquidated damages constituted a penalty; given Cragcorp suffered no loss for the work being delivered late, no liquidated damages could be imposed. Therefore, while the basis of the adjudicator's decision was QCE's submission, it was not the outcome QCE sought which resulted.

Cragcorp also argued that the adjudicator had failed to provide sufficient reasons for her decision, citing authority where natural justice was denied where the reasons for a decision did not reveal any foundation or logical basis.

DECISION

The court dismissed Cragcorp's application. Lyons SJA identified no jurisdictional error in the adjudicator's decision.

Statutory task of valuation

Lyons SJA held that the adjudicator had performed the task of valuation required under the Qld Act and had made the decision that the payment claim was a claim for a variation under the contract by finding a legal source for the entitlement to a variation in the construction contract. The absence of a latent conditions clause was irrelevant to the consideration of whether the variations constituted variations under the contract.

The disputed existence of the variation claims was also rejected. Lyons SJA found that the wording in the payment schedule supported an inference the variations were approved and that only the quantum was in dispute. Her Honour emphasised that the adjudicator was correct not to take into account reasons for withholding payments not raised in the payment schedule. The adjudicator therefore performed the task required of her under the Qld Act, making a decision that the payment claim was a claim for a variation after considering the contract, the Qld Act and all supporting documentation.

Natural justice and giving of proper reasons

Lyons SJA found no jurisdictional error. The effects of a denial of natural justice have to be substantial, and there was no evidentiary basis for concluding that the adjudicator would have made a different decision if Cragcorp made submissions in relation to the liquidated damages findings. Cragcorp had the opportunity to respond to the submissions of QCE and had done so.

The claimed jurisdictional error based on the failure to provide sufficient reasons was also rejected. The adjudicator considered all material required and gave a clear conclusion. There had been no denial of natural justice because the adjudicator's reasons did not go into precise detail on all points. The adjudicator had regard to only the relevant matters specified in the Qld Act and the relevant contract and submissions, so no jurisdictional error existed.

Livingstone Shire Council v EarthTEC Pty Ltd and Ors [2018] QSC 271

An adjudicator has fallen into jurisdictional error by failing to take into account notices of charge served under the *Subcontractors' Charges Act 1974* (Qld) (Charges Act) which caused a respondent to pay money into court. The respondent contended that this ought to be accounted for in the determination of its liability to the applicant.

The list of matters to be considered by an adjudicator in the Qld Act will not be construed narrowly. The Qld Act does not preclude a statutory provision raised in a payment schedule or properly made submission from consideration by an adjudicator, even where it is not in the list of matters to be considered, provided it relates to a matter explicitly included in the list.

FACTS

Livingstone Shire Council (**Livingstone**) engaged EarthTEC Pty Ltd (**EarthTEC**) to perform roadworks between Yeppoon and Roslyn Bay in Queensland.

A dispute arose over a payment claim made under the Qld Act and the parties proceeded to an adjudication. Livingstone also terminated the contract with EarthTEC. Following termination, some of EarthTEC's subcontractors served notices of claims of charge pursuant to the Charges Act. In response Livingstone paid around $1.1 million into court.

Livingstone contended that the money paid into court ought to be accounted for in determining the adjudication, otherwise it might be required to pay for the same work twice.

As part of the adjudicator's decision, the adjudicator found that he did not have jurisdiction to consider the notices of charge as the Charges Act was not explicitly included as a matter for consideration in section 26(2) of the Qld Act (which sets out the matters an adjudicator must have regard to in making their determination).

The adjudicator found that consideration of section 4 of the Qld Act, which prevented a person who had claimed under the Charges Act from also making a claim under the Qld Act, was outside his jurisdiction. On this basis, he also could not have regard to the potential duplicate liability of the respondent under both the Charges Act and the Qld Act.

On application, Livingstone argued that this construction amounted to jurisdictional error and emphasised that, pursuant to section 26(2)(d) of the Qld Act, the adjudicator was obliged to consider *'all submissions, including relevant documentation, that have been properly made'*, and that this included the respondent's submissions made in relation to the Charges Act.

EarthTEC contended in response that there was no reference at all to section 4 of the Qld Act in section 26(2) of the Qld Act and, as such, the independent operation of section 4 of the Qld Act would exclude the notices of charge from consideration.

DECISION

The court found in favour of Livingstone and held that the adjudicator's decision was infected by jurisdictional error.

Adopting a purposive approach, the court found that the proper construction of section 26(2) of the Qld Act was not one which excluded consideration of the Charges Act. Section 4 of the Qld Act existed to prevent duplicate claims, and in an appropriate case an adjudicator would be bound to consider it.

The court found an adjudicator is not precluded from making a finding that a respondent's liability to a claimant is discharged by money paid into court under the Charges Act. This amounted to jurisdictional error, as proper consideration of the matters in section 26(2) of the Qld Act was a pre-condition to the adjudicator's authority to make a decision.

The court also considered whether the adjudicator, by omitting to seek submissions from the parties, failed to accord natural justice. The court held that the issue of whether the adjudicator could consider the submissions in relation to the Charges Act was critical to the determination of the adjudication application, and the failure of the adjudicator to raise the issue in repeated requests for further submissions amounted to a denial of natural justice.

Low v MCC Pty Ltd & Ors; MCC Pty Ltd v Low [2018] QSC 6

The Supreme Court of Queensland granted an interlocutory injunction to an owner challenging the validity of two adjudication decisions made against it for progress payments upon completion of 'Frame Stage' of construction.

The policy behind the Qld Act will not prevent the grant of an interlocutory injunction to restrain the enforcement of an adjudication decision where the validity of that decision is being challenged. The decision deviates from the reasoning in *Wiggins Island Coal Export Terminal Pty Ltd v Sun Engineering (Qld) Pty Ltd* [2014] QSC 170 (*WICET*) (analysed in our Security of Payment Roundup of 2014 cases).

FACTS

Alvin Low (**Owner**) applied for an interlocutory injunction to restrain enforcement of two adjudication decisions until the validity of those decisions was determined.

The dispute arose after the Owner and MCC Pty Ltd (**Builder**) entered into two construction contracts. Each contract provided for progress payments upon completion of a number of stages, including the 'Frame Stage'. After the progress payments were initially not made upon the alleged completion of the Frame Stage, the Builder served the Owner with payment claims and subsequently obtained two adjudication decisions.

The Owner commenced proceedings seeking declarations that the adjudication decisions were void. He alleged that the reference date for the Frame Stage had not been reached as the Frame Stage was not complete due to the Builder's failure to install:

- light steel framing on external and structural walls;
- floor joists; and
- frames for internal partitions.

The Builder submitted that upon proper construction of the contracts, the Frame Stage was completed and a reference date arose on 4 August 2017. Alternatively, the Builder submitted that it was entitled to a progress payment because the Frame Stage constituted 'Practical Completion'. The contracts defined Practical Completion as including when the owner takes possession of the land when they are not entitled to do so. The Builder argued that Practical Completion occurred on 4 August 2017, as the Owner excluded the Builder from site by changing the temporary fencing and refusing access by security contractors.

In applying for the interlocutory injunction the Owner submitted that the policy of the Qld Act does not support the payment of an invalid adjudication decision that is susceptible to be declared void.

In reply, the Builder argued that an injunction would defeat the policy of the Qld Act that payment is to be made promptly of an amount established by an adjudication decision.

DECISION

Jackson J granted the injunction to restrain the builder from enforcing the adjudication decisions because:

- the Owner's submissions about the progress of the Frame Stage were sufficient to establish there was a serious question to be tried; and
- the balance of convenience favoured granting the injunction.

His Honour considered the following factors in determining the injunction was in the balance of convenience:

- an injunction would not defeat the policy of the Qld Act. Despite there being no express policy that there must be a payment in respect of an invalid adjudication decision, the Owner's claim was comparable to the exception provided in section 31(4) of the Qld Act for orders to set aside adjudication certificates. The declaration and injunction sought by the Owner had the same effect in substance, and the undertaking by the Owner to lodge a bank guarantee with the register also fulfilled the same purpose as a payment into court as required by section 31(4);
- the policy of the Qld Act likewise does not support dismissal of the application on discretionary grounds, as suggested by *WICET*;
- the Owner's case could not be characterised as weak;
- there was nothing to suggest the proceeding would not be heard promptly; and
- the Builder was not likely to suffer loss or damage beyond the cost of being kept out of the money payable under the adjudication certificates.

Monadelphous Engineering Pty Ltd v Acciona Agua Australia Pty Ltd & Anor [2018] QSC 310

A contract will not be an excluded contract for the purposes of the statutory payment regime under section 3(2)(c) of the Qld Act (or the equivalent section 61(2)(c) of the Qld BIF Act), where it expressly contemplates a process for progress claims to be paid, in accordance with the value of the work completed, notwithstanding that any final or profit sharing adjustment between the parties cannot be calculated until the conclusion of the project.

FACTS

Monadelphous Engineering Pty Ltd (**Monadelphous**) subcontracted Acciona Agua Australia Pty Ltd (**Acciona**) to complete works. Their agreement included a formal instrument of agreement, a collaboration deed and a subcontract. Importantly, the subcontract set out a process for progress claims.

Acciona served a monthly payment claim on Monadelphous which Monadelphous disputed. Acciona then commenced adjudication proceedings under the Qld Act. Monadelphous sought an interlocutory injunction on the basis that the Qld Act did not apply, by reason of section 3(2)(c) of the Qld Act, as consideration payable for construction work carried out under the contract was to be calculated other than by reference to the value of the work carried out. An interlocutory injunction was granted on 9 November 2018.

At trial, Monadelphous submitted that Acciona could only claim progressively for certain costs in excess of their 50% participation interest, by reason of sharing machinery in the collaboration deed. As such, their relationship was akin to joint venturers and any consideration for construction work was to share equally in the costs and surplus in the project. Therefore, the Qld Act did not apply to the subcontract.

Acciona submitted that the Qld Act did apply because:

- the collaboration deed and subcontract could be read together;
- the collaboration deed was silent in respect of the progress payments that Acciona was entitled to receive under the subcontract;
- the correct position was that the amount payable was tied to the value of the construction work, by reference to the lump sum in the formal instrument of agreement, and was not affected by the terms of the collaboration deed.

DECISION

The Queensland Supreme Court dismissed Monadelphous's claim and ordered the existing interlocutory injunction be dissolved.

Douglas J reasoned that the proper construction of the subcontract led to the conclusion that consideration payable for construction work under the subcontract was to be calculated by reference to the lump sum set out in the formal instrument of agreement which reflected the value of the work and related goods and services.

His Honour held that any surplus or other final adjustment required between the parties could still be calculated in accordance with the subcontract, in particular the collaboration deed, and that it did not matter that the surplus or other final adjustments could not be calculated until the subcontract was completed because the subcontract expressly contemplated the payment of progress claims by reference to the value of the work.

Runaway Bay Investments Pty Ltd as trustee for Runaway Bay Investments Unit Trust v GCB Constructions Pty Ltd and Ors [2018] QSC 292

The Supreme Court of Queensland has held that an important consideration when exercising its discretion to order payment to the court of a disputed adjudication amount is that the policy of the Qld Act is not circumvented.

FACTS

GCB Constructions Pty Ltd (**GCB**) entered into a contract with Runaway Bay Investments Pty Ltd (**Runaway Bay**) to build a restaurant. Following a dispute, GCB made an adjudication application pursuant to the Qld Act. The adjudicator appointed to decide the application found that an amount of $61,054.44 was payable to GCB.

When Runaway Bay failed to pay the adjudicated amount, GCB obtained an adjudication certificate in the sum of $72,392.10 and then obtained judgment in the District Court for the certified amount pursuant to section 31 of the Qld Act.

Following this, Runaway Bay applied to the Supreme Court for a declaration that parts of the adjudicator's decision were void on the basis of jurisdictional error or denial of natural justice, and for an injunction restraining GCB from enforcing or relying on the affected parts of the decision.

GCB then applied for an order pursuant to rule 658 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) or the court's inherent jurisdiction that Runaway Bay be required to pay the certified amount into court pending determination of Runaway Bay's application.

DECISION

Lyons SJA found in favour of GCB and ordered Runaway Bay to pay the certified amount (plus interest) into court.

Her Honour first considered section 31(4)(b) of the Qld Act which provides that if a party commences proceedings to set aside a judgment (arising from the filing of an adjudication certificate), then the party must pay any unpaid portion of the adjudicated amount into court as security pending final determination of those proceedings. Her Honour found that Runaway Bay's originating application was not a proceeding of the type envisaged by section 31(4) of the Qld Act as it did not seek to have the judgment set aside but rather sought to challenge the adjudicator's decision. Although Lyons SJA noted that the application would essentially have the same consequence if successful, the mandatory requirement under section 31(4) of the Qld Act of paying the adjudicated amount into court did not apply here.

Lyons SJA then considered the broader issue, namely whether the court should nonetheless exercise its discretion to require payment pursuant to rule 658 UCPR or the inherent jurisdiction of the court to ensure that the policy of Qld Act was not circumvented. Her Honour affirmed a number of analogous cases where the courts have considered that the policy of security of payment legislation is to provide a legislative entitlement to be paid for work which is undertaken pursuant to a construction contract, together with a regime whereby a properly obtained adjudication decision can be enforced against a respondent. Lyons SJA was compelled by the arguments in the cases that GCB relied upon that the policy of the Qld Act is that a claimant is to be given protection of payment particularly where a respondent seeks to challenge an adjudicated amount.

Her Honour found that due to the particular circumstances of this case, it was not mandatory under the Qld Act that Runaway Bay pay the money into court prior to judgment of its application, but nevertheless, the general policy of the Qld Act supported making an order requiring the payment. Her Honour held that the policy of the Qld Act was relevant to the exercise of her Honour's discretion to make the order because the court is cautious to ensure that legislation was not circumvented.

St Hilliers Property Pty Ltd v Pronto Solar Innovations Pty Ltd [2018] QSC 164

If a contractor completes work for which it does not hold a licence, it will not have any recourse under the security of payment legislation in Queensland.

FACTS

St Hilliers Property Pty Ltd (**St Hilliers**) was the contractor to Bouygues Construction Australia Pty Ltd who was the head contractor for the construction of solar farms in central Queensland.

Pronto Solar Innovations Pty Ltd and Pronto Projects Pty Ltd (each a **Pronto entity**) entered into separate subcontracts with St Hilliers to perform subcontract works on the solar farms. The subcontract works included pile driving and pre-drilling activities. Neither Pronto entity held any form of licence to perform building work under the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCCA**).

On 19 December 2017, both Pronto entities served payment claims under their respective subcontracts on St Hilliers. Each payment claim purported to be made under section 17 of the Qld Act.

On the basis of the payment claims, on 20 December 2017, each Pronto entity also served St Hilliers with a Form 1 Notice of Claim of Charge and a Form 2 Notice to Contractor under the *Subcontractors' Charges Act 1974* (Qld) (**SCA**).

St Hilliers commenced proceedings against each Pronto entity seeking cancellation of the claims of charge under section 21 of the SCA and declarations that the claims under the Qld Act were invalid.

Each Pronto entity refuted the arguments advanced by St Hilliers and also sought an estoppel prohibiting St Hilliers from arguing the Pronto entity was not entitled to issue its payment claim under section 42 of the QBCCA. The basis for the estoppel claim was an affidavit filed by the special projects officer for each Pronto entity that outlined a series of conversations with the authorised agent of St Hilliers which took place before the service of the payment claims. The conversations were to the effect that St Hilliers had expressly stated to each Pronto entity that it would not require a building licence as it would be working under St Hillier's licence.

DECISION

Daubney J found in favour of St Hilliers and cancelled the claims of charge under the SCA and declared that the claims made under the Qld Act were invalid. His Honour also rejected each Pronto entity's estoppel application.

In reaching his decision his Honour held:

- Each subcontract was for the performance of 'building work' within the meaning provided in schedule 2 of the QBCCA. His Honour held the phrase 'building work' extends beyond the traditionally understood meaning and included the piling and drilling works and also held that, despite the Pronto entities' submissions, the piling and drilling works were not excluded under the *Queensland Building and Construction Commission Regulation 200*3 (Qld) (**QBCC Regulation**). His Honour also identified that licences were in fact required for the pile driving and pre-drilling activities under schedule 2 of the QBCC Regulation.
- As the Pronto entities did not hold any licence to complete the respective contracted works they were not entitled to any monetary or other consideration under section 42 of the QBCCA (which expressly requires a person not to carry out building work unless the person holds a contractor's licence of the appropriate class).
- As no payments were due under either of the subcontracts no payments could be secured by a charge under the SCA.
- Payment claims which were made by each Pronto entity purportedly under the Qld Act were not valid payment claims because an unlicensed contractor, rejected under section 42(3) of the QBCCA, cannot be entitled to progress payments under the Qld Act (relying on Williams JA in *Cant Contracting Pty Ltd v Casella* [2006] QSC 242 at [30]).
- Neither Pronto entity could raise an estoppel to prevent St Hilliers from relying on section 42 of the QBCCA. In rejecting the estoppel application his Honour relied on the decisions in *Multiplex Constructions Pty Ltd v Rapid Contracting Pty Ltd (in liquidation) & Anor* [1999] QCA 306 and *Zullo Enterprises Pty Ltd & Ors v Sutton* (CA No 8045 of 1998, 15 December 1998), where it was held that section 42(3) of the QBCCA precludes a restitutionary claim.

Watkins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd [2018] QSC 65

The case is a reminder that parties have limited rights to review an adjudicator's decision under the Qld Act.

Adjudicator decisions won't be set aside for jurisdictional error for brevity if they are sufficient and reveal a foundation and logical basis for the decision.

FACTS

Hyatt Ground Engineering Pty Ltd (**Hyatt**) was a subcontractor engaged by Watkins Contracting Pty Ltd (**Watkins**) to carry out grouting works on a large concrete plinth. While performing the works, Hyatt's drill rig slipped while on the concrete plinth and rolled on to its side. As a result of this incident, Watkins contended that the head contract it had entered into with the principal was terminated and that it had terminated the subcontract with Hyatt for breach of contract.

Hyatt served a payment claim on Watkins pursuant to the Qld Act, claiming $479,488.10 for works performed under the subcontract.

Watkins' payment schedule stated that the scheduled amount was 'nil' on the basis that there was no valid reference date for the purpose of sections 12 and 17 of the Qld Act because at the time the payment claim was served on Watkins the subcontract had been terminated by Watkins following the drill rig incident.

Watkins' adjudication submissions contended that Hyatt had breached obligations in the head contract relating to safe work practices, obligations in Hyatt's SHE Work Method Statement (**SHEWMS**), being a document Hyatt was required to prepare under legislation, and certain implied terms relating to carrying out the work in a proper and tradesperson-like manner, safely and without negligence.

Hyatt denied that it had breached the subcontract and that it had been validly terminated.

The adjudicator highlighted that Watkins' submissions did not address why the obligations in the head contract or SHEWMS should be incorporated into the subcontract, nor did they address why the implied terms should be implied into the subcontract as a matter of law. Accordingly, the adjudicator found that they did not form part of the subcontract, the subcontract was not validly terminated and there was a valid reference date for the purposes of the sections 12 and 16 of the Qld Act and determined the adjudicated amount to be the entire amount claimed by Hyatt.

Watkins applied to the Supreme Court for an order that the decision was void on the basis of jurisdictional error because:

- the adjudicator refused to consider Watkins' submission that the subcontract had been terminated, which, if accepted, meant that there was no reference date for the purposes of the Qld Act and the adjudicator had no jurisdiction to adjudicate the payment claim under the Qld Act; or
- the adjudicator ignored its submissions, substantially denying it natural justice.

DECISION

Brown J found that the adjudicator did consider, albeit briefly, Watkins' submissions as to jurisdiction and did not make a jurisdictional error nor deny Watkins natural justice.

Further, her Honour found that the reasons for rejecting the incorporation into the subcontract of express and implied terms were sufficient and effectively resolved the question of whether the subcontract was terminated and whether there was an available reference date under the Qld Act. Accordingly, there was no jurisdictional error.

Her Honour found that as the adjudicator found that the terms did not form part of the subcontract, the adjudicator was not required to consider the question of breach and whether termination had occurred.

Victoria

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The *Building and Construction Industry Security of Payment Act 2002* (Vic) is referred to as the **Vic Act**.

Victoria overview

EMERGING TRENDS

Digby J's first full year in the position of Judge in Charge of the Technology, Engineering & Construction List of the Victorian Supreme Court has delivered a number of interesting developments. The most important of which may be the way in which excluded amounts are to be treated. We note also that Digby J has balanced the workload more than his predecessor (Vickery J), with the eight Victorian Supreme Court decisions in relation to the Vic Act being shared between three judges (Digby J, Kennedy J and Riordan J).

DEVELOPMENTS

In *Shape Australia v The Nuance Group* [2018] VSC 808 the levying of liquidated damages, and subsequent assessment by the contract's superintendent (which adjusted the contract sum), went unchallenged for 13 payment claims. This led the adjudicator to conclude that any claim for that amount was a claim to recoup liquidated damages and therefore an excluded amount. In obiter, Digby J considered the adjudicator's determination, and concluded that the adjudicator was correct to consider that the case law supported his finding and that he was correct to exclude the entirety of the payment claim as an amount calculated to recover earlier adjustments to the contract sum.

We consider that the adjudicator's determination was contrary to the purpose and object of the Vic Act, which, in this decision, Digby J identified as ensuring cash flow is maintained through a network of contractors. If the adjudicator's reasoning is accepted claimants will be prevented from claiming and being paid amounts otherwise due, because of the timing of when they dispute liquidated damages.

We anticipate that there will be further judicial consideration of this issue.

Further clarification was also provided by the Victorian Courts on:

- summary judgment under the Vic Act; and
- how reference dates arise under the Vic Act.

There were four decisions relating to summary judgment under the Vic Act, determining that an application should be by way of originating motion, confirming that a respondent cannot raise any crossclaim or defence where it has failed to issue a payment schedule and providing guidance on the interaction between the Vic Act and the *Civil Procedure Act 2010* (Vic).

FUTURE

The Vic Act remains an outlier in relation to other Australian jurisdictions, with its unique concept of 'excluded amounts' continuing to limit its use.

The Federal and Victorian governments are yet to provide comment or endorse the Murray Review, which recommended an adjudication system similar to the NSW Act and which expressly rejected the concept of excluded amounts.

We await comment from either the Federal or Victorian government as to whether any recommendations of the Murray Review are to be adopted.

3D Flow Solutions Pty Ltd v LTP Armstrong Creek Pty Ltd [2018] VCC 674

Parties seeking summary determination under the Vic Act should make their application by originating motion. Where parties apply to recover payment under section 16(2)(a)(i) of the Vic Act, the test for summary judgment under the *Civil Procedure Act 2010* (Vic) (CPA) does not apply.

FACTS

LTP Armstrong Creek Pty Ltd (**respondent**) was the owner of the land on which an aged care facility (**project**) was to be constructed. It engaged MOC Development Pty Ltd (**construction manager**), a related entity, to undertake the role of construction manager. By a subcontract dated 19 October 2016 (**contract**), the construction manager engaged 3D Flow Solutions Pty Ltd (**claimant**) to carry out drainage works for the project.

On 1 November 2017 (**first payment claim**), 30 November 2017 (**second payment claim**) and 22 December 2017 (**third payment claim**) the claimant submitted claims under the Vic Act to the construction manager.

The respondent alleged that:

- by emails from the construction manager to the claimant on 4 December 2017 and 12 December 2017 which alleged that certain works under the contract were defective, it had provided a payment schedule in response to the second payment claim; and
- by a report emailed by the construction manager to the claimant on 3 January 2018 which related to alleged defective works under the contract, it had provided a payment schedule in response to the third payment claim.

Neither respondent nor construction manager paid any of the amounts claimed in the three payment claims which totalled $105,556.72.

The claimant applied to the County Court for summary judgment by originating motion against the respondent for $105,556.72 as a debt due under a construction contract pursuant to section 16(2)(a)(i) of the Vic Act.

DECISION

Woodward J awarded summary judgment in favour of the claimant for the full amount of $105,556.72.

What is the test for an application for judgment under section 16(2)(a)(i) of the Vic Act?

The respondent submitted that the test for an application made under section 16(2)(a)(i) of the Vic Act was identical to the test for summary judgment under section 63 of the CPA, namely whether a respondent to an application has a 'real as opposed to fanciful' prospect of success.

Woodward J disagreed. While acknowledging that the issue had not been the subject of any authoritative determination, his Honour considered that an applicant seeking relief under section 16(2)(a)(i) of the Vic Act by way of originating motion needed to establish 'on the balance of probabilities' that the prerequisites to a claim for a debt due under section 16(2) of the Vic Act were satisfied.

Did the respondent's payment schedules comply with section 15 of the Vic Act?

Woodward J found that neither of the alleged payment schedules complied with the Vic Act. This was on the basis that they either failed to:

- identify the payment claim to which they related and the amount proposed to be paid (as required by sections 15(2)(a) and (b)) of the Vic Act; or
- indicate the reason for withholding payment (as required by section 15(3)) of the Vic Act.

Best Fab Pty Ltd (ACN 105 906 876) v Australian High Bay Installations Pty Ltd [2018] VCC 1053

This case considered the standard of proof to be satisfied before summary judgment can be entered in a security of payment claim. The court considered two different standards of proof and, without deciding which was the correct test, applied a standard of proof that required the applicant to establish the six elements of a security of payment claim on a 'balance of probabilities'.

FACTS

The contract between the parties

In its capacity as head contractor, Australian High Bay Installations Pty Ltd (**respondent**) engaged Best Fab Pty Ltd (**claimant**) to assist in the supply and installation of a cold storage racking system in a warehouse. The agreement between the claimant and respondent was partly in writing and partly oral, with no formal contract signed by the parties.

The progress payment claim

The claimant made a payment claim under the Vic Act for the amount of $330,000 on the basis of a separate payment arrangement to the terms documented in the draft contract. The claimant contended that the respondent failed to issue a valid payment schedule within the required time and the claimant was therefore entitled to summary judgment.

In submissions, both parties agreed that the standard of proof was that if the defendant's version of facts is reasonably open (and not fanciful), then the application should be dismissed.

DECISION

Morrish J dismissed the claimant's summary judgment application.

Standard of proof

Two different standards of proof were considered by the court:

- Has the applicant established the elements of a security of payment claim on a 'balance of probabilities' (the first approach)?
- Has the applicant proven that the respondent has no real prospect of success (the second approach, which is typically applied in ordinary summary judgment applications).

Morrish J applied the first approach because her Honour considered it to be more favourable to the plaintiff. However, in doing so she was not required to determine what was the applicable standard of care in such cases. Her Honour was also not prepared to adopt the second approach which both parties agreed should apply.

Without determining which was the correct standard to apply, Morrish J indicated that the first approach better served the object and purpose of the Vic Act which placed great importance on having a streamlined and speedy process.

She considered that the Vic Act merely required six elements to be proven in order for an applicant to be successful and, if satisfied, an applicant is immediately entitled to relief. The failure to satisfy the elements of such a claim resulted, in effect, in the 'sudden death' of the security of payment claim. For these reasons a security of payment claim lent itself to being determined summarily on a 'balance of probabilities'.

However, her Honour also reflected that the interests of justice may be better served by requiring an applicant to prove that the respondent has no real prospect of success or that its defence is fanciful.

Cat Protection Society of Victoria v Arvio [2018] VSC 757

In circumstances where the construction contract expressly provides for reference dates, a claimant will be limited to such dates even if the contract has been terminated.

FACTS

The Cat Protection Society of Victoria (**respondent**) engaged Arvio Pty Ltd (**claimant**) under a construction contract to build an animal shelter.

Approximately $3.5 million of works were completed before the respondent purported to terminate the contract on 26 February 2018. The claimant ceased performing the works on or around this time.

On 24 May 2018 the claimant served a purported 'final' payment claim for $468,725.37 pursuant to the Vic Act. The respondent provided a payment schedule on 22 June 2018 assessing the value of the claim as $Nil. Consequently, the claimant made an adjudication application. The adjudicator determined that respondent was liable to pay the claimant $210,145.77 (**Determination**).

The respondent sought judicial review of the Determination on the basis of jurisdictional error on four grounds:

1. the finding that the Vic Act permits a claimant to serve a payment claim following the termination of a contract;
2. the finding that there was a reference date in the contract to sustain the payment claim;
3. the inclusion of excluded amounts; and
4. failing to value the payment claim.

The respondent contended that the payment claim was a claim for final payment rather than a progress claim and accordingly, the express contractual precondition for a final payment claim of 'practical completion' was never achieved and a reference date did not arise.

The claimant maintained that the payment claim was a progress payment claim for payment for works performed up until the date the contract was terminated, despite the fact that the claim was described as a 'final claim' for the purposes of the Vic Act, included amounts for the return of retention and deposit monies and the remainder of the contract sum.

DECISION

The court found in favour of the respondent on the first two grounds and quashed the Determination. In light of this, the court decided that it was unnecessary to consider the third and fourth grounds.

Digby J considered the elements of the payment claim objectively finding that it was a final rather than a progress claim under the respective contract. Particularly, the claim:

- was expressed to be a final payment claim for the purposes of the Vic Act;
- included a claim for return of retention moneys;
- included a claim for return of deposit moneys; and
- appeared to claim the unpaid balance of the contract sum, taking into account that only part of the works was completed prior to the contract being terminated.

Digby J held that these claimed amounts extended beyond the 'value of materials supplied and works done' which were covered by ordinary progress claims under the contract.

As to the second ground, given that practical completion had not been achieved there was no available reference date for the claimant to have made its final payment claim on 24 May 2018.

In obiter, Digby J noted that the contract between the parties did not expressly provide for a final payment claim. In such circumstances, it may have been open to the claimant to rely on the default reference dates set out in section 9(2)(d) of the Vic Act where a contract does not prescribe a reference date for a final payment claim. However, in the circumstances, the claimant maintained that the payment claim was a claim for a progress payment (not a claim for final payment) and it abandoned its previous reliance on the default reference dates set out in section 9(2)(d) of the Vic Act. Consequently, it was not open to the court to determine that a reference date existed after termination.

Coal Projects Pty Ltd v Maicome Pty Ltd [2018] VCC 1730

This case provides an example of when progress payment claims will be automatically stayed.

Where there have been mutual debts between parties and one of the parties is an insolvent company that is being wound up, proceedings with respect to the debts are automatically stayed, including proceedings involving enforcement of adjudication determinations made under the Vic Act.

FACTS

Maicome Pty Ltd (**Maicome**) and Coal Projects Pty Ltd (**Coal**) entered into a domestic building contract to construct 12 units in February 2012. In 2013, Coal submitted a total of 7 invoices which Maicome failed to pay.

Following this, a number of issues arose for Cole, namely:

- on 22 May 2013 the Victorian Building Authority (**VBA**) cancelled the building practitioner registration of Coal's sole director; and
- on 31 May 2013 Maicome terminated the domestic building contract; and
- on 5 June 2013 a winding up action was commenced in the Supreme Court against Coal by an unrelated creditor.

On 11 June 2013, Coal served a payment claim under the Vic Act on Maicome for the unpaid amounts. Maicome did not provide a payment schedule in response to the payment claim. Coal subsequently lodged an adjudication application and successfully obtained a determination for the claimed amounts. Maicome engaged another builder to complete the works and did not pay Coal as determined by the adjudicator.

On 28 November 2013, an ex parte judgment was entered in favour of Coal against Maicome (**Judgment**) in the amount of $305,737.77, which represented the claimed amounts together with interest and costs (**Judgment Sum**).

Maicome subsequently filed an application for summary judgment seeking to set the Judgment aside. The court stayed the proceedings, subject to Maicome providing security, which was provided in the form of a 12-month performance bond. The performance bond expired in due course and the parties continued to fail to resolve their debts.

Submissions and questions to be determined

Coal argued that the Judgment should be upheld and that the stay on the Judgment ordered by Anderson J had in effect lapsed because of the expiry of the performance bond and as such Maicome was in default of those orders and was liable for the Judgment Sum.

Maicome sought to have the Judgment set aside on the basis that Coal was not a 'claimant' under the Vic Act due to the cancellation of the relevant builder's registration by the VBA. Alternatively Maicome sought a stay on the Judgment as a result of claims it made against Coal by way of set-off against the Judgment Sum, arguing that such a stay should happen automatically as a result of the operation of section 553C of the *Corporations Act 2001* (Cth) (**Corporations Act**).

The court was required to consider three key questions:

- Given the cancellation of the building practitioner's registration, can Coal technically be a 'claimant' under the Vic Act?
- Assuming the Judgment was entered regularly, should a further stay be ordered?
- If a stay is ordered, should Maicome provide further security as a condition of any stay being granted?

DECISION

The court found in favour of Maicome on all three questions.

Cancellation of licence

Ryan J considered that since the progress claims related to work done at a time when the relevant building practitioner was registered, the subsequent cancellation of registration did not affect Coal's ability to bring a claim. At that time the claim was submitted, Coal was solvent; therefore, theoretically Coal would have been able to appoint a new licensed director and continue to carry out construction work.

Should a stay be ordered?

Her Honour held in favour of Maicome that a stay on execution of the Judgment is warranted until the parties' rights are finally determined by the accounting required under section 553C of the Corporations Act. Further, her Honour noted that, as contemplated by section 47 of the Vic Act, the Judgment obtained by Coal is an interim judgment and not a final one. Consequently, the parties' rights can subsequently be readjusted pursuant to section 553C of the Corporations Act at a later date and, until then, it is unknown as to what amount is owing and by whom. Her Honour applied the Court of Appeal case of *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 (analysed in our Security of Payment Roundup of 2016 cases) where it was found that companies in liquidation are precluded from relying upon the scheme prescribed for interim payment.

Should security be a condition of the stay?

On the issue of whether security should be provided, Ryan J held that section 553C of the Corporations Act came into effect once the winding up order was made. If a further order is made for the provision of security, it would defeat the purposes of the section, which provides that the original debt has effectively gone and the only amount to be determined is the balance between the amount claimed and any cross claim, being matters to be worked out by the liquidators on the lodging of a proof of debt. Accordingly, her Honour held that it was not appropriate that Maicome be ordered to provide further security for the current level of the Judgment Debt.

Cornonero Pty Ltd v Bright Moon Buddhist Society & Anor [2018] VSC 737

'Paid' as contemplated by sections 28B(5) and 28B(6) of the Vic Act means that the funds are in the hands of and readily accessible to the claimant before a review application is made by the respondent. Little leniency will be shown to a party who fails to ensure payments are cleared well-within the expiration of five business days required under the Vic Act.

FACTS

On 18 January 2017, Cornonero Pty Ltd (**claimant**) and Bright Moon Buddhist Society (**respondent**) contracted for the claimant to carry out construction work on the respondent's land. A dispute arose in regard to a payment claim, which resulted in the claimant submitting an adjudication application. On 1 June 2017 it was determined that the claimant was entitled to a progress payment of $677,250.16 (first determination). It was accepted that the respondent received the first determination on 5 June 2017, meaning 13 June 2017 was the last date by which an application for review of the first determination could be made. The respondent submitted the review application on 13 June 2017, which included a proof of payment receipt dated 12 June 2017 and a payment summary identifying a further payment as 'processing' as at 13 June 2017.

On 14 June 2017, an adjudicator was appointed to review and determine the first determination. The director of the claimant deposed that $250,000 cleared in the claimant's account on 15 June 2017. On 21 June 2017 the adjudicator determined that the plaintiff was entitled to $103,388.11 (**second determination**).

The claimant sought judicial review of the second determination on four grounds that the adjudicator committed jurisdiction error, or erred in law, by determining that:

- the first defendant validly commenced the review application despite failing to pay the adjudicated amount to the claimant before making its application;
- the first defendant validly commenced the review application despite failing to pay the alleged excluded amounts into a designated trust account before making its application;
- certain variations were excluded amounts; and
- that the total sum of second class variations exceeded the ten percent cap.

DECISION

Digby J held that the second determination should be quashed and the respondent should be restrained from seeking an adjudication certificate or seeking to enforce the second determination.

Sections 28B(5) and 28B(6) of the Vic Act stipulate that an application may only be made if the respondent has 'paid' the claimant the adjudicated amount and has paid the alleged excluded amounts into a designated trust account.

Digby J was required to determine whether the word 'paid' in those provisions means when the transfer of funds is initiated, or when the funds clear, and are in the hands of, under the control of, and are immediately accessible to the claimant. His Honour found that the language of section 28B(5) and 28B(6) of the Vic Act, and in particular the phrase 'may only be made if', makes it clear that the requirements for the defined amounts to be paid are, in each case, preconditions to the respondent's application to review an adjudication determination. Further, it was his Honour's view that the relevant intention of Parliament in including the requirement for funds to be 'paid', is to ensure that the funds are in the hands of and readily accessible to the claimant before a review application is made by the respondent. This is, in part, to ensure that the claimant is not financially disadvantaged as a result of a respondent seeking a review.

Factually, his Honour found that the required payments were not made by the respondent within time and therefore the statutory preconditions were not satisfied. Given that the funds did not clear until 15 June 2017, the funds were not effectively transferred to, and readily accessible in, the trust account prior to the review application, and therefore not 'paid' in accordance with the meaning of the term in sections 28B(5) and 28B(6) of the Vic Act. This non-compliance, in his Honour's view, resulted in the second determination being vitiated.

As grounds 1 and 2 were made out, his Honour did not consider it necessary to deal with grounds 3 and 4.

Geotech Pty Ltd v Broadspectrum (Australia) Pty Ltd & Anor [2018] VCC 1047

A principal is not entitled to advance a crossclaim or raise a defence in an application for summary judgment where it has failed to issue a payment schedule and make payment of the payment claim within the required time.

FACTS

Geotech Pty Ltd (**claimant**) was party to two agreements with an unincorporated joint venture between Broadspectrum (Australia) Pty Ltd and Comdain Civil Constructions Pty Ltd trading as TransCom Connect (**respondent**) under which it was to:

- construct a weir and fish lock at Box Creek (**Box Creek Agreement**); and
- construct a weir regulator at the Fish Point Weir in Swan Hill (**Swan Hill Agreement**).

Payment Claims

In early 2017, the claimant sent the respondent payment claims under the Box Creek Agreement and the Swan Hill Agreement (**2017 claims**). The respondent subsequently served payment schedules to the claimant outside the 10 business day timeframe prescribed under the Vic Act.

The claimant served a further payment claim under the Fish Point Weir Agreement in March 2018 for $560,383.40, which included the amount it had previously claimed in 2017. The respondent certified $109,305.63 in its payment schedule, refusing to pay that amount because it was owed $248,109.94 under the Box Creek Agreement. The claimant commenced adjudication proceedings in respect of the payment claim and the adjudicator determined that the respondent was required to pay the claimant $462,162.36, plus interest. The adjudicated amount was subsequently paid by the respondent (save for a discrepancy in the calculation of interest).

The claimant commenced proceedings to recover the unpaid portion of the 2017 claims plus interest.

The respondent contended it had a right to setoff for liquidated damages under both agreements and therefore the dispute between the parties should instead be resolved through the contractual mechanisms, being the arbitration which it commenced and sought a stay of proceedings in the interim.

DECISION

Cosgrave J found in favour of the claimant.

Citing the 'pay now and argue later' policy of the Vic Act, Cosgrave J found that the respondent was not entitled to advance a crossclaim or raise a defence in relation to the adjudicated amounts claimed and that the respondent should pay the claimant and make different arrangements to pursue any other claims it had against it (eg for liquidated damages).

In relation to the argument that the proceeding should be stayed and the dispute referred to arbitration, Cosgrave J was not satisfied that the dispute which the respondent sought to raise was arbitrable and therefore, did not grant the stay sought by the respondent.

Green Suburban Pty Ltd v Vita Built Pty Ltd [2018] VSC 330

A payment claim under the Vic Act must be supported by a valid reference date. Where a construction contract has been terminated it is important to consider the precise terms of the relevant contract to determine if a claimant has a right to issue a payment claim post termination.

FACTS

Green Suburban Pty Ltd (**respondent**) engaged Vita Built Pty Ltd (**claimant**) to build 16 townhouses and a basement carpark at Doncaster. The contract specified that the 'reference' date for submitting progress claims was the 24th of the month.

On 14 February 2018, the respondent served a notice of default and immediate termination on the claimant due to the occurrence of an 'insolvency event' under the contract. The claimant accepted that the contract had been validly terminated and no work was performed by the claimant on site after termination.

Clause Q6 of the contract provided that where the contract has been terminated due to an 'insolvency event' the respondent *'will not be bound to make any further payment to the contractor unless an obligation to pay arises under clause Q9'* (**clause Q9**). Clause Q9 set out a process whereby, following termination of the contract, the architect would calculate the amount owing by one party to the other and issue a certificate in respect of that amount.

On 3 April 2018, the claimant served a payment claim on the respondent for $189,468.40. The respondent did not issue a payment schedule responding to the payment claim.

Adjudicator found payment claim supported by 24 March 2018 reference date

The adjudicator issued his determination pursuant to section 23 of the Vic Act for the full amount of the payment claim. The adjudicator determined that the payment claim was supported by the reference date of 24 March 2018.

The respondent commenced proceedings seeking to quash the adjudication determination on a number of grounds, including the ground that there was no valid reference date under the contract.

DECISION

Kennedy J held that the payment claim was not supported by a valid reference date and quashed the adjudicator's determination.

Her Honour held that that the right to issue a progress payment on the 24th of the month was suspended on termination and that no reference date could arise until the process under clause Q9 had been completed. This was because it was the issue of a certificate pursuant to clause Q9 that gave rise to the payment obligation post-termination.

Her Honour applied the reasoning of the High Court in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52 (analysed in our Security of Payment Roundup of 2016 cases) in concluding that the existence of a reference date is a precondition to the making of a valid payment claim under section 14 of the Vic Act.

Ultimately, given that the payment claim of 3 April 2018 was not supported by any reference date the adjudicator had no jurisdiction to make his determination.

Ian Street Developer v Arrow International [2018] VSCA 294

A decision made by an adjudicator under the Vic Act outside the prescribed time limits will not be invalid.

FACTS

Late adjudication decision

Arrow International (**claimant**) made a progress payment claim on 31 May 2017 against Ian Street Developer (**respondent**) under the Vic Act for $882,608.14. The respondent's superintendent scheduled a zero amount in the payment schedule and the claim was referred to adjudication by the claimant on 28 June 2017.

After an extension of time was granted under section 22(4) of the Vic Act, the adjudicator determined that the respondent was liable to pay the claimant $381,446.78 together with 50% of the adjudicator's fee. The adjudicator delivered a decision on 28 July 2017, 21 business days after being appointed and accepting the application.

How long does an adjudicator have to make a decision?

Due to the extension of time, the trial judge had to determine the time limit set by the Vic Act. The initial time limit set by the Vic Act for an adjudication decision is 10 days from the date of acceptance by an adjudicator of the adjudication application, with an ability to extend this time up to 15 days. The question the court had to determine was whether this 15 day period is in addition to the initial 10 days, or whether 15 days is the upper limit.

Trial judge found the adjudicator's decision to be valid

The trial judge held that the late decision of the adjudicator was not invalid. In coming to this decision, the trial judge:

- determined that the proper construction of section 22(4) of the Vic Act allows for an adjudicator to make a decision up to 15 business days after the acceptance of the application by the adjudication. Importantly, the court noted that the Vic Act makes a number of references to instances where an adjudicator's decision would be void. However, there is no reference to invalidity due to lateness; and
- considered cases concerning out of time determinations under the NSW Act as the corresponding provisions in the NSW Act are essentially identical to the Vic Act. The trial judge noted that the NSW Act allows parties to act upon an adjudicator's late decision (including allowing the claimant to withdraw the application).

DECISION

On appeal, the court agreed with the trial judge in finding that an adjudication decision will not be invalid where the decision is delivered outside the time limits set by the Vic Act. The court also accepted the trial judge's interpretation of section 22(4) of the Vic Act in that an adjudicator granted an extension of time should make a decision within 15 business days from the acceptance of the adjudication application.

Although the Vic Act is silent on whether an adjudication decision is voided where the adjudicator is late in delivering that decision, the court took the view that such a consequence is for Parliament to decide and it not for the court to read additional words into the Vic Act to achieve this consequence. The court noted a number of previous cases had warned of 'gap-filling', and held that the task in the present case was simply to expound the meaning of the statutory text. Guiding its decision, the court found that it was bound to follow the decision in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28. In that case, the court held that where a statute is silent as to a subject matter, it is not intended to support an alternate construction inconsistent with the text or content of the Vic Act. The court highlighted that this was a question of understanding Parliament's intention in the absence of an express provision addressing the issue.

After considering a number of authorities, the court held that there was nothing in the Vic Act that indicated that Parliament had intended to render an adjudicator's decision invalid simply due to it being delivered outside of the time requirements. The court determined this based on the fact that the Vic Act:

- considers a number of circumstances where an adjudicator's decision will be invalid;
- deals with circumstances where an adjudicator delivers a late decision; and
- was established for the benefit of claimants, and invalidating a decision due to a factor outside of their control would be in conflict with this purpose.

John Beever (Aust) Pty Ltd v Roads Corporation [2018] VSC 635

This decision provides a considered explanation of how section 16 of the Vic Act operates alongside procedural requirements of Victorian court rules regulating applications for summary judgment. Respondents to payment claims made under the Vic Act who find themselves in the situation of having failed to provide a payment schedule within the time prescribed under the Vic Act will find this decision to be a useful reference.

FACTS

Roads Corporation (**respondent**) is a statutory corporation trading under the name VicRoads. It engaged John Beever (**claimant**) to perform strengthening and other maintenance works to the Wallen Road Bridge which links the suburbs of Richmond and Hawthorn across the Yarra River.

On 28 September 2017, the claimant purported to serve a payment claim under the Vic Act for $290,148.61. The respondent failed to serve a payment schedule. The claimant applied for judgment by writ for this amount under section 16(2)(a)(i) of the Vic Act. The respondent resisted the application on several grounds. It also made application to strike out the claimant's claim for the amount sought on the basis that its pleadings failed to disclose an alleged 'reference date' (**strike out application**).

DECISION

The court found in favour of the respondent, dismissing both the application for summary judgment and the strike out application.

Summary judgment application

Section 16(2)(a)(i) of the Vic Act provides that where payment is due and the respondent fails to pay the claimed amount in the time prescribed, the claimant may recover the unpaid portion of the claimed amount as a debt due to the claimant in any court of competent jurisdiction.

Both parties proceeded on the basis that the claimant's application for judgment under section 16(2)(a)(i) of the Vic Act was in the nature of an application for 'summary judgment' and accordingly regulated by the relevant court rules (being rule 22 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic)). Digby J determined that the court should apply the 'no real prospects of success' test referred to in section 61 of the *Civil Procedure Act 2010* (Vic) to determine whether the defence to the application disclosed any grounds of challenge.

Having set out the elements the claimant would need to prove on the 'balance of probabilities' to succeed in its application, his Honour turned to consider each of the respondent's grounds of defence to the application, namely that the payment claim:

- was not supported by a valid reference date having regard to the regime for determining such a date created under the parties' construction contract;
- did not formally comply with section 14(2) of the Vic Act insofar as it contained amounts which were not referrable to any identified construction work; and
- included amounts in the nature of non-agreed variations which are excluded under the Vic Act.

Digby J concluded in respect of each ground that the claimant failed to demonstrated that the respondent had 'no real prospect of success' in arguing that the requirements of section 16(2)(a)(i) of the Vic Act were not satisfied. The application was accordingly dismissed.

Strike out application

The respondent contended that as the claimant's statement of claim failed to plead a reference date, it was liable to be struck out. His Honour found that the claimant's pleading was 'sound and sufficiently comprehensible' and that there was no requirement for pleading 'conditions precedent to a valid payment claim or recite … the relevant provisions and operation' of the Vic Act. The strike out application was also dismissed.

Nuance Group v Shape Australia [2018] VSC 362

The Victorian Supreme Court has quashed a security of payment determination because the adjudicator failed to undertake his core function of determining whether the construction work the subject of a claim had been performed and the value of that work. This finding serves as a cautionary tale for adjudicators to provide sufficiently comprehensible reasons in a determination. The decision also confirms that the review processes under the Vic Act in respect of determinations do not preclude a party from contesting the original determination. This decision serves as a useful reminder that adjudicators must demonstrate that they have turned their mind to whether the construction work the subject of a claim has been performed and the value of that work.

FACTS

In July 2016 The Nuance Group (Australia) Pty Ltd (**respondent**) engaged SHAPE Australia Pty Limited (**claimant**) to carry out works at the retail duty-free space at Melbourne Airport.

In March 2018 the claimant made a payment claim under the Vic Act for $3.5m. After the respondent rejected this claim with a payment schedule identifying $nil payable, the claimant made an adjudication application for a reduced amount of $2.2m.

The adjudicator issued an adjudication determination in the amount of $1.4m. The respondent then sought a review of the adjudication determination under the Vic Act. The review adjudicator issued a review determination based on the adjudication determination in the amount of $1.2m.

The respondent commenced proceedings in the Supreme Court to quash the adjudication determination and the review determination, on the basis that the original adjudicator had erred in making his determination.

DECISION

Digby J quashed the adjudication determination on the basis that the adjudicator had failed to undertake the adjudication determination in accordance with the Vic Act. By extension, the review determination was also quashed because it was based on an invalid adjudication determination.

Separately, his Honour held that the respondent's decision to initiate the review process under the Vic Act in respect of the original adjudication determination did not waive its right to challenge that determination.

The task required of the adjudicator

Section 23 of the Vic Act requires the adjudicator to determine the amount of the progress claim to be paid.

Digby J stated that section 23 at a minimum requires a determination as to whether the construction work the subject of the claim has been performed and its value. While the adjudicator must also provide reasons, his Honour confirmed that bare reasons which render the adjudicator's determination comprehensible will suffice.

The adjudicator's erroneous approach

Digby J held that by undertaking a process of working backwards from the claimant's total claimed amount, and by simply accepting the total amount claimed and then deducting the claims that the adjudicator found to be excluded amounts, the original adjudicator had failed to perform the functions required by section 23 of the Vic Act.

Despite the low threshold regarding the reasons for a determination, in this case Digby J found that the adjudicator had failed to provide sufficiently comprehensible reasons and basis for the amount determined.

To show how the adjudicator arrived at his determination, the claimant needed to make a number of inferences and extrapolations. His Honour held that in such circumstances a fair reading of the adjudication determination itself failed to provide comprehensible reasons in relation to the determination of the adjudicated amount.

PHHH Investments No 2 Pty Ltd v United Commercial Projects Pty Ltd [2018] VSC 15

A failure by the adjudicator to make an adjudication determination within the time limit set by section 22(4) of the Vic Act does not of itself invalidate the determination.

FACTS

PHHH Investments No 2 Pty Ltd (**respondent**) contracted United Commercial Projects Pty Ltd (**claimant**) to perform alterations and additions to the respondent's commercial building at 282-284 Victoria Street, Brunswick (**Site**).

On 15 June 2017, the claimant served a payment claim under section 14 of the Vic Act on the respondent for certain works conducted at the Site. On 29 June 2017, the respondent served a payment schedule on the claimant for $0 within the required time. An adjudication application was made by the claimant on 13 July 2017 and the adjudicator accepted the appointment on 17 July 2017.

During the course of the adjudication, the claimant sent a letter to the adjudicator on 25 July 2017 requesting that the adjudicator request further submissions from the claimant. In the letter, the claimant stated it understood the adjudicator may require further time to accommodate the further submissions and that 'the claimant is happy to agree to a reasonable request for same'.

The adjudicator issued a notice to the parties dated 26 July 2017 requesting further submissions pursuant to section 22(5) of the Vic Act and an extension of time pursuant to section 22(4)(a) of the Vic Act to 7 August 2017. However that notice was not received by either party.

On 3 August 2017, the claimant raised that it had not received the adjudicator's notice dated 26 July 2017. On 4 August 2017, the respondent stated in a letter to the adjudicator and the claimant that the last day on which the adjudicator could have made a determination under section 22(4)(a) of the Vic Act was 31 July 2017 and therefore, a determination made after that date would be invalid and of no effect.

On 7 August 2017, the parties were advised by email that the adjudicator had made a determination, which was subsequently released to the parties on 14 August 2017 after the adjudicator's fees were paid.

The respondent initiated proceedings to quash the determination on the basis that the adjudicator had committed jurisdictional error or erred in law by issuing the determination late.

DECISION

The court found in favour of the claimant, holding that the determination was made 'out of time' but not invalid.

No implied agreement to an extension of time

Riordan J found that the word 'agrees' in section 22(4)(b) of the Vic Act should be afforded its ordinary meaning. The language used in the claimant's letter of 25 July 2017 indicated an intention to agree to a reasonable request by the adjudicator for an extension of time, not an outright agreement without a request, especially if the request was not reasonable. Without an agreed extension, his Honour's finding was that the determination was out of time.

Determination not void

Not only would a finding of invalidity be inconsistent with the object of the Vic Act, the two specified consequences of non-compliance with the adjudication time limit according to section 28(2) of the Vic Act do not include an invalidating the determination.

It was further considered that providing the claimant a right to withdraw the application under section 28(2) of the Vic Act would serve no purpose if an out of time determination was a nullity and the claimant, who was not responsible for the non-compliance, would suffer an inconvenience (including the cost of a further adjudication) and be deprived of the benefit of an adjudication determination despite completing their submissions.

Re Advanced Controls Pty Ltd [2018] VSC 639

Under the Vic Act, if a valid payment claim is served by a claimant and no payment schedule is provided by the respondent, the amount can be recovered as a debt due and payable. If a statutory demand is made in respect of that debt and it remains unpaid, the respondent will not be able to have the statutory demand set aside (or any subsequent winding up proceedings dismissed) on the basis that there is a genuine dispute regarding the unpaid debt.

This case provides an illustration of the interaction between the winding up provisions of the *Corporations Act 2001* (Cth) following the making of a statutory demand and the provisions of the Vic Act. A court will not grant a winding up order where there is a 'genuine dispute' as to the debt; respondents to claims should be wary that a genuine dispute will not exist where a payment claim is validly served under the Vic Act and the respondent fails to serve a payment schedule in accordance with the requirements of the Vic Act.

FACTS

Gordon McKay Pty Ltd (**first claimant**) commenced proceedings to wind up Advanced Controls Pty Ltd (**respondent**). However, the first claimant resolved its debts with the respondent. In this proceeding Nilsen (Vic) Pty Ltd (**applicant**) sought substitute itself as the plaintiff in place of the first claimant.

The applicant entered into a building contract with the respondent in 2016. Pursuant to this contract, the applicant alleged that the respondent owed moneys in relation to variations, in particular, moneys in respect of an extension of time, additional cable ladders and removal of redundant cables and equipment. The total amount claimed by the applicant was of $195,942.06.

An invoice for this amount was issued to the respondent in 2018. The applicant argued that this invoice was a payment claim issued under the Vic Act, and as it had not been disputed by the respondent in accordance with the Vic Act, the amount claimed could was not susceptible to being the subject of a genuine dispute. However, the respondent argued that the Vic Act did not apply to this particular invoice.

The respondent argued that:

- it had a bona fide genuine dispute as to the debts because the variations were not requested, nor did they instruct the applicant to undertake the works; the amounts claimed in respect of the variations were not 'claimable variations' as defined under the Vic Act and were therefore 'excluded amounts' for the purposes of the Vic Act and not entitled to be claimed under it; and
- the time-related costs were excluded by section 10B(2) of the Vic Act and therefore the claim in respect of those moneys was not made pursuant to the Vic Act.

DECISION

The court held in favour of the respondent in finding that there was a 'genuine dispute' as to whether the moneys claimed by the applicant were claimable amounts under the Vic Act.

No 'genuine dispute' in circumstances where claim complies with the Vic Act

The court followed previous cases that held that an application for winding up will not usually be entertained where there is a 'genuine dispute' as to a debt. The court also agreed with a number of previous cases that supported the proposition that a 'genuine dispute' will not exist where a claimant validly serves a payment claim and the respondent fails to serve a payment schedule. This is due to the operation of section 16(4) of the Vic Act, which prevents a respondent from raising any defence or bringing any cross claim where it fails to serve a payment schedule. This is because following such events, the Vic Act creates a statutory liability which cannot be disputed.

Court finds 'genuine dispute' as to whether the amounts were claimable under the Vic Act

The main question the court had to determine was whether or not the variations were 'claimable amounts' under the Vic Act. The court found that the correspondence between the parties revealed that there was no clear or unequivocal instructions to carry out the variations. In addition, the court also found that there was a genuine dispute as to whether the extension of time claim was an excluded amount.

Shape Australia v The Nuance Group [2018] VSC 808

In obiter, Digby J accepted the second adjudicator's reasoning that the claimant's claim was a claim to recoup liquidated damages and that it was therefore a claim for an excluded amount under the Vic Act.

We consider that the second adjudicator's determination was contrary to the purpose and object of the Vic Act, which, in this decision, Digby J identified as ensuring cash flow is maintained through a network of contractors. If the second adjudicator's reasoning is accepted claimants will be prevented from claiming and being paid amounts otherwise due, because of the timing of when they dispute the levying of liquidated damages.

FACTS

The plaintiff, Shape Australia Pty Ltd (**claimant**) was contracted by the first defendant, The Nuance Group (Australia) Pty Ltd (**respondent**) to perform demolition, refurbishment and fit out works for a retail space at Melbourne International Airport (**contract**).

On 29 June 2018, Digby J quashed an adjudication determination made in relation to payment claim 13 (PC-13) (**first adjudication determination**) and held that the adjudicator failed to perform his basic and essential function as required under sections 23(3)(a) and (b) of the Vic Act.

On 27 July 2018, the claimant made a second adjudication application in respect of payment claim 14 (PC-14) which included uncontested individual line items claimed in PC-13 (**second adjudication application**). On 24 August 2018, the adjudicator determined that PC-14 was not a valid payment claim and determined that a nil amount was payable by the respondent to the claimant.

In its response to payment claims 1-13, the respondent had levied liquidated damages which were assessed by the superintendent under the contract to adjust the contract sum. As a result the second adjudicator found that the payment schedule in response to PC-14 did not set off an amount in response to PC-14 but relied on the adjusted contract sum to withhold payment. The second adjudicator concluded that the claimant's claim was a claim to recoup liquidated damages and that it was therefore a claim for an excluded amount under the Vic Act.

By originating motion dated 25 September 2018, the claimant sought various orders, including the remittal of the first adjudication application or the second adjudication application to be re-determined, and that both applications should be characterised as claims for reimbursement of liquidated damages, not excluded amounts.

DECISION

The court dismissed the claimant's application.

No reference date, no valid payment claim

Digby J determined that the second adjudication application was correctly determined. As no new work had been performed since PC-13 was issued, PC-14 was the second payment claim made in respect of the same reference date as PC-13. PC-14 had no valid reference date and was therefore, not a valid payment claim.

Liquidated damages are excluded amounts

Vickery J's decision in *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183 (***Seabay***) determined that claims for liquidated damages were excluded amounts under the Vic Act, and therefore that respondents could not set off such claims in payment schedules under the Vic Act.

Digby J considered whether the second adjudicator's conclusion that the claimant's claim was a claim to recoup liquidated damages, and that it was therefore a claim for an excluded amount under the Vic Act, was a correct application of *Seabay* and in accordance within the proper meaning of section 10B(2) of the Vic Act.

His Honour concluded that the second adjudicator was correct to consider that *Seabay* supported his finding and was correct to exclude the entirety of PC-14 as an amount calculated to recover earlier superintendent-effected adjustments to the contract sum.

SJ Higgins Pty Ltd v The Bays Healthcare Group Inc [2018] VCC 805

This case confirms that the Vic Act should not be construed in an 'unduly technical manner'. Rather, the Vic Act should be implemented free of 'excessive legal formality'.

FACTS

On 12 August 2016 The Bays Healthcare Group Inc (**respondent**) contracted SJ Higgins Pty Ltd (**claimant**) to design and construct a post-natal facility at Bays Hospital, Mornington (**contract**).

The contract included provisions requiring that

- payment claims served under the contract were to be served on the contract's superintendent; and
- payment claims made under the Vic Act were to be served on the respondent (rather than the superintendent).

Pursuant to the Vic Act, the claimant made several payment claims as follows:

- on 31 May 2017 the claimant served a payment claim on the superintendent only for the amount of$292,693.30 (**payment claim 14**);
- on 17 August 2017 the claimant served a payment claim on the superintendent only for the amount of $175,387.54 (**payment claim 15**); and
- on 1 September 2017 the claimant served a payment claim, in the form of a tax invoice enclosing the superintendent's payment schedules in response to payment claims 14 and 15 (without including these payment claims themselves), on the respondent for the amount of $175,387.54 (**payment claim 16**).

The respondent did not provide a payment schedule, or pay any amount, in respect of payment claim 16.

The claimant applied to the County Court for summary judgment by originating motion against the respondent for $175,387.54 as a debt due under a construction contract pursuant to section 16(2)(a)(i) of the Vic Act.

DECISION

Woodward J awarded summary judgment to the claimant in the amount of $167,957.54 (being the full amount claimed by payment claim 16 less excluded amounts under the Vic Act).

His Honour found that payment claims 14 and 15 were not validly served under the Vic Act, because they had been served on the superintendent, and not the respondent, in circumstances where the contract explicitly made clear that the superintendent was not authorised to receive claims under the Vic Act.

As a result payment claim 15 had not validly used a reference date under the Vic Act, and it was open for the claimant to make payment claim 16 in respect of that same reference date.

The respondent had alleged that payment claim 16 did not identify the construction work to which it related and so was not a valid claim under section 14(2)(c) of the Vic Act. His Honour cited authorities from Victoria and New South Wales and reiterated that the Vic Act was not to be interpreted in 'an unduly technical manner' and that to comply with section 14(2)(c) of the Vic Act it was only necessary for a payment claim to provide a respondent with the material which was reasonably necessary to make the payment claim objectively comprehensible.

Woodward J further noted that in undertaking that objective analysis it was appropriate to take into account the background knowledge of the parties as evidence by their past dealings and exchanges of information.

Accordingly, because payment claim 16 referred to payment claims 14 and 15, by reference to the payment schedules in response to those claims, and because the respondent had received copies of those claims (as provided to it by the superintendent), payment claim 16 did identify the construction work to which it related and was a valid claim under the Vic Act.

South City Plaster Pty Ltd v Modscape Pty Ltd [2018] VCC 1576

The Vic Act will apply to claims for prefabrication work carried out in Victoria for erection in other states. Practically, when a construction contract is made in Victoria and the claim issued substantially relates to work carried out in Victoria, the Vic Act will apply.

FACTS

Modscape Pty Ltd (**respondent**), was engaged by Fairbrother Pty Ltd to supply and install 64 fabricated modules for use in the Royal Hobart Hospital Temporary Decant Facility in Tasmania (**Project**).

The respondent engaged South City Plaster Pty Ltd (**claimant**) for the plastering work of the modules.

The claimant served two invoices each endorsed with the words 'this claim is made under the Securities [sic] of Payment Act' under the cover of an email. The invoices raised by the claimant were $297,448.80 and $33,300.96.

The respondent did not serve a payment schedule in accordance with the Vic Act and only paid the claimant $100,000.00 of the amount claimed.

The claimant issued proceedings claiming $230,749.70 pursuant to section 16(2)(a) of the Vic Act.

The respondent argued that the Vic Act did *'not apply to the construction contract to the extent it deals with construction work carried outside of Victoria and related to goods and serves supplied in respect of construction work carried out outside Victoria'*.

The respondent also argued that in any event, no valid payment claim had been issued because:

- the payment claim did not expressly refer to the Vic Act;
- the payment claim pertained to part of a much larger contract which was the subject of a pending court proceeding;
- multiple payment claims were served for the same reference date in contravention of section 14(8) of the Vic Act; and
- a valid reference date did not exist for the payment claim.

The respondent also contended that given the complexity of the matter, it was unsuitable for determination by summary judgment.

DECISION

The court found in favour of the claimant.

In regards to the territorial application of the Vic Act to the dispute, Macnamara J considered that the quotations and purchase orders did not call for any work to be done outside the State of Victoria and therefore the Vic Act applied. This conclusion was reached on a factual analysis with his Honour preferring the evidence of the respondent that the plastering work was undertaken at a workshop in Victoria.

His Honour also had regard to:

- the general common law presumption that Victorian legislation purports to regulate events and things in Victoria and not elsewhere; and
- the definition of construction work under the Vic Act.

On the validity of the payment claim his Honour was satisfied that the invoices constituted a valid payment claim, finding that:

- reference to the 'Securities [sic.] of Payment Act' on the invoices was sufficient to satisfy the requirements of the Vic Act;
- the payment claim pertained to a separate and distinct contract not multiple contracts as contended by the respondent;
- multiple claims were not issued for the same reference date; and
- a valid reference date did in fact exist.

His Honour rejected the respondent's argument that the present application should be treated as an application for summary judgment that would require a higher burden of proof under section 63 of the *Civil Procedure Act 2010* (Vic). Instead, Macnamara J preferred the view that granting summary relief under the Vic Act was akin to an interim order and therefore did not require the higher threshold of proof.

Valeo Construction v Pentas [2018] VSC 243

The restriction on issuing multiple payment claims in respect of one reference date under section 14(8) the Vic Act will be construed strictly.

FACTS

In March 2014 Pentas Property Investments Pty Limited (**respondent**) contracted Valeo Construction Pty Ltd (**claimant**) to construct a five-storey residential apartment building (**contract**). Under the contract, as amended, the claimant was entitled to make claims for payment on the thirtieth day of each month.

On 28 February 2018 the claimant served a payment claim titled 'Progress Payment claim #45' for the sum of $2,215,160.03 (**first payment claim**).

On 1 March 2018 the claimant served a revised payment claim, with the same title, in the sum of $2,240,160.13 (**second payment claim**). The second payment claim was served under cover of an email stating that the 'PC sum for the pool has been updated' and that this claim was a 'Rev 1'.

On 6 March 2018 the claimant's contracts administrator sent a further email to the respondent stating that the claimant had withdrawn the first payment claim and that it relied on the second payment claim. The email did not attach a further payment claim, but it did expressly state that 'Valeo has withdrawn the payment claim dated 28 February 2018 … and relies on the amended payment claim dated 1 March 2018'.

On 22 March 2018 the respondent served a payment schedule on the plaintiff (**payment schedule**).

The claimant asserted that because the payment schedule was served more than 10 business days after the second payment claim was served the respondent was liable for the full amount claimed (section 16 of the Vic Act).

The respondent disputed the validity of the second payment claim under section 14(8) of the Vic Act.

DECISION

Digby J held that the second progress payment claim was invalid as it breached section 14(8) of the Vic Act.

In *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd (No 2)* [2015] VSC 500 (analysed in our Security of Payment Roundup of 2015 cases) service of a payment claim on 7 October 2014 accompanied by three tax invoices was supplemented by re-sending the same payment claim on 9 October 2014 with additional trade invoices. In that case Vickery J determined that the two series of correspondence constituted the one payment claim.

His Honour determined that:

- the communication attached to the second payment claim did not clearly and unequivocally convey to the respondent that the first payment claim was withdrawn or abandoned by the claimant and replaced with the second payment claim;
- the 6 March 2018 email did withdraw the first payment claim, but it did not serve any new payment claim; and
- because the second payment claim was for a different amount, it rectified what appeared to be an omission from the first payment claim; accordingly, the claimant had served two payment claims in respect of the same reference date, contrary to section 14(8) of the Vic Act.

His Honour noted, as a practical observation, that it could be problematic for respondents if payment claims could be amended after service unless the earlier payment claim is *'clearly abandoned or withdrawn'*.

Vanguard Development Group Pty Ltd v Promax Building Developments Pty Ltd & Anor [2018] VSC 386

Regard must be had to the precise terms of a contract to determine whether a reference date under the Vic Act arises for final payment following the termination of that contract.

If in a subsequent adjudication, a respondent seeks to rely on defects that existed at the time of an earlier adjudication but were only subsequently identified, the adjudicator must consider whether these defects alter the value of the works.

FACTS

Vanguard Development Group Pty Ltd (**respondent**) engaged Promax Building Developments Pty Ltd (**claimant**) to construct 10 apartments at 47 Dickens Street, Elwood.

SC-22 of the contract provided that 'notwithstanding any other term of the contract and/or its termination' the reference date for a 'final claim for payment' was the date the claimant last undertook any works on site. Clause N11 of the contract prescribed that a 'final claim' could be made when:

- all defects liability periods have ended;
- the claimant has rectified all defects and finalised all incomplete work; and
- the works have been completed in accordance with the contract.

On 15 December 2017 (being the last day the claimant performed works on the site), the claimant issued a payment claim under the Vic Act (**December Payment Claim**). After the respondent issued a payment schedule proposing to pay 'nil', the claimant referred the matter to adjudication and was awarded a sum of $230,000 (**First Adjudication**).

On 27 February 2018 the contract was terminated.

Notwithstanding the termination of the contract, on 8 March 2018 the claimant served a new 'claim for final payment' in the amount of $340,000 (**March Payment Claim**). The respondent responded by issuing a payment schedule proposing to pay 'nil'.

The claimant referred the March Payment Claim to adjudication (**Second Adjudication**). In the Second Adjudication, the adjudicator relied on SC-22 in finding that there was a valid reference date for the payment claim, alternatively the adjudicator relied on section 9(2)(d) of the Vic Act. In determining that $210,000 was payable to the claimant, the adjudicator concluded that issue estoppel and section 23(4) of the Vic Act precluded him from considering defects that existed at the time of the First Adjudication that were subsequently identified.

DECISION

Kennedy J quashed the Second Adjudication determination on the grounds of jurisdictional error.

No valid reference date

In concluding that there was no valid reference date under the contract, her Honour held that a 'final claim for payment' could only be submitted where the three circumstances identified in clause N11 of the contract had been satisfied. This was not the case. As such, the March Payment Claim was not a 'final claim for payment' within the meaning of SC-22 and the reference date under that clause had not arisen.

Consistent with *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52 (analysed in our Security of Payment Roundup of 2016 cases), her Honour also held that no default reference date arose under section 9(2)(d) of the Vic Act because SC-22 made express provision for a reference date for final payment.

Adjudicator failed to re-assess the value of defective work

In respect of the defects that existed at the time of the First Adjudication, Kennedy J held that section 23(4) of the Vic Act required the adjudicator to direct himself to the question of the 'value of the works'. Where the respondent invited the adjudicator to do so, the adjudicator was required to ask himself whether he was satisfied that the 'value' of the works was altered by reason of the existence of the further alleged defects. The adjudicator's failure to do so constituted a jurisdictional error.

Western Australia

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CASE INDEX

- *Clough Projects Australia Pty Ltd v Floreani* [2018] WASC 101
- *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2018] WASCA 28
- *Easy Stay Mining Accommodation Pty Ltd v Grounded Construction Group Pty Ltd* [2018] FCA 519
- *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd* [2018] WASCA 27
- *Total Eden Pty Ltd v Charteris* [2018[WASC 60

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 continue to emphasise the underlying objective of the WA Act, being the fair, inexpensive and quick resolution of disputes.

DEVELOPMENTS

In 2018, the courts and tribunals were again not afforded the opportunity to interpret the substantial amendments to the WA Act that we saw at the end of 2016, including the ability to 'recycle' claims by re-issuing disputed invoices.

We did however see a development of case law in the following key areas:

- the continued application of the rules of procedural fairness to adjudications;
- the ability of the courts to sever parts of an application affected by jurisdictional error;
- determinations regarding 'hybrid' contracts; and
- the extent that the implied contractual provisions in the WA Act should be applied.

In *Clough Projects Australia Pty Ltd v Floreani* [2018] WASC 101, Tottle J held that the adjudicator denied the parties procedural fairness as the determination was made on a basis not submitted by either party. The adjudicator found that the claimant was partially entitled to the disputed payments because of an implied contract, yet neither party argued this point in their submissions. Tottle J determined that the adjudicator had exceeded their jurisdiction on this basis.

In *Duro Felguera Australia Pty Ltd v Samsung C & T Corporation* [2018] WASCA 28 and *Samsung C & T Corporation v Duro Felguera Australia Pty Ltd* [2018] WASCA 27 the WA Court of Appeal determined:

- that WA courts can sever parts of an adjudication decision affected by jurisdictional error; and
- that adjudicators can make determinations regarding payment disputes where only some of the work falls within the meaning of 'construction work' under the WA Act, provided that the work falling outside of that definition carries obligations under a 'construction contract' as defined in the WA Act.

In *Total Eden Pty Ltd v Charteris* [2018] WASC 60 Pritchard J determined that the adjudicator denied procedural fairness in failing to consider a set-off claim that was advanced by Total Eden. Pritchard J also held that the adjudicator erred in implying all of the implied terms in division 5 of Schedule 1 of the WA Act and should have only implied provisions to the extent that those provisions were expressly absent from the construction contract.

FUTURE

In February 2018, the WA Minister for Commerce and Industrial Relations announced that an Industry Advisory Group chaired by John Fiocco would review the security of payment regime in WA. A particular focus of the group was the extent to which WA should adopt the Murray Review recommendations.

In October, the group produced the Security of Payment Reform in WA Building and Construction Industry final report (**Fiocco Report**), which made a number of recommendations, including an overhaul of the existing legislation and a new security of payment regime based predominantly on the New South Wales model.

In 2019, we expect to see the extent to which the McGowan Government will adopt the recommendations of the Fiocco Report. If the recommendations are adopted we can expect to see the WA security of payment regime brought more into line with the current approach on the East Coast.

Clough Projects Australia Pty Ltd v Floreani [2018] WASC 101

An adjudicator may adjudicate more than one payment dispute between parties, without the consent of the parties, where the adjudicator is satisfied that doing so will not adversely affect his or her ability to adjudicate the dispute fairly and as quickly, informally and inexpensively as possible. Making a determination on a basis not argued by either party is a denial of procedural fairness and will result in jurisdictional error. Making a determination on the basis of an implied contract, and not on the basis of the contract under which the adjudication application is brought, will result in jurisdictional error.

This case confirms that an adjudicator may adjudicate more than one payment dispute between parties, without the consent of the parties, where the adjudicator is satisfied that doing so will not adversely affect his or her ability to adjudicate the dispute fairly and as quickly, informally and inexpensively as possible. The case also provides a timely reminder that an adjudicator will deny the parties procedural fairness where the adjudicator makes a decision on a basis not advanced by either of the parties, without inviting further submissions from the parties on that point.

FACTS

Clough Projects Australia Pty Ltd (**respondent**) and the Oceanic Offshore Pty Ltd (**claimant**) entered into a lump-sum subcontract under which the claimant was to provide diving services at Mundaring Weir (**Subcontract**). The Subcontract contained a provision that the claimant could not vary the work without a written direction from the respondent. In May and June 2017, the claimant issued fifteen separate invoices, nine of which were disputed by the respondent.

On 17 October 2017, the claimant served an adjudication application on the respondent, seeking payment of $605,963 in relation to the disputed invoices, which the claimant characterised as a single 'payment dispute' under the WA Act. The adjudicator determined that the invoices constituted fifteen separate payment claims, which had given rise to nine separate payment disputes. Nonetheless, the adjudicator determined that on the proper construction of section 32(3)(c) of the WA Act he had jurisdiction to determine the nine separate payment disputes simultaneously without first obtaining the consent of the respondent.

Having concluded that he had jurisdiction to determine the payment disputes, the adjudicator was required to consider the respondent's contention that the claimant had no entitlement to payment in respect of certain variation claims because no written directions had been provided. In finding that the claimant had a partial entitlement to payment for seven of the nine payment disputes, the adjudicator found that a separate implied contract arose in relation to certain variations. This was not a submission advanced by either party.

The respondent applied to the Supreme Court of Western Australia to quash the determination.

DECISION

Ultimately, Tottle J held that the adjudicator was entitled to adjudicate one or more payment disputes between the same parties without both parties' consent; however, the adjudicator fell into jurisdictional error by:

- denying the respondent procedural fairness by making the determination on a basis that was not advanced by either party; and
- making a determination on the basis of an implied contract that he found to have been formed, and not on the basis of the Subcontract under which the adjudication application was brought.

In finding that section 32(3)(c) of the WA Act permitted an adjudicator to adjudicate a payment dispute simultaneously with one or more other payment disputes, Tottle J considered that such a construction of the WA Act was consistent with the plain language of the section, the WA Act's object to determine payment disputes 'fairly and as quickly, informally and inexpensively as possible' and the extrinsic materials available.

However, the court considered that the adjudicator's finding that one or more implied contracts had been formed between the parties was not readily available on the parties' submissions. The respondent should have been given the opportunity to respond to matters prejudicial to its interests that were known only to the adjudicator and which might have been taken into account in the adjudicator's final determination of the issues. The adjudicator's failure to invite submissions amounted to a denial of procedural fairness.

Further, the adjudicator's jurisdiction was limited to adjudicating payment disputes under the Subcontract. By making the determination on the basis of implied contracts, Tottle J considered that the adjudicator exceeded his jurisdiction.

Duro Felguera Australia Pty Ltd v Samsung C&T Corporation [2018] WASCA 28

Adjudication determinations under the WA Act are capable of severance as the court has the power to quash parts of an adjudication determination that are invalid due to jurisdictional error.

FACTS

Samsung C&T Corporation (**Samsung**), the head contractor, entered into a subcontract with Duro Felguera Australia Pty Ltd (**Duro**) for the Roy Hill Iron Ore Project (**Project**). The Project involved the development of an open cut mine for the extraction of iron ore, with associated processing, rail and port facilities in the Pilbara region of Western Australia.

Duro referred five disputes between the parties to adjudication, which were adjudicated by different adjudicators. Each adjudicator determined in favour of Duro and determined the amounts due to Duro from Samsung.

Duro brought proceedings to enforce the five determinations (**enforcement applications**), the validity of which Samsung challenged in judicial review proceedings (**judicial review proceedings**). Both proceedings were heard simultaneously before the trial judge who handed down a single set of reasons.

The trial judge:

- in respect of the first, fourth and fifth adjudication determinations, dismissed Samsung's judicial review proceedings and found in favour of Duro; and
- in respect of the second and third adjudication determinations, dismissed Duro's enforcement applications and found in favour of Samsung.

The parties appealed to the Court of Appeal. The Court of Appeal dealt with Duro's appeal in these proceedings and with Samsung's appeal in *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd* [2018] WASCA 27.

The court described the issues in Duro's appeal in respect of the second and third adjudication determinations as the 'set-off' issue and the 'severance' issue.

Set-off issue

The trial judge found that the adjudicator had exceeded his jurisdiction with respect to part of the determination which awarded an amount of approximately $34.2 million said to have been certified as payable, but which Samsung claimed to have 'set off'. On appeal, Duro submitted that it should be open to the adjudicator to consider the set-off issue in exercising the jurisdiction conferred by the WA Act, which requires it to determine *'whether any party to the payment dispute is liable to make a payment'*.

Severance issue

In the context of the set-off issue, Duro submitted that the trial judge could and should have severed the invalid portion of the adjudicator's determination and allowed the valid portions of the determination to be enforced.

DECISION

Duro's appeal in respect of the set-off issue was upheld. The Court of Appeal held that the adjudicator correctly limited his determination to the question of whether Samsung was entitled to set off the amount which it claimed in partial answer to Duro's payment claim, evident from the fact that the adjudicator did not include in his determination any amount reflecting the difference between the $6.66 million which Samsung claimed to set off and the $13.1 million which the adjudicator found Samsung had wrongly withheld.

Further, the Court of Appeal held that courts do have the power to sever part of an adjudication determination which is invalid because of jurisdictional error. Therefore, the Court of Appeal severed the invalid part of the determination and held that the parts of the determination that had not been affected by jurisdictional should remain enforceable.

Easy Stay Mining Accommodation Pty Ltd v Grounded Construction Group Pty Ltd [2018] FCA 519

The decision of the Federal Court establishes that a contractor cannot rely solely on a successful adjudication determination to prove the existence of a 'construction contract' for the purpose of the WA Act.

FACTS

In February 2017, Grounded Construction Group Pty Ltd (**GCG**) commenced construction of a mining camp near Laverton for Easy Stay Mining Accommodation Pty Ltd (**Easy Stay**). In June 2017, GCG evacuated the site upon the request of Easy Stay. GCG issued seventeen invoices for the works completed between May and June. On 30 June 2017, GCG issued a statutory demand for $1,828,478 for works completed. Easy Stay applied to set aside the statutory demand.

First adjudication applications

GCG lodged adjudication adjudications under the WA Act in respect of nine of the invoices. Between 21 and 24 July adjudication determinations were published in favour of GCG. The total amount determined to be payable in respect of those nine invoices by Easy Stay was $948,018. Easy Stay paid this amount in October after obtaining a personal undertaking that a director of GCG would repay the amount if an application by Easy Stay for judicial review of the determinations was successful.

Subsequent adjudication applications

In August, GCG lodged adjudication applications in respect of five more of the invoices. Those applications were successful and the total extra amount payable by Easy Stay was $549,013.06. Easy Stay did not pay this amount. GCG sought to enforce these adjudications and Easy Stay sought judicial review of each of the determinations.

Claims

Easy Stay claimed there was no enforceable contract and GCG was entitled only to a claim in *quantum meruit* for work done on the construction site. Further, Easy Stay alleged there was no construction contract for the purpose of the WA Act and therefore no jurisdiction for an adjudicator to make any determination regarding the invoices.

GCG claimed there was no genuine basis on which to dispute the existence of a contract for the purposes of the WA Act, stating that the contract was entered into by Easy Stay upon the execution of a document dated 22 February 2017. The document recorded schedules of rates to apply to the works and incorporated GCG's standard terms and conditions.

DECISION

Based on the evidence of both parties, Colvin J determined there was a genuine dispute over the existence of the debt, and set aside the statutory demand in accordance with s459H of the Corporations Act.

Colvin J dismissed GCG's argument that the determinations established that there is a construction contract for the purpose of the WA Act and that the court must enforce the adjudication determinations. In dismissing this argument, his honour emphasised that the adjudication process does not make any determination other than the determination of an amount to be paid by the force of the statutory provisions. While the existence of a construction contract is necessary for the adjudicator to make a valid payment determination, the court is not bound by the adjudicator's views in respect of the existence of that contract.

An order to set aside the statutory demand was made, and Easy Stay was entitled to majority of the costs.

Samsung C&T Corporation v Duro Felguera Australia Pty Ltd [2018] WASCA 27

An adjudicator can determine payment claims in respect of work which includes both construction work and work excluded from the definition of construction work as 'obligations' in relation to work under the contract.

This decision was based on the provisions of the WA Act before the 2016 amendments to the WA Act. Had this case been assessed under the legislation as amended, instead of considering whether or not the work is intrinsically linked to a mining process, the test could well be whether or not the work was the construction of an 'item' of plant.

FACTS

The facts are set out in our analysis of *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2018] WASCA 28 above.

The trial judge dismissed Samsung's judicial review proceedings and allowed Duro's applications for enforcement of the relevant determinations.

The trial judge found that the adjudicator had erred in his determinations that some of the works were not within the meaning of 'construction contract' for the purposes of the WA Act (construction work interpretation error). However, the trial judge concluded that these errors did not invalidate both determinations as the adjudicators had made those errors in the course of exercising jurisdiction conferred on them by the WA Act.

Samsung appealed to the Court of Appeal:

- on the basis that the work being undertaken by Duro was not 'construction work' within the meaning of the WA Act and therefore the adjudicator was bound under section 31(2)(a) of the WA Act to dismiss the adjudication application; and
- in the alternative, the adjudicator had no jurisdiction to determine amounts relating to work which was not of a kind described in the definition of construction contract under the WA Act.

In these proceedings, the Court of Appeal considered whether an adjudicator has jurisdiction to determine a payment dispute where some of the work falls outside the definition of 'construction contract' under the WA Act.

Duro's appeal was the subject of the related proceedings in *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2018] WASCA 28.

DECISION

By a majority (Buss P and Murphy JA, Martin CJ dissenting), the court allowed Samsung's appeal.

The Court of Appeal held that:

- it is within an adjudicator's jurisdiction to determine payment claims in respect of work which included within, and excluded from, the meaning of 'construction contract' as obligations in relation to work under the contract are still obligations under 'construction contracts' for the purposes of the WA Act;
- a determination in relation to anything other than a 'payment dispute' (for the purposes of the WA Act) will fall into jurisdictional error because adjudicators do not have the power to determine the merits of a dispute that does not involve a 'payment claim' under the WA Act; and
- invalid components of an adjudicator's determination can be severed under section 31(2)(b) of the WA Act.

Total Eden Pty Ltd v Charteris [2018] WASC 60

The court quashes an adjudication determination for jurisdictional error where the adjudicator fails to consider a set-off argument, and also holds that the implied provisions in the WA Act should only be implied to the extent that those provisions are expressly absent from the contract in question.

FACTS

Total Eden Pty Ltd (**Total Eden**) was contracted on the Woodie Agriculture Project (**Project**) to supply and install irrigation equipment. Total Eden subcontracted ECA Systems Pty Ltd (**ECA**) to supply and install the electrical and process control works. In May 2014, ECA provided an initial quotation for works being performed in connection with the Project, and the parties subsequently agreed to a price of $169,852 (plus GST). On 11 August 2016, ECA submitted an invoice to Total Eden for $80,640 (plus GST) for part of the works (**Invoice**). Total Eden did not pay the Invoice on time, and on 6 October 2016, ECA applied for adjudication under the WA Act (**Application**).

On 18 October 2016, Total Eden advised ECA that its Principal had refused payment of Total Eden's invoices, in the sum of $134,730.64, because of alleged loss and damage the Principal had suffered due to ECA's failures. Total Eden sought payment of that sum from ECA.

The adjudicator's determination of the Application required Total Eden to pay ECA a total of $92,853.74, comprised of the amount for which Total Eden was liable to pay under the Invoice, interest on that amount, GST, $1,681.82 for ECA's costs of preparing the Application, and $1,500 for ECA's share of the adjudicator's fee (**Determination**).

Total Eden sought judicial review of the Determination on the basis that the adjudicator:

1. failed to make a determination of Total Eden's liability as at the date of the Determination;
2. failed to have regard to Total Eden's entitlement to set off $134,730.64 for faulty or defective works;
3. failed to consider matters which he was obliged to consider, namely Total Eden's entitlement to set off $134,730.64 for faulty or defective works;
4. failed to make the Determination on the basis of the law of Western Australia;
5. required Total Eden to make a payment of ECA's costs of preparing the Application, which did not form part of the 'costs of the adjudication'; and
6. misconstrued section 34(2) of the WA Act and acted unreasonably by ordering Total Eden to pay ECA's preparation costs and ECA's portion of the adjudicator's fee.

DECISION

The court upheld grounds 2, 3 and 6 of the appeal and held that the Determination should be quashed.

Under section 31(2)(b) of the WA Act, adjudicators are required to determine on the balance of probabilities whether a party to a payment dispute is liable to make a payment. The court found that in performing this role, the adjudicator failed to assess Total Eden's liability by reference to the terms of the contract and applicable legal principles. The adjudicator did not take into account Total Eden's set-off claim under the indemnity given in clause 5.3 of the contract on the basis that it was not open to Total Eden to rely on the set-off claim in the adjudication because under section 17 of the WA Act all of the terms of division 5 of schedule 1 to the WA Act were implied into the contract.

Pritchard J found that the adjudicator had erred in concluding that all of the terms of division 5 of schedule 1 to the WA Act were implied into the contract and that, in any event, section 32 of the WA Act required the adjudicator to take into account both matters raised in ECA's claim and matters raised in Total Eden's response. Therefore, the adjudicator's failure to take in to account Total Eden's set off claim meant that the adjudicator had failed to determine Total Eden's liability according to the contract, and failed to take into account a matter which the WA Act required the adjudicator to take in to account. Pritchard J was satisfied that these failures amounted to jurisdictional error sufficient to uphold grounds 2 and 3.

Pritchard J held that, under section 34(2) of the WA Act, an adjudicator may order a party to pay the costs of the adjudication if the adjudicator is satisfied that a party incurred costs because of frivolous or vexatious conduct by another party. Pritchard J found that the adjudicator's only basis to conclude that Total Eden's conduct was frivolous or vexatious was Total Eden's alleged late defence for not making payment (ie the set-off claim) which did not comply with the implied provisions of the WA Act and was therefore bound to fail. Pritchard J concluded that the adjudicator's basis to require Total Eden to pay ECA's costs was an unreasonable exercise of an adjudicator's discretion he had under section 34(2) of the WA Act and was therefore a jurisdictional error.

South Australia

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The *Building and Construction Industry Security of Payment Act 2009* (SA) is referred to as the **SA Act**.

South Australia overview

EMERGING TRENDS

The most significant development in 2018 remains the High Court's decisions in *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5 (***Maxcon***) and *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 (***Probuild***). In addition, the South Australian Supreme Court has aligned SA with NSW in rejecting the concept of 'premature payment claims' and provided further clarity on what will amount to a jurisdictional error under the SA Act.

DEVELOPMENTS

The decision in *Maxcon* provided certainty on the one hand by conclusively confirming that judicial review is only available under the SA Act where jurisdictional error arises. However, the High Court's finding that a provision making return of retention monies contingent on an event under the head contract (in this case practical completion) violated the SA Act's preclusion on 'pay when paid' provisions opens up a potential new avenue of dispute.

The decision in *Hansen Yuncken Pty Ltd v Yuanda Australia Pty Ltd* [2018] SASC 158 clarified that a failure by an adjudicator to exercise the power under section 22(5) of the SA Act to correct an error in an adjudication determination does not give rise to jurisdictional error. Whilst in this case the court did not consider an error had been made, the court concluded that such an error would be 'within jurisdiction'. This case also acted as a salient reminder of the critical importance of raising any grounds relied upon in the payment schedule; given that the respondent was required to make a substantial payment in this instance due to a failure, in the adjudicator's view, to properly identify the entirety of its claim to set off liquidated damages.

The Supreme Court applied *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52 (analysed in our Security of Payment Roundup of 2016 cases) in *The Trustee for Allway Unit Trust Trading as Westside Mechanical Contracting Pty Ltd v R&D Airconditioning Pty Ltd* [2018] SASC 46, and confirmed that the existence of an available reference date is a necessary precondition for a valid claim. The court also rejected the concept of 'premature' payment claims being subsequently enlivened upon arrival of a reference date. The court found that the entitlement to serve a payment claim under the SA Act arose on and from the reference date and not prior.

Finally, the *Building Construction Industry Security of Payment (Review) Amendment Bill 2017* (SA) (**Bill**) passed through the House of Assembly, but lapsed whilst awaiting consideration in the Legislative Council. To date, the Bill has not been re-introduced.

FUTURE

As yet the High Court's decision in *Maxcon* regarding 'pay when paid' provisions has not generated judicial review proceedings however we anticipate that it is only a matter of time.

In light of the clarity provided by the *Maxcon* decision and South Australian Supreme Court decisions over the last few years it is expected that the question of reference dates will continue to be the focus of judicial review proceedings.

Hansen Yuncken Pty Ltd & Anor v Yuanda Australia Pty Ltd & Anor [2018] SASC 158

The Supreme Court has confirmed that the criteria set out in the slip rule — being section 22(5) of the SA Act which provides that an adjudicator may on its own initiative or on the application of the parties correct a determination if the determination contains a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation of figures, or defect of form — are not jurisdictional facts, and no judicial review arises from an adjudicator's refusal or otherwise to make a correction pursuant to section 22(5). Whilst the court found that the adjudicator had not committed an error in this case, it found that an error in applying the discretion provided by section 22(5) would be 'within jurisdiction'.

The adjudicator's determination, which the court agreed with, was premised on a finding that certain amounts had not been raised in the relevant payment schedule. The decision is a salient reminder that the payment claim and payment schedule define the dispute between the parties, and any amounts or arguments not included in a payment schedule will not, under the SA Act, be put in issue before an adjudicator.

FACTS

Hanson Yuncken Pty Ltd and CPB Contractors (Hansen Yuncken – Leighton Contractors Joint Venture) (**respondent**) entered into a contract with the State Government to design and construct the new Royal Adelaide Hospital. In August 2012, the respondent and Yuanda Australia Pty Ltd (**claimant**) entered into a contract whereby the claimant agreed to undertake façade works.

There were delays in the project. The respondent alleged that the claimant did not meet the Date for Substantial Completion under the contract, and on 12 September 2017 the respondent exercised its rights under the contract to impose liquidated damages on the claimant across the period 24 March 2015 to 1 July 2015 in the sum of $6,483,947.24. On 1 December 2017, the respondent drew down on two bank guarantees, totalling $4,420,873.13, in partial payment of the assessed liquidated damages. The respondent alleged that the balance of the liquidated damages, $2,063,074.12, remained owing by the claimant (**balance of the liquidated damages**).

On 18 April 2018, the claimant served a payment claim on the respondent, seeking payment of $7,763,159.39. On 2 May 2018, the respondent served a payment schedule, asserting the sum owing as being the negative sum of -$592,029.10. Critically, whilst the respondent's scheduled amount took into account deduction of $4,420,873.13 for liquidated damages, it did not deduct the balance of the liquidated damages. The claimant applied for adjudication.

The adjudicator subsequently determined that the respondent owed the claimant the sum of $1,905,069.90. The adjudicated amount did not include reference to the balance of the liquidated damages.

Having received the adjudication determination, the respondent considered that the adjudicator had mistakenly used the amount of $4,420,873.13 (the sum recovered under the bank guarantees) as the respondent's entitlement to liquidated damages, rather than the full sum of $6,483,947.24. The respondent requested that the adjudicator exercise the discretion to 'correct' a determination under section 22(5) of the SA Act.

Section 22(5) of the SA Act provides that such correction may be made if the determination contains:

- a clerical mistake; or
- an error arising from an accidental slip or omission; or
- a material miscalculation of figures or a material mistakes in the description of a person, thing, or matter referred to in the determination; or
- a defect of form.

The adjudicator, having considered the parties submissions on that point, determined that he had not made an error to which section 22(5) of the SA Act applied, and declined to exercise discretion, and did not amend his determination. The respondent sought to review that decision on the basis that the adjudicator made a jurisdictional error in determining an incorrect sum of liquidated damages and subsequently determining that he could not exercise the powers conferred by section 22(5), and that the decision was so unreasonable that no reasonable decision-maker in the position of the adjudicator could have made it.

DECISION

The court dismissed the respondent's application.

The court found that the criteria set out in section 22(5) of the SA Act are not jurisdictional facts, and as such were there any error in respect of the application of section 22(5) it was within jurisdiction and therefore not reviewable. Whilst strictly unnecessary given that finding, the court also determined that there was no error as the adjudicator was correct in determining that the respondent had only put in issue the sum of $4,420,873.13 for liquidated damages.

Jurisdictional error

Lovell J considered the purpose of the SA Act is to provide 'prompt route to payment' and therefore that section 22(5) in the context of the SA Act confers upon an adjudicator the power to make minor corrections in a 'speedy and efficient manner'. Enabling the court to review decisions made pursuant to section 22(5) would be inconsistent with the overall purpose of the statutory scheme. The court followed the reasoning of the Queensland and New South Wales Supreme Courts in *Uniting Church in Australia Property Trust (Qld) v Davenport* [2009] QSC 134, and *Musico v Davenport* [2003] NSWSC 977. In those cases, the courts considered the equivalent sections of the Qld Act, and NSW Act, respectively, and concluded that the criteria in those sections are not jurisdictional facts.

Liquidated damages in issue

The court rejected the respondent's submission that it had made clear that the balance of the liquidated damages was in issue. The court held that a payment schedule must indicate why the scheduled amount is less than the claimed amount, and any reason for withholding payment. Any written submissions in the adjudication process are necessarily directed towards the scheduled amount. The respondent's failure to include the balance of liquidated damages in its scheduled amount calculations was fatal, and the adjudicator was correct to find that the balance of liquidated damages sum was not in issue.

Unreasonableness

Given the court's finding that the respondent had only put in issue the sum of $4,420,873.13 for liquidated damages, and had not included the balance of the liquidated damages, it was held that there was no unreasonableness in the adjudicator's refusal to exercise his discretion conferred by section 22(5) of the SA Act.

Maxcon Constructions Pty Ltd v Vadasz [2018] HCA 5

Together with the High Court's decision in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 (*Probuild*), the High Court confirmed that each of the NSW Act and the SA Act removes a court's jurisdiction to overturn an adjudicator's determination infected by non-jurisdictional errors of law.

The High Court also held that provisions relating to the release of retention sums under a subcontract contingent upon an event under a head contract are void under the 'pay when paid' prohibition in the SA Act.

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 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, alleging that the adjudicator made an error of law in deciding that the relevant clauses were 'pay when paid provisions'.

At first instance, Stanley J found that the adjudicator's determination that the retention provisions of the contract were 'pay when paid provisions', but held that the error was neither jurisdictional, nor on the face of the record and consequently judicial review did not lie.

The Full Court of South Australia agreed with Stanley J that the adjudicator had erred and that the error did not amount to jurisdictional error. However the Full Court found that certiorari for such an error was impliedly excluded by the SA Act.

The High Court granted special leave to hear the head contractor's appeal to overturn the SA courts' decision which had followed the NSW Court of Appeal's decision in *Probuild*.

DECISION

Having reached its decision in *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' under the SA Act.

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 certificate of occupancy 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 a non-jurisdictional error. This meant that the court did not have jurisdiction to set aside the adjudicator's determination.

McMahon Services Australia P/L v John Holland P/L [2018] SADC 134

This case provides guidance as to what will constitute a 'statewide shutdown' for the purpose of the exclusion to business day under the SA Act. Consideration is also given to whether the inclusion of claims for amounts which do not arise from the relevant reference date period will invalidate a payment claim.

FACTS

John Holland Pty Ltd (**John Holland**) subcontracted McMahon Services Australia Pty Ltd (**McMahon**) in respect of the construction of the Calvary Hospital. On 20 February 2017, McMahon served a payment claim on John Holland of $277,713.42 for 'claims this period' (**Period Claim Amount**) and also included a demand for the sum of $927,000.63, comprised of the Period Claim Amount plus amounts claimed under a previous payment claim (**Demand Amount**). On 15 March 2017, John Holland served its payment schedule.

At issue was whether:

- McMahon had served a valid payment claim; and
- John Holland served a payment schedule within time.

The SA Act is unique in that business day is defined to exclude days on which there is a 'statewide shutdown' of 'operations of the building and construction industry'.

14 March 2017 was scheduled as a rostered day off (**RDO**) for workers under both John Holland's own enterprise agreement and four major building industry unions, meaning a considerable portion of the workforce on site were away. John Holland submitted that this RDO satisfied the definition of 'statewide shutdown' and was therefore not a business day, which meant that the payment schedule was due on 15 March 2017 and had been served within time.

McMahon disagreed, asserting that different RDOs were scheduled for other organisations or unions such that the balance of the industry may still be operating on any given RDO. McMahon sought summary judgment on the basis that it was entitled to recover the payment claim amount as a debt due under section 15(2)(a)(i) of the SA Act.

At first instance, the District Court Master declined to enter summary judgment as John Holland had a reasonable basis on which to defend McMahon's claim. The issue on appeal was whether John Holland had established that there was a reasonable basis for its defences.

DECISION

In this appeal, as the court was focused on whether a reasonably arguable defence was available, rather than a final merits determination, its findings are useful guidance and not determinative of the issues.

Valid payment claim

Dart J held that McMahon had complied with section 13(2)(b) of the SA Act in relation to the Period Claim Amount.

In respect of the Demand Amount, while a claimant may include in a payment claim an amount previously claimed pursuant to section 13(6) of the SA Act, his Honour considered that the claimant still needed to comply with section 13(2) of the SA Act so as to allow the respondent to understand the basis of the claim. His Honour remarked in obiter that it was not appropriate to make a claim for payment by mere incorporation of another document. His Honour considered that the Demand Amount did not comply with section 13(2) of the SA Act.

However, as the Demand Amount did not purport to be a 'claim this period', his Honour found that in itself this likely did not render the payment claim invalid but the inclusion of the Demand Amount provided a basis on which John Holland could argue the payment claim was not valid. There was therefore a basis to uphold the District Court Master's decision not to enter judgment summarily in favour of McMahon.

Served within time

Dart J considered the ordinary meaning of the words in the definition of business day and held that:

> *a complete or total shutdown of work in the industry was not necessary. The definition requires a shutdown of operations of the building and construction industry and that this be statewide. His Honour did not consider that the definition required the shutdown to be 'complete'.*

His Honour acknowledged the SA Act requires a respondent to act 'promptly' in responding to a payment claim. However, his Honour observed that in order to respond, a principal may need to make enquiries of employees and contractors as to work carried out and variations and that this process would be inhibited if substantial parts of the workforce were not available. Consequently, his Honour considered that the question of whether an RDO amounted to a statewide industry shutdown was, to some extent, a matter of fact and degree. His Honour concluded that sufficient doubt existed to provide John Holland a reasonable basis to defend McMahon's claim.

The Trustee for Allway Unit Trust trading as Westside Mechanical Contracting Pty Ltd v R&D Airconditioning Pty Ltd & Ors [2018] SASC 46

The Supreme Court has applied recent High Court authority in quashing an adjudication determination on the basis the reference date relied on by a claimant did not arise under the contract. The Supreme Court has also confirmed that the SA Act does not allow for the concept of 'premature' payment claims on the basis that the wording of the SA Act entitles a claimant only to serve a payment claim 'on and from' a reference date, and not prior to that date.

This case serves a good example of the importance of properly considering and identifying what, if any, reference date is available before making a payment claim under the SA Act. A failure to do so creates both a risk of jurisdiction arguments being raised as well as creating a risk that the SA Act's prohibition against more than one payment claim being served in respect of each reference date is offended.

The decision also aligns the position in South Australia with that of New South Wales in rejecting the concept of 'premature' payment claims being valid. This contrasts with the present position in Victoria where, in a number of cases, the Victorian Supreme Court has determined premature claims are to be treated as enlivened on and from the occurrence of the next reference date under the Vic Act.

FACTS

On 6 October 2016, Westside Mechanical Contracting Pty Ltd (**respondent**) and R&D Airconditioning Pty Ltd (**claimant**) entered into a subcontract for the claimant to perform mechanical services installation works at the Department of Defence's AIR 7000 Project at the RAAF Base at Edinburgh, South Australia (**Contract**).

The claimant ceased work under the Contract in October 2017, though it maintained that the Contract had not been terminated; rather, the respondent had simply asked the claimant to leave the site, and the claimant had agreed to do so. The respondent contended that the Contract had in fact come to an end as of 31 October 2017, either by the respondent's acceptance of the claimant's repudiation, or alternatively, by the parties' agreeing to terminate the Contract from that date.

On 8 December 2017, the claimant served the respondent with a payment claim, endorsed as a payment claim pursuant to the SA Act, for the amount of $336,344. The respondent provided a payment schedule denying any liability to pay, noting that the payment claim did not identify a reference date (and in any event, the respondent claimed entitlement to set off amounts).

On 17 January 2018, the claimant brought an application for adjudication of the payment claim. In its adjudication application the claimant nominated a reference date of 23 December 2017, and submitted that whilst the payment claim did not indicate a reference date, the SA Act did not require that it do so. The Contract specified the time for submission of payment claims as the *'23rd day of the month for work done to and including the last day of the month'*, and allowed for the submission of a final payment claim within 15 days of the works being deemed to be completed. The adjudicator's determination of 2 February 2018 similarly noted a reference date of 23 December 2017, and the adjudicator ultimately determined in the claimant's favour for the amount claimed.

The respondent issued proceedings seeking judicial review, contending that the adjudicator fell into error in concluding that the payment claim had a valid reference date, and that the resultant determination was therefore infected by jurisdictional error.

DECISION

The court held that the adjudicator's determination was affected by jurisdictional error and should be quashed.

In doing so, it cited the recent High Court case of *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 which clarified that judicial review of an adjudicator's determination under the SA Act is confined to review for jurisdictional error.

The court followed the decision in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52 (analysed in our Security of Payment Roundup of 2016 cases), where the High Court accepted that the existence of an available reference date was a necessary precondition to the making of a valid payment claim under the SA Act.

The court found that the Contract had been terminated by the parties in late October 2017 and as a result no reference date of 23 December 2017 could arise pursuant to the Contract. The court found that as consequence the adjudicator's determination, reliant on a reference date of 23 December 2017, was infected by jurisdictional error.

While a reference date of 23 October 2017 was notionally available (and the court considered that despite the claimant making progress claims in respect of that reference date, it had not yet made—for the purposes of the SA Act—payment claims in respect of that reference date), both the claimant's application and the adjudicator's determination were predicated upon a 23 December reference date. Consequently, the court found that the earlier reference date could not provide the adjudicator the requisite jurisdiction to have made the determination in question.

The court also addressed the alternate scenario in which the Contract had remained on foot. Following the decision of the NSW Court of Appeal in *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* [2017] NSWCA 289 (analysed in our Security of Payment Roundup of 2017 cases), the court found that even if a reference date of 23 December 2017 did arise, the adjudication determination was still infected by jurisdictional error. The court determined that as the payment claim was served on 8 December 2017 it could not be in respect of a reference date of 23 December 2017. The court focused on the wording of section 8 of the SA Act which entitles a claimant only to serve a payment claim 'on and from' a reference date.

Australian Capital Territory

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- *Canberra Drilling Rigs Pty Ltd v Haides Pty Ltd* [2018] ACTSC 282

The *Building and Construction Industry (Security of Payment) Act 2009* (ACT) is referred to as the **ACT Act**.

Canberra Drilling Rigs Pty Ltd v Haides Pty Ltd [2018] ACTSC 282

As long as it can be demonstrated that a construction contract existed between the parties, the ACT Act will apply and the entitlement to serve a payment claim will arise. The court does not need to determine whether or not the work was actually performed under the construction contract in every case; it is enough that one party 'claims to be' entitled to a progress payment and that the other party 'may be' liable to make the payment.

A payment claim may include unpaid amounts that were the subject of a previous payment claim and not all work claimed needs to be performed within the preceding 12 months of that payment claim. It is sufficient as long as some of the work was undertaken within the preceding 12 months of that payment claim.

FACTS

Core Building Group (**Core**) contracted Canberra Drilling Rigs Pty Ltd (**Canberra Drilling**) to perform piling and anchoring works for a multi-story residential building development (**Mezzo project**). Canberra Drilling subcontracted Haides Pty Ltd (**Haides**) to perform hard ground drilling and anchoring works for the Mezzo Project.

Haides undertook anchoring and drilling work on the Mezzo project in April and May 2016. A payment claim was served for $165,000 of which Canberra Drilling paid $120,000. A year later, at the request of Core, Haides did two more days of work on 31 May 2017 and 1 June 2017 (**additional work**). Canberra Drilling claimed it was not aware of Core's request for the additional work.

Haides then served a second payment claim on Canberra Drilling for $287,068.50 dated 16 June 2017, which included the additional work and the outstanding amount for work performed in April and May of 2016. On 1 September 2017, Haides served a third payment claim which was identical to the second payment claim, save for a different 'claim date' of 31 August 2017. These two payment claims did not state a reference date.

Haides received no payment for the works and applied for adjudication of the third payment claim. The adjudicator issued a determination that Canberra Drilling pay Haides $284,057.50. Canberra Drilling commenced judicial review proceedings, challenging the adjudicator's decision on error of law.

The grounds of the challenge were:

- The additional work was not work carried out under the contract between Canberra Drilling and Haides.
- The second and third payment claims were made in respect of the same reference date, which Canberra Drilling contended is 30 June 2017, in contravention of section 15(5) of the ACT Act.
- The same work was claimed in both the first payment claim and the third payment claim, in further contravention of section 15(5) of the ACT Act.
- Because it was for works for which Haides was not entitled to claim payment, insofar as the third payment claim related to the additional work, the third payment claim was not a valid payment claim due to the time limit stipulated in section 15(4)(b) of the ACT Act.

DECISION

The court dismissed all four grounds of Canberra Drilling's application with costs. McWilliam AsJ held that Canberra Drilling had failed to establish any error of law in the adjudicator's decision and found that the third payment claim was valid.

Ground 1: Not necessary to determine whether or not work is actually performed under construction contract

In this case the construction contract was oral and the parties disputed the nature of work to be performed and the contract price. The court noted that the ACT Act permits a person to make a claim if they 'are entitled' to a process payment and also if that person 'claims to be' entitled to a progress payment. Therefore the court held that a claim under the ACT Act is not the forum to resolve contractual terms in order to establish whether or not work was performed 'under the contract' since this would defeat the entire objective of the ACT Act.

His Honour held that a basic and essential requirement for an adjudicator to make a determination is the existence of a construction contract between the parties. However, this does not require determining whether or not the work was actually performed 'under the contract' in every case. It is sufficient that:

- there was a construction contract between Haides and Canberra Drilling;
- Haides claims the work was done under it; and
- it is at least arguable that the work was either expressly incorporated or necessarily part of the work to be performed under the contract.

Ground 2: Not the same reference dates for second and third payment claims

Section 15(5) of the ACT Act prohibits a claimant giving more than one payment claim for each reference date. McWilliams AsJ noted that the ACT Act does not require work to have been carried out in a particular month in order for it to be a 'named month' to correlate with the definition of a reference date. His Honour preferred to construe the ACT Act as allowing a claimant to issue a payment claim any time up to 12 months (in the absence of any time stipulated in the contract) from the date the work was last carried out. Applying this construction of the ACT Act:

- the additional work carried out on 1 June 2017 gave rise to a reference date of 30 June 2017, and subsequent reference dates of 31 July 2017 and 31 August 2017;
- the third payment claim's reference date was 31 August 2017 which is different from the second payment claim's reference date of 30 June 2017;
- with a reference date of 30 June 2017, the second payment claim which was served on 16 June 2017 would be invalid since Haides' entitlement to serve this payment claim arose only on and from 30 June 2017.

Ground 3: Permissible to claim unpaid items in respect of the same work in subsequent payment claims

Section 15(6) of the ACT Act makes it clear that section 15(5) of the ACT Act does not prevent a claimant from including in a payment claim an amount that has been the subject of a previous payment claim. A claimant is entitled to make a claim for earlier work done and for which it has not been paid. Canberra Drilling did not make any payment of the second payment claim and it was therefore permissible for Haides to include those unpaid items in its third payment claim.

Ground 4: Sufficient that some of the work covered in the third payment claim was in the preceding 12 months

McWilliam AsJ held that the third payment claim was within the time frames imposed by the ACT Act. While acknowledging the essential compliance with the time limit in section 15(4) of the ACT Act, his Honour held that it was sufficient so long as some of the work in a payment claim was undertaken in the 12 months preceding the payment claim in question.

His Honour also observed that Canberra Drilling's argument depended on the court finding that the additional work was outside the scope of the contract between Canberra Drilling and Haides because it would have meant the work claimed in the third payment claim (served on 1 September 2017) was last carried out in May 2016. Since his Honour had already found under the first ground that Haides was entitled to claim for the additional work, the third payment claim was valid.

Tasmania

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- *Forico Pty Limited v Sive* [2018] TASSC 21

The *Building and Construction Industry Security of Payment Act 2009* (Tas) is referred to as the **Tas Act**.

Forico Pty Limited v Sive [2018] TASSC 21

An adjudicator does not have jurisdiction to determine a claim under the Tas Act where there is no building and construction contract.

Where the works under a building and construction contract have been completed and the parties' respective obligations are at an end, a claimant has no further right to issue a payment claim under section 12 of the Tas Act because there is no building and construction contract.

FACTS

In November 2014, Forico Pty Ltd (**respondent**) entered into a contract with SEMF Pty Ltd (**applicant**) for the design, project management and construction supervision (**Contract**) of a new infeed deck, log yard and seal at the respondent's premises. Practical completion of the project was achieved on 22 July 2015; however, the applicant continued to undertake project management services and civil design services relating to defects until June 2017. Despite the applicant's requests, the respondent did not agree that the existing Contract would be extended for works post July 2015.

In August 2017, the applicant sent the respondent a payment claim claiming payment for professional services from August 2015 to May 2017 for the amount $98,430.66. The respondent issued a payment schedule stating that it would not make payment. The applicant lodged an adjudication application under section 21 of the Tas Act. The adjudicator determined that there was a valid payment claim made under the Contract and the respondent was required to pay the applicant the sum of $98,430.66.

The respondent's primary ground for relief was that the adjudicator did not have jurisdiction to make the determination because the payment claim issued in August 2017 was not a payment claim within the meaning of the Tas Act, in that the applicant did not undertake to supply building or construction related services under a building or construction contract as claimed.

DECISION

Marshall AJ held that the adjudicator did not have jurisdiction to make the determination and ordered that the determination be quashed and that the judgment in favour of the applicant be set aside.

His Honour held that the service of a valid payment claim is a jurisdictional pre-condition to the conduct of a valid adjudication and that the claim must be in relation to work carried out pursuant to a building and construction contract. His Honour agreed with the respondent's submissions that the evidence did not support a finding that the parties had entered into a building or construction contract pursuant to which the applicant undertook to supply the services set out in its payment claim.

His Honour considered that an email sent in August 2015 which attached a tax invoice titled *'Final Project Management invoice as agreed'* brought to an end the parties' obligations under the Contract. The payment claim issued in August 2017, which formed the basis of the adjudication determination, was therefore not a payment claim of the requisite character under section 12 of the Tas Act because the work referred to in the accompanying tax invoice was not the subject of agreement between the parties.

Notably, in concluding that there was no agreement between the parties for the work claimed in the payment claim, his Honour did not provide any comments on the effect of the words *'or other arrangement'* in the definition of 'building or construction contract' under section 4 of the Tas Act.

Northern Territory

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- *JKC Australia LNG Pty Ltd v Inpex Operations Australia Pty Ltd & Ors* [2018] NTCA 6
- *Northern Territory of Australia v Woodhill and Sons Pty Ltd* [2018] NTSC 30

The *Construction Contracts (Security of Payments) Act 2004* (NT) is referred to as the **NT Act**.

JKC Australia LNG Pty Ltd v Inpex Operations Australia Pty Ltd & Ors [2018] NTCA 6

During an adjudication proceeding, where an issue was not put forward by the parties, but was nonetheless one that could be anticipated by, and should not be a surprise to, the parties, then it is incumbent on the parties to prepare submissions in relation to that issue. The adjudicator need not specifically request the parties to make submissions.

FACTS

In 2012 Inpex Operations Australia Pty Ltd (**INPEX**) entered into an EPC contract (**Contract**) with JKC Australia LNG Pty Ltd (**JKC**), under which JKC was required to provide engineering, procurement, supply, construction and commissioning of certain facilities for the Ichthys project.

JKC issued invoices to INPEX, which were disputed. JKC made an application under the NT Act in connection with the invoices.

In correspondence with the parties prior to making a determination, the adjudicator raised the question of whether provisions implied into deficient construction contracts by section 20 of the NT Act should be imported into the Contract, and invited the parties to make submissions. Both parties responded saying that there was no basis for importing the provisions.

Notwithstanding this, the adjudicator determined that section 20 operated to imply the provisions into the Contract. Clause 6 of those implied provisions provided that INPEX needed to issue the notice of dispute 14 days after receiving the payment claim. This was different to the terms of the Contract, which gave INPEX 21 days to do so. As INPEX did not issue its notice of dispute with 14 days, it was required to pay the full amount of the claim. This was the case even though INPEX issued its notice within 21 days, as required by the Contract.

INPEX sought relief in the nature of certiorari to quash the determination, on the basis that the adjudicator did not afford INPEX procedural fairness. Her Honour held that:

- procedural fairness required the adjudicator to notify the parties of 'proposed conclusions that were not put forward by the parties and could not be easily anticipated'; and
- a failure to provide such procedural fairness which deprived a party of the possibility of a successful outcome will enable the court to set aside the adjudication.

As the adjudicator had not given INPEX reasonable notice of the basis upon which he intended to make his determination (namely that he would rely on section 20 of the NT Act despite both parties submitting that there was no basis to do so) and a fair opportunity to address that proposed basis, and make submissions as to why he should not decide that way, her Honour found there was jurisdictional error.

JKC appealed, with the sole ground being that her Honour erred in concluding that the adjudicator failed to afford INPEX natural justice.

DECISION

The court allowed the appeal. It held:

- it has long been established that the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires. In the case of the security of payments schemes, the rapid adjudication process is a trade-off between speed and efficiency on the one hand, and contractual and legal precision on the other;
- while it is incumbent on a decision-maker to notify the parties of proposed conclusions that were not put forward by the parties and could not be easily anticipated, generally speaking the parties must anticipate possible findings and make submissions on potential findings;
- the test is an objective one, and resolves to whether the party asserting the breach of procedural fairness received express notice, or should reasonably have anticipated, that either the adjudicator or the other party would rely upon the issue or principle concerned (in this case clause 6 being implied into the Contract by section 20 of the NT Act);
- the adjudicator sought submissions on whether clause 6 was to be implied into the Contract, and in doing so, the possibility of a finding that no notice of dispute was given within 14 days was clearly flagged; and
- that the adjudicator implied clause 6 should not have come as any surprise to INPEX. It was not incumbent on the adjudicator to go back to the parties for further submissions in the event he determined that cause 6 was implied into the Contract.

Northern Territory of Australia v Woodhill and Sons Pty Ltd [2018] NTSC 30

Section 34(3)(b) of the NT Act precludes an adjudicator from determining more than two payment disputes simultaneously but does not negate the adjudicator's appointment itself. The parties' consent is not a prerequisite to the appointment. The courts have also clarified that an adjudicator in this situation cannot rely on the 'conflict of interest' provisions under the NT Act to determine only the first dispute whilst declining to determine the second dispute.

FACTS

The Northern Territory of Australia (**Territory**) engaged Woodhill and Sons Pty Ltd (**Woodhill**) to carry out civil works under various contracts.

Woodhill made an application for adjudication of a payment dispute under a contract (**First Application**) and, a few days later, made a separate application under a different contract (**Second Application**).

The adjudicator accepted the appointment for the First Application, and the parties did not object. The registered appointer then appointed the adjudicator for the Second Application but did not seek the parties' consent, presumably on the basis that it considered the indication of consent to the first appointment was sufficient.

The Territory objected to the Second Appointment, on the basis that under section 34(3)(b) of the NT Act, an adjudicator may adjudicate two or more payment disputes between the parties simultaneously if the parties consent. The Territory had not given its consent.

The adjudicator proposed to continue to adjudicate the First Application, but withdraw from the Second Application. The Territory objected to this.

The questions considered by the court were:

- whether section 34(3)(b) of the NT Act precludes an adjudicator who has been appointed to adjudicate two payment disputes between the parties from adjudicating either payment dispute in circumstances where one party has not provided its consent to that adjudication; and
- if so, whether an adjudicator may withdraw from, decline or otherwise disavow one appointment and proceed with the adjudication of the other payment dispute.

DECISION

The court held:

- the appointment for the First Application and Second Application just four days apart gave rise to a situation of simultaneous application;
- that being the case, the adjudicator was precluded from determining both payment disputes without the parties' consent (which was not forthcoming);
- consent of the parties is not a precondition to appointment, and accordingly, the adjudicator was validly appointed for both applications. Section 34(3)(b) of the NT Act operates only to preclude the adjudicator from adjudicating disputes simultaneously in the absence of consent. It does not negate the appointment itself;
- the NT Act only contemplates the withdrawal of an adjudicator, once appointed, in circumstances where there is a conflict of interest. It was not open to the adjudicator to decline or otherwise disavow his appointment in the adjudication of the Second Application, and to proceed with the First Application; and
- it was open to Woodhill to withdraw the Second Application (whereupon the adjudicator would be at liberty to proceed with the Second Application), or to wait until the expiry of the prescribed time (when the Second Application would be dismissed).

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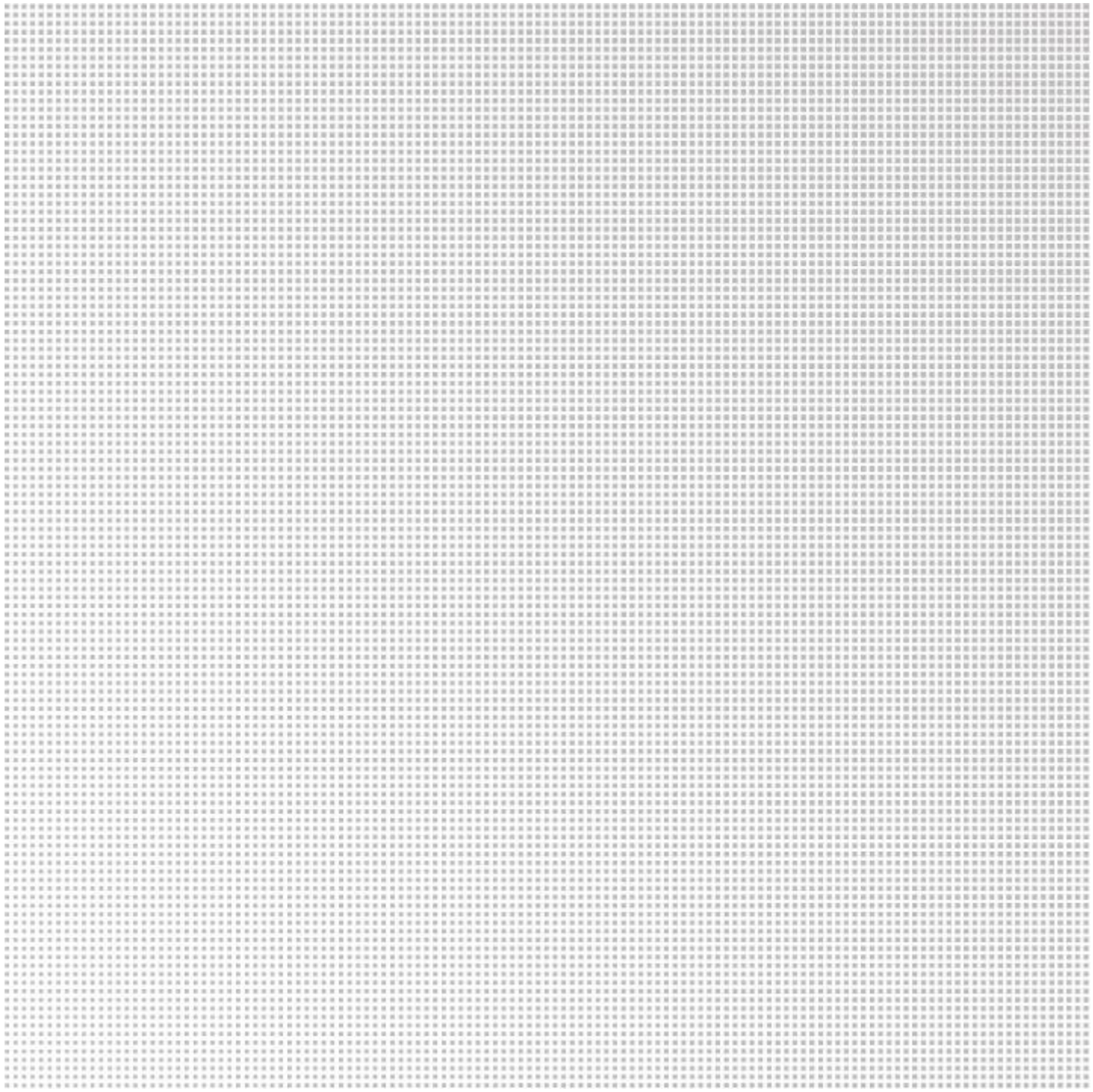

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