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Construction Law Update

December 2016

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Legislative update

Commonwealth

Introducing a new Building Code

Richard Crawford | Simon Moses

What happened?

On 30 November 2016, the Senate and the House of Representatives passed the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (**ABCC Act**) which re-establishes the Australian Building and Construction Commission (**ABCC**). The ABCC's enabling legislation is effective as of 2 December 2016.

The establishment of the ABCC was originally a recommendation of the Cole Royal Commission, based on the 'lawless behaviour' it found was prevalent in the building and construction industry. The increased civil penalties now provided for under the ABCC Act are also consistent with the maximums recommended by the more recent Royal Commission into Trade Union Governance and Corruption.

The Abbott and Turnbull Governments were originally unable to get the ABCC's enabling legislation through the Senate and this led to the double dissolution election of July this year.

How will you be impacted from a construction contracts perspective?

- We recommend that all clients update their Building Code clauses in any not-yet finalised contracts to contemplate the *Code for the Tendering and Performance of Building Work 2016* (**2016 Code**).
- Once the 2016 Code applies to an industry participant, it must comply with the code on all publicly and privately funded projects to remain eligible for Commonwealth funded work.
- In our view, until the ABCC or Minister for Employment issue a direction to the contrary, we do not believe that the 2016 Code applies to State Government Agencies that receive Commonwealth funding pursuant to funding agreements (or similar). We do, however, recommend that State Government Agencies comply with the 2016 Code as we anticipate that such a direction will be issued (likely in the form of a supporting guideline).

Code of practice

On 2 December 2016, the Minister for Employment issued the 2016 Code which takes effect as a code of practice under the ABCC Act.

The 2016 Code replaces the earlier *Building Code 2013* and is modelled on the draft code issued in April 2014. It sets out requirements that building industry participants must comply with to be eligible to tender for and win Commonwealth-funded building work. It will apply to all Commonwealth-funded building work for which a Commonwealth-funding entity has called for an expression of interest or tender on or after 2 December 2016. Importantly, once the 2016 Code applies to an industry participant, it must comply with the code on publicly and privately funded projects to remain eligible for Commonwealth-funded work, although some of the 2016 Code requirements only apply for publicly-funded projects. The *Building Code 2013* will continue to apply in respect of Commonwealth-funded building work procured prior to 2 December 2016.

The 2016 Code formalises obligations set out in the draft 2014 Code that:

- building industry participants must not make enterprise agreements that contain content (relevant examples of which are set out in the 2016 Code) that is unproductive, discriminatory or contrary to freedom of association (however, until 29 November 2018, these content requirements will not apply to enterprise agreements made before 2 December 2016);

- building industry participants must:
  - strictly enforce right of entry requirements and protect freedom of association;
  - comply with applicable industrial instruments and industrial laws;
  - not coerce or otherwise require contractors, consultants or subcontractors to make over-award payments or have particular workplace arrangement in place;
  - notify the ABCC in respect of breaches of the 2016 Code as well as actual or threatened industrial action;
  - draft a Workplace Relations Management Plan (**WRMP**) on certain types of Commonwealth-funded projects (WRMPs must, among other things, deal with how the 2016 Code will be complied with on the relevant project and must ultimately be approved by the ABCC prior to execution of the contract);
  - implement fitness for work policies and procedures to ensure workers are not affected by alcohol or other drugs; and
  - police subcontractor compliance with the 2016 Code on Commonwealth-funded projects whether or not particular subcontractors would themselves be required to comply with the 2016 Code in their own right.

The 2016 Code also includes a number of new provisions included as a result of compromises reached with the cross-bench as part of passing the ABCC Act, including;

- specific prohibitions in respect of sham contracting;
- prohibitions on collusive tendering practices;
- greatly strengthened security of payment obligations, which include requirements that:
  - builders have a documented dispute resolution process that details how payment disputes will be resolved (which must provide an option for resolution by referral to an independent adjudicator);
  - the ABCC be notified of any 'disputed' or 'delayed' payment; and
- new strict market testing requirements which require that an employer show that *'no Australian citizen or Australian permanent resident is suitable'* for a particular vacant position before a non-citizen or non-permanent resident can be engaged in the role.

With the exception of requirements to police subcontractor compliance, the formulation of WRMPs, and the tendering information requirements referred to below, most obligations contained in the 2016 Code apply to privately and publicly funded projects.

In respect of the provisions affecting subcontracting, the 2016 Code mirrors the Building Code 2013 in that the obligations that require builders to require their subcontractors to comply with the 2016 Code is limited to when the builder is tendering for Commonwealth funded work. However the subcontracting provisions have been bolstered by requiring the subcontractors to satisfy the eligibility requirements in sections 11 and 23 of the 2016 Code and requiring the subcontractors to take remedial action to remedy non-code compliant behaviour.

In addition, the 2016 Code also contains new requirements that building industry participants must satisfy in the process of completing an expression of interest or request to tender for Commonwealth-funded work, including:

- demonstrating a positive commitment to the provision of appropriate training and skill development;
- listing the number of its apprentices and those of its employees who hold visas;
- providing details of any payment it has been required to make under a security of payment adjudication certificate; and
- (in respect of 'preferred tenderers') providing information on the extent to which domestically sourced and manufactured building materials will be used to undertake the building work, whether such materials comply with Australian standards, an assessment of the 'whole of life' costs of the project, an assessment of the 'impact on jobs of the project to which the building work relates'; and whether the project 'will contribute to skills growth'.

Security of Payments Working Group

The ABCC Act also establishes a Security of Payments Working Group to monitor the impact of the activities of the ABCC on the conduct and practices of building industry participants including in relation to their compliance with security of payment laws.

The group will also make recommendations to the ABC Commissioner about steps that could be taken to improve compliance with security of payment laws and to the Minister about matters the Minister requests the group to consider.

What do the changes mean for the industry?

The ABCC legislation will result in a regulator with increased powers to monitor behaviour in the industry, prosecute alleged breaches and seek significantly higher monetary penalties for individuals and unions that breach applicable legislative requirements.

The 2016 Code is a key issue for principal contractors and subcontractors. It will be important to develop protocols dealing with its requirements, including:

- advertising for roles on sites;
- information required when tendering; and
- collating information about compliance with the 2016 Code as required.

A review of commercial contracts may also be necessary, particularly to ensure that building industry participants have appropriate powers to monitor subcontractor compliance with the 2016 Code on Commonwealth funded projects, and to reflect its new requirements.

While builders with existing non-Code compliant enterprise agreements will be able to tender for Commonwealth-funded projects until November 2018, any new enterprise agreements must be compliant. If negotiating a current enterprise agreement, an audit of proposed terms to ensure compliance is crucial. Under the 2016 Code, the ABCC will retain the Fair Work Building & Construction's capacity to provide compliance assessments for draft enterprise agreements.

For further information regarding the consequences for you and your business, please contact Richard Crawford and Simon Moses.

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Charging forward – public inquiry into road user charges

David Pearce

Overview

The Federal Government announced recently that it will conduct a public inquiry into road user charging. This is an important step in the journey towards replacing vehicle registration fees and fuel excises with a 'user pays' model based on road usage. However, Major Projects Minister Paul Fletcher cautioned that this was a 'ten to fifteen year journey' that will only be delivered if there are clear benefits to the community.

The announcement was part of the Government's response to the 'Australian Infrastructure Plan', which was released by Infrastructure Australia (**IA**) in February. The Plan included 78 recommendations across a broad range of infrastructure issues, of which 69 were accepted by Government.

On road user charging, the Government accepted IA's recommendations to conduct a public inquiry and to commit to the full implementation of a heavy vehicle road charging structure in the next five years. It did not accept the recommendation of a full implementation for light vehicles in the next 10 years, noting that this depended on the outcomes of the inquiry.

While IA recommended that the inquiry be led by either itself or the Productivity Commission, the Government has decided to establish a study chaired by an 'eminent Australian' (yet to be announced). Given the political sensitivities around a major change to our tax base, this is probably not surprising.

The case for change

Roads are currently funded by the Federal fuel excise (almost 40c per litre, and contributing the majority of taxes), State and Territory vehicle registration fees, licence fees and stamp duty. New vehicles are increasingly fuel efficient, or even electric, eroding the tax base provided by the fuel excise. This is resulting in a growing funding gap. To date the solution has generally been to increase vehicle registration fees. However, this is not sustainable and disadvantages those who use their cars infrequently.

IA labelled the current situation as 'unfair, unsustainable and inefficient'. Importantly, road users do not currently receive price signals to use the network in the most cost-effective way.

The community challenge

Any change to road user charging will meet resistance from the public. Road usage, with the exception of tollroads, is currently perceived as free. The requirements for GPS vehicle monitoring also raise privacy concerns.

To gain public support, Government will need to increase public awareness of the current methods of funding and the growing inadequacies of those methods, and prove that the benefits of road user charging will outweigh the costs. A recent study revealed that 88% of people had little to no knowledge about the primary funding sources for our roads.

The Government's likely response will be a public awareness campaign, which may include measures such as itemising fuel excise costs on receipts, and highlighting successful international models. Road user charging is already being used in New Zealand, Austria, Belgium, Germany, Hungary, Poland, Russia, Slovakia and Switzerland, with congestion charges in London, Stockholm, Gothenburg and Singapore.

Recent studies

There have been numerous local and international studies into road user charging models. Those models typically involve either distance charges (per KM, based on location), congestion charges (based on time of day or actual congestion) or a combination of both.

Transurban is surveying tollroad users to determine consumer behaviours and preferences. These tests have involved both distance-based charges and congestion charges. Their data to date suggests a willingness from the public to explore user charging, when properly informed, an acceptance of GPS monitoring of vehicle movements and a preference for charging based on distances travelled. A similar study is being conducted in Hawaii, where one million road users are being tested over three years.

Uber, in partnership with Infrastructure Partnerships Australia, is also utilising data from its vehicles to report on relative congestion across the course of each day in major capital cities.

Next steps

With the public inquiry scheduled to start next year, and a 10-15 year timeframe for implementation, the change to a more cost-reflective model for road user charging is still a long distance off. Given the mix of road ownership, a coordinated response from all three levels of Government will also be required. However, provided community engagement is managed well, it is looking more and more like a case of 'when' not 'if' for a major change in how we fund public roads.

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Queensland

Latest in the Queensland subcontractor security of payment public consultation

Michael Creedon

Background

In December 2015, the Queensland Department of Housing and Public Works issued its Security of Payment Discussion Paper (**discussion paper**). The discussion paper built on the information received in response to the earlier 2014 Queensland Building and Construction Commission Better Payment Outcomes Discussion Paper, which was focused on exploring ways of delivering better payment outcomes for subcontractors.

Discussion Paper

The discussion paper sought feedback on the following five different security of payment options:

- **Option 1 - Project Bank Accounts** to facilitate simultaneous payments of a project's head contractor and all participating subcontractors through a trust arrangement
- **Option 2 - Retention Trust Fund Scheme** to require subcontractors' retention money to be held in a separate trust account
- **Option 3 - Insurance Schemes** to provide insurance against defects, late completion and insolvency of contractors
- **Option 4 - Federal Legislative Changes** to reform Commonwealth legislation relating to security of payment
- **Option 5 - Education** for the building and construction industry stakeholders regarding matters such as financial management and business management

Deloitte Report

Following the release of the Security of Payment Discussion Paper and public consultation, the Queensland Government engaged Deloitte to undertake economic and financial analysis of certain reform proposals that arose as a result of consultation.

The Deloitte report, *Analysis of security of payment reform for the building and construction industry* (**Report**) was released to the public on 27 November 2016.

The key findings of the Report are that:

- **Project Bank Accounts** (**PBAs**): if implemented:
  - to just Government building and construction projects with a contract value between $1m to $10m (excluding infrastructure projects and residential building and construction) would deliver a positive cost benefit ratio and increase real state gross product by $269.3m and deliver an extra 51 jobs; and
  - to a much wider range of projects, being all Government and private construction projects with contract values over $1m (excluding infrastructure projects and residential building and construction) would cut construction costs by 2.5%.
- **Retention Trust Fund Scheme**: if implemented, would deliver a negative cost benefit ratio.
- **Education**: a qualitative analysis of the proposal to deliver an education program found it would have a positive impact on the industry and community as a whole.

The Queensland Government has indicated that legislation is currently being prepared to implement the use of PBAs. This will no doubt be positive news for many Queensland subcontractors, but it will also be bad news for many Queensland head contractors as the cost to head contractors over 20 years is estimated to be $1.5bn.

While the Deloitte report finds that implementing PBAs would deliver positive benefit cost ratios over a 20-year evaluation period in certain scenarios, there remains concerns in the industry that they are complicated arrangements that could lead to significant additional administrative costs.

The real costs of implementing PBAs will not be known until draft legislation is released. For example, there are no current details available about the proposed process for release of moneys from the PBAs, how many subcontracting tiers will be included and what additional agreements will need to be put in place with creditors to a PBA.

Further, critical assumptions have been made in the Deloitte report that 'sell' the benefit of PBAs (on a community scale) on the basis that their use will deliver a significant positive benefit cost ratio. The most critical assumption in reaching this conclusion is that PBAs will result in a 2.5% reduction in project costs because subcontractors will remove contingency for the risk that the head contractor will become insolvent. This assumption relies on research on PBAs by Highways England in the United Kingdom.

The Deloitte report also assumes that a head contractor working on a project using a PBA will only need to spend an additional 8 hours administration per project per month using administration staff costing $52 per hour. This seems optimistic.

PBAs appear to be gaining in popularity with government organisations. They have been used in the United Kingdom by Highways England, the Defence Infrastructure Organisation and Crossrail for many years, and New South Wales and Western Australia have both conducted trials of the use of PBAs.

Recently, on 12 August 2016, the Western Australian Government announced that PBAs would be used for the majority of projects to be delivered by the Building Management and Works section of its Department of Finance.

Unfortunately, although the introduction of PBAs might be good news for many Queensland subcontractors, their introduction will result in another instance of inconsistency between state and territory security of payment legislation. This is an issue that is important to developers and head contractors that work in multiple jurisdictions.

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Western Australia

A Christmas gift for the construction industry in WA - *Construction Contracts Act 2004* (WA)

Kip Fitzsimon | Emma Cavanagh

We previously reported on the WA government's proposed reforms to the *Construction Contracts Act 2004* (WA). On 22 November 2016, Parliament passed the *Construction Contracts Amendment Bill*.

Significance

From 15 December 2016, rapid adjudications, also known as security for payment laws, changed in Western Australia. This may bring some surprises before the Christmas break as the extended application period and new definition of 'business days' will make issuing an application between 9 December 2016 and 9 January 2017 unnecessary.

If the time limit to make (or respond to) an application for adjudication ends on or after 15 December 2016, the extended provisions apply. For example, if a payment dispute arose on 17 November 2016, an application under the existing laws must be made within 28 days or by 15 December 2016 which will now extend to the new period of 90 business days, or by April 2017.

If an application is served on or after 12 December 2016, the response must be made by 26 December 2016, which extends to Monday 9 January 2017 because 25 December 2016 to 7 January 2017 are not

'business days'. As a result, there is no imperative to issue an application until the new year and to do so will only give a respondent more time to prepare.

It will be interesting to see whether adjudicators accept applications to adjudicate payment disputes where an invoice has been 'recycled' (which is permitted from 15 December 2016) even though when it was first issued the invoice was excluded under the legislation then in force.

Five key dates

17 November 2016	A payment dispute arising from this date can be the subject of an application for adjudication within 90 business days (not the existing 28 days).
9 December 2016	The last day to serve an application where a response is required before the new year.
15 December 2016	Most amendments take effect.
1 to 12 January 2017	after 1 January 2017, a notice must be given 3 business days' before work can be suspended for failure to comply with a determination; Monday 9 January 2017 is the first 'business day' in the year 2017, so work cannot be suspended during this period.
3 April 2017	Construction contracts entered into after this date are deemed to provide no more than 42-day payment terms, regardless of any written contract.

Five key changes (and what you need to do)

1. Time limit to make an application quadruples from 28 days to 90 business days or more than 4 months. However, the time to reply is still 2 weeks. (Check the timing of any dispute resolution provisions in your contract and consider whether your document management systems can provide a quick response if you receive an application 4 months after the event.)
2. A disputed invoice can be re-invoiced but not re-adjudicated and an adjudicator can determine an application even with some technical defects. (Responses to applications should be carefully considered and not rely on technical defects alone; an argument that has previously been successful in defending an application may no longer satisfy an adjudicator.)
3. An application for adjudication can be determined by consent. (With only 2 weeks to respond to an application, start negotiating before making or receiving an application, and be careful not to give an adjudicator any without prejudice correspondence.)
4. Contracts entered into after 3 April 2017 are deemed to include payments terms of 42 days, not 50 days. (Review standard contracts terms and review invoicing processes; if you process invoices at the end of the following month you may be too late.)
5. Adjudicated determinations will no longer need to be consideration by a judge. Instead, if a determination is stamped by the Building Commissioner and lodged at the court with an affidavit that the payment is outstanding, the determination will automatically become a court order. (This will reduce the time it takes to enforce a determination which will begin before a respondent has time to commence judicial review proceedings (or seek an injunction), if appropriate.)

Industry insight

The amended laws provide more time and flexibility to make applications for adjudication and more efficient means of enforcing the resulting determinations. Parties should take advantage of the ability to obtain a determination by consent and begin negotiating resolutions to payment disputes on a without prejudice basis before an application has to be made.

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In the courts

Commonwealth

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

Richard Crawford | Michelle Knight

On 21 December 2016, the High Court unanimously allowing an appeal from the New South Wales Court of Appeal (NSWCA).

In its first ever consideration of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**), the High Court overturned the decision of the NSWCA in *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288. In that case, the NSWCA found that the existence of a reference date was not a jurisdictional fact or a precondition for the making of a valid payment claim, and therefore that an adjudicator had jurisdiction to determine a dispute about the existence of a reference date.

The High Court disagreed with the NSWCA, construing the reference in section 13(1) of the SOP Act to a '*person referred to in section 8(1) who is or who claims to be entitled to a progress payment*' as a reference to a party to a construction contract who has undertaken to carry out construction work or supply related goods and services, and who therefore (under section 8(1) of the SOP Act) is entitled to a progress payment only on and from each reference date. The practical effect of the High Court's decision is that an adjudicator will not have jurisdiction to determine a dispute in respect of any payment claim for which no reference date exists.

There will be a full review of this decision in the our next annual Security of Payment Roundup, to be published in February 2017.

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Australian Capital Territory

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

Richard Crawford | Kate Reagh

Catchwords

Application for stay after judgment – whether order preventing enforcement of judgment should be continued on the ground that plaintiff is insolvent – *Corporations Act 2001* (Cth) – Progress claim is satisfied by mutual set-off – *Building and Construction Industry (Security of Payment) Act 2009* (ACT)

Significance

The primary judgment granting a stay to the Islamic Republic of Pakistan (**IRP**) to prevent the enforcement of a judgment in favour of Denham Constructions Pty Ltd (**Denham**) (who at the time was in administration but not insolvent) was covered in our previous CLU (see our October issue in *OnSite*).

The IRP was again successful in its application for a further stay preventing enforcement of that judgment until determination of proof of debt under section 533C of the *Corporations Act 2001* (Cth) (**Corporations Act**). Section 533C of the Corporations Act provides that, where there have been mutual dealings between an insolvent company and another entity, the liquidator must take account of what is due from one party to the other and set off the sum due from one party against any sum due from the other party.

As Denham was insolvent (and the judgment amount would be dispersed to secured creditors), the IRP successfully argued that it would be deprived of its right to obtain a set-off for its claim of $503,000 under section 533C of the Corporations Act.

Facts

This case concerned a building contract between Denham and the IRP for the construction of the High Commission of Pakistan in Canberra. The principal judgement was given on 12 August 2016 in favour of Denham. Stay was granted for any enforcement of the judgement for a period of seven days. On 24 August 2016, Mossop AsJ found that the plaintiff was insolvent and has been the subject of a winding-up order. Because Denham was insolvent, his Honour continued the stay and made directions relating to the filing and service of additional evidence and outlines of submissions, which were not complied with. The IRP sought further stay of execution of judgment award pending resolution of the balance of $503,780.65.

IRP's submissions

The IRP argued, on the basis of the decision in *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685, that stay of orders are similar to the principles that govern interlocutory relief; such as the IRP must show the appeal raises serious issues for determination, there is a real risk it will suffer prejudice or damage, and the appeal is considered on the balance of convenience. Subsequently the IRP contended that if a judgement was made at this stage it would go straight to the receiver, and the IRP would be left as a creditor of a company without any assets. The IRP further submitted that section 553C of the Corporations Act required the net amount payable to be determined by the mutual credit and set-off.

Denham's submissions

Denham submitted that it should not be assumed that there were any entitlement to avoid judgment amount or there was no contest about the IRP's claim for the additional amount of $503,000. No inference should be drawn from the circumstances in which no payment schedule was served.

Decision

The court held in favour of the IRP that the judgment pronounced on 17 August 2016 be stayed until 21 days following the liquidators determination of the proof of debt under section 553C of the Corporations Act. His Honour accepted the approach taken by McDougall J in *Veolia Water Solutions & Technologies (Australia) Pty Ltd v Kruger Engineering Australian Pty Ltd (No 3)* [2007] NSWSC 459. The relationship between section 553C of the Corporations Act and the *Building and Construction Industry (Security of Payment) Act 2009* (ACT) is that the progress claim is satisfied by mutual set-off.

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New South Wales

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

Richard Crawford | Michelle Knight

Catchwords

Application for summary judgement – Practice Note SC Eq 3 – questions of construction – whether appropriate to resolve conflicting lines of authority or matters of discretion on summary judgement application

Significance

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

Facts

The defendant, Cosmas Pty Ltd (**owner**), is the registered proprietor of a property in King Street, Sydney, which is mortgaged to the Commonwealth Bank of Australia (**CBA**). The owner's equity in the property is $6.87 million, and the current market value of the property is $11 million property.

Pursuant to a contract dated 29 August 2014 (**contract**), Bellevarde Constructions Pty Ltd (**builder**) carried out work for the owner. The contract contained a charging provision in clause 27 which stated that the owner charges the parcel of land on which the construction takes place with the due payment to the builder of all moneys that may become payable to the builder by virtue of the contract or otherwise arising from the carrying out of the works.

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

The builder obtained a favourable adjudication determination under the *Building and Construction Industry Security of Payment Act 1999* (NSW).for some of the claimed amount and registered the adjudication certificate and obtained judgement against the owner in the sum of $986,703.60.

The builder then commenced proceedings seeking, amongst other things, a declaration that the property is charged with payment to the builder to the amount due under the adjudication and judicial sale of the property. The owner filed a cross-summons and cross-claim, after which numerous matters were settled out of court. The builder maintained its claim for a declaration and an order for judicial sale. The builder sought summary judgement for that relief.

Decision

The application for summary judgement was dismissed with costs. The builder had not demonstrated clearly beyond argument that it was entitled to the remedy sought.

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

As to whether the court should exercise a discretion to order judicial sale, his Honour considered there were a number of factors relevant to the exercise of discretion which made it inappropriate to order summary judgement. Those factors included the fact that the owner had a claim for damages against the builder which would not be resolved until the final hearing, that any security the builder had over the property arising from clause 27 of the contract was unlikely to be eroded before the hearing, and the builder could protect its interest by lodging a caveat. Additionally, there were concerns regarding the builder's financial position.

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

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Guy and Anor v K J & W E McIlveen t/as K J McIlveen Builders [2016] NSWCATCD 77

Richard Crawford | Winnie Jobanputra

Catchwords

Variations not in writing – quantum meruit – compensation for rectification of defective works and for delays in completion

Significance

A builder may be entitled to its costs for completing variation works instructed by the landlord the subject of the *Home Building Act 1989* (NSW), even if contractual provisions regarding notification and

approval of variations were not complied with and details of the costs claimed for variations were not provided to the owner until after the contract was completed, notwithstanding that the *Home Building Act 1989* (NSW) prohibits the builder from enforcing its rights under the building contract. These costs would be recoverable by the builder on a quantum meruit basis to the extent that the builder can establish the extent of the variations as a matter of fact.

A landlord is entitled to compensation for defective building work only to the extent of enabling it to rectify loss caused by the defects. Rectification costs should not result in the landlord deriving an additional benefit.

Facts

The applicants, Anne Guy and George Regent (**owners**), and respondent, K J McIlveen Builders (**builder**), entered a building contract in February 2014 for the builder to construct a kit home for the owners (**contract**).

Issues arose in the course of the building works being carried out, which gave rise to three main claims by the owners:

- First, the owners contended that completion of the works was substantially delayed as a result of failure of the builders to provide an 'Occupation Certificate', which would allow occupancy of the property. As a result, the owners had to pay the cost of temporary accommodation for the period of delay, for which they sought compensation.
- Second, the owners sought an order for rectification and completion in respect of re-bedding and tiling of the front veranda to fix issues with water pooling to the veranda, as well as the cost of supplying and installing a meter box and issuing a new Basix Certificate.
- Third, the owners claimed that they should not be required to pay for contested variations to the works claimed by the builder. Variations to the contract were requested by the owners during the course of the building works but no quotes were received or approved. Final invoices in respect of variations were not issued until January 2015.

Decision

Quantum meruit claim for variations

The court held that provisions of the contract relating to variations were not complied with and claimed costs for variations were not provided to the owner until after the contract had been completed. As such, pursuant to section 10(3) of the *Home Building Act 1989* (NSW), the builder could not rely on contractual remedies to recover its costs in respect of the variations.

However, the court held that a quantum meruit claim remained available to the builder to recover its costs in respect of the variations. The court, citing *Pender v Robwephi Pty Ltd and Anor* [2008] NSWSC 114, held that *'an action of quantum meruit lies where the work performed by one party constitutes a benefit and the other party accepts the benefit in circumstances where it would be unjust for the latter to retain that benefit without remuneration of the former party'*. The court, acknowledging that the builder bears the onus of establishing the extent of the variation on the evidence available, analysed each claim in respect of a contested variation individually and ordered a total of $15,889.67 be payable to the builders for variations.

Rectification costs

The court made an order that rectification costs totalling $2,430.00 be payable by the builder to the owners. The court ordered that costs claimed in respect of the meter box and Basix Certificate be payable in full to the owners. However, with regard to the tiling work claimed as a rectification costs by the owner, the court ordered that some but not all of the owners' claimed costs be payable. On this point, the court reasoned that *'if tiles were added to the verandas, the [owners] would obtain a benefit to which they are not entitled and accordingly it is appropriate to reduce the amount claimed to take into account that benefit*'.

Additional hire costs arising from delay

The court ordered that the builder pay the owners the cost of additional rental for the site office, toilet, shower block and shipping container where the applicants resided for a total of 20 weeks while the works were delayed, to the value of $6,760.60.

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

Richard Crawford | Imogen Bailey

Catchwords

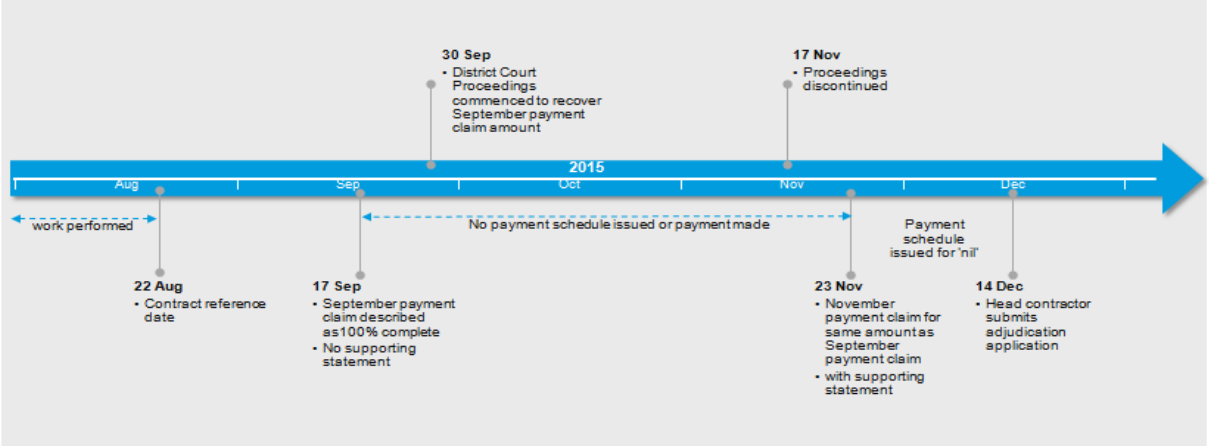
Security of Payment – adjudication – payment claim – reference date – two payment claims made under same reference date – claim not accompanied by supporting statement – knowingly false supporting statement

Significance

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

Facts

The plaintiff principal, Kyle Bay Removals Pty Ltd (**respondent**), applied to the NSW Supreme Court to set aside an adjudication determination under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) in favour of the defendant contractor, Dynabuild Project Services Pty Ltd (**claimant**).



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

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

Decision

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

District Court proceedings

In relation to the election to recover under section15(2)(a)(i) of the Act, the court held there could be no binding election to recover the claimed amount in the District Court proceedings as the September payment claim, which was the subject of those proceedings, had not been accompanied by the required supporting statement and was therefore not validly served in accordance with section 13(7) of the Act.

Reference Date

The court held that:

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

Supporting Statement

A 'payment arrangement' had been made with one of the subcontractors whereby the contractor would make its outstanding payments when its cash flow enabled it to do so. The court held that, as the payment claim and supporting statement was served not knowing that the latter was false, it was not served in breach of section 13(8) of the Act, despite the fact that there were amounts due and payable to the subcontractor at the time of the declaration, and despite the court's acknowledgement that the payment 'arrangement' would not be legally enforceable.

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

Richard Crawford

Catchwords

Appealing adjudication determination – procedural fairness – whether determination made on bases not contended for – *Building and Construction Industry Security of Payment Act 1999* (NSW)

Significance

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

Facts

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

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

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

Decision

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

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

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

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

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The Owners – Strata Plan No 83297 v Eastern Construction Group Pty Ltd [2016] NSWSC 387

Claire Tait

Catchwords

Building and construction – *Home Building Act 1989* (NSW) – defects in residential building work - reliance on statutory warranties by a successor in title – contract in existence between builder and developer

Significance

In the absence of evidence to the contrary, proof of a contract to carry out building work, coupled with the self-evident fact that the work was carried out, supports the conclusion that the work was carried out by the entity contracted to do it.

Section 18D of the *Home Building Act 1989* (NSW) (**Home Building Act**) provides that a successor in title may rely on the statutory warranties implied under section 18B of the Home Building Act in every contract to do residential building work.

Facts

Eastern Construction Group Pty Ltd (**builder**) entered into a contract with a developer to build a residential complex which was subsequently sold to The Owners – Strata Plan No. 83297 (**owners corporation**). The owners corporation sued the builder for breach of statutory warranties implied under the Home Building Act for defective building work.

Decision

The court held that the builder had breached the statutory warranties implied by section 18B of the Home Building Act and awarded damages and interest in the sum of $2,290,347.98 and costs to the owners corporation.

McDougall J held that, in the absence of evidence to the contrary, proof of a contract to carry out building work, coupled with the self-evident fact that the work was carried out, supports the conclusion that the work was carried out by the entity contracted to do it. This conclusion was further confirmed by a rectification order issued by the Department of Fair Trading to the builder and the existence of an insurance certificate in favour of the builder.

His Honour further held that the work was self-evidently residential building work for the purposes of the Home Building Act and that its section 18D operates to extend the statutory warranties implied by section 18B of the Home Building Act to the owners corporation as a successor in title. It follows that the owners corporation was entitled to rely on the statutory warranties in a claim against the builder.

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Wong v Van Vlymen [2016] NSWSC 161

Richard Crawford | Sandy Godfrey | Claire Laverick

Catchwords

Contract – interpretation – contract terms – implied terms – performance 'subject to finance'.

Significance

Contracts are not subject to an implied term that performance is 'subject to finance'. Where parties intend performance to be 'subject to finance', an express condition precedent to this effect must be included in the contract.

Facts

Mr Wong (**plaintiff**) and Mr Van Vlymen (**defendant**) were, through various corporate entities owned and controlled by them, involved together in a business (**joint venture**). The plaintiff and the defendant reached a legally binding agreement in short form (**contract**) whereby the plaintiff and his corporate entities would sell their interest in the joint venture to the defendant and his corporate entities.

Under the contract, the plaintiff and the defendant were required to formalise the contract in a settlement agreement within 60 days of acceptance (**settlement agreement**), following which payment would flow.

The plaintiff executed the settlement agreement, but the defendant did not. Although it was agreed that the contract existed on mutually agreed terms, the defendant asserted that the contract was subject to an implied term that the obtaining of finance by the defendant was a condition precedent to the execution of the settlement agreement. In other words, the performance of the contract was 'subject to finance'.

Decision

The court held that the contract was not subject to an implied term that performance by the defendant would be 'subject to finance'. Knowledge by one party that another party may or will require finance to perform a contract is not sufficient for such a term to be implied. In this instance, the contract was effective without such implication.

Implication of terms is not an orthodox exercise in the interpretation of contracts. It is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. The court must be satisfied that it is what the contract actually means (*Commonwealth Bank of Australia v Barker* [2014] HCA 32 and *BP Refinery (Westenport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 were followed).

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Woolley v Johns & Rogers Pty Limited [2016] NSWCATCD 16

Richard Crawford | David Bell

Catchwords

Home Building Act — Scope of work — section 18F defence — breach of statutory warranty

Significance

Where defective residential building works arise from a homeowner instruction, the builder must have provided a written warning of the potential defects arising out of such instruction before carrying out the instruction to be able to rely on the statutory defence in section 18F of the Home Building Act.

We note that this case was decided under a previous iteration of the Home Building Act. Section 18F now corresponds to section 18F(1)(a) of the Home Building Act. We consider the result would still be the same under the amended provision.

Facts

The homeowner entered into a contract with the builder to perform residential work at the homeowner's house. The contract was therefore subject to the *Home Building Act 1989* (NSW) (**Home Building Act**).

The homeowner claimed the works were defective and sued the builder for a breach of the statutory warranties contained in section 18B of the Home Building Act (**section 18B**). The builder claimed the defective works arose out of instructions given by the homeowner and purported to rely on the defence contained in section 18F of the Home Building Act (at the time of writing, the relevant defence appears in section 18F(1)(a)) (**section 18F**).

Section 18F of the Home Building Act provides a defence where the defects arose from instructions given by the homeowner, contrary to the written advice of the builder.

The builder also submitted that, even if it could not rely on section 18F, it could rely on a defence outside of the Home Building Act, as it had warned the homeowner orally that its instructions could lead to defects.

Decision

The tribunal held that the builder had breached the section 18B statutory warranties in respect of certain parts of the works. It was satisfied that no written warning had been given and did not accept that the builder could have a defence under section 18F for providing oral warnings.

Builders should therefore ensure that all warnings related to homeowner instructions are provided in writing prior to carrying out the relevant instructions.

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Queensland

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

Andrew Orford | Sarah Cahill

Catchwords

Administrative law – declarations – excess or want of jurisdiction – particular instances of jurisdictional error – where the applicant and the first respondent were parties to construction contract – where the first respondent served a payment claim under the *Building and Construction Industry Payments Act 2004* (Qld) – where the applicant served a payment schedule under the Act – where the payment schedule did not raise contractual time limitations as a basis for withholding payment – where the second respondent did not consider contractual time limitations in the adjudication – whether, in not considering contractual time limitations, the second respondent committed jurisdictional error

Significance

This decision highlights the difference between a failure to consider a relevant contractual provision (which may constitute jurisdictional error) and an adjudicator's decision not to consider a time bar because of the operation of section 24(4) of the *Building and Construction Industry Payments Act 2004* (Qld), which if erroneous would constitute an error within jurisdiction.

Facts

The applicant, Annie Street JV Pty Ltd (**principal**), contracted with the first respondent, MCC Pty Ltd (**contractor**), to construct 18 residential units in New Farm, Brisbane.

The contractor served an adjudication application. In its adjudication response the principal raised a new reason for withholding payment, namely a time bar for a portion of the amount claimed.

The adjudicator decided that the principal should pay the contractor $528,505 plus interest.

The principal applied to have part of the adjudication decision set aside on the basis that the adjudicator committed jurisdictional error. It was common ground that the case concerned a standard payment claim.

The contractor argued that as the claim was a standard payment claim the adjudicator rightly gave paramountcy to section 24(4) of *Building and Construction Industry Payments Act 2004* (Qld) (**BCIPA**), which precludes the time bar argument from the adjudication response in circumstances where it was not raised in the payment schedule. The contractor argued that as a result the time bar argument was a submission not properly made under section 26(2)(d) of the BCIPA.

The principal argued that the adjudicator should have taken the time bar into account as a relevant contractual provision under section 26(2)(b) of the BCIPA regardless of the fact the time bar had not been raised in the payment schedule.

Decision

The court held that there was no jurisdictional error as the adjudicator had properly exercised discretion to not consider contractual time requirements and that such discretion was exercised properly within his jurisdiction.

Flanagan J drew a distinction between a failure to consider a relevant contractual provision (which may constitute jurisdictional error) and the adjudicator's decision not to consider the time bar because of the operation of section 24(4) of the BCIPA, which if erroneous would constitute an error within jurisdiction.

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