MinterEllison

Construction Law Update

September 2017

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Legislative update

Commonwealth

Customs Amendment (Safer Cladding) Bill 2017 (Cth)

Jeanette Barbaro | Isobel Carmody

Since the Grenfell Tower fire on 14 June 2017, it has been revealed that the Grenfell Tower was recently clad with polyethylene (**PE**) core aluminium composite panels (**ACPs**). ACPs with a PE core have been banned in countries such as the USA and Germany. Banning, however, did not filter through globally. Here in Australia, the Senate Economics Reference Committee last week recommended that the importation of ACPs with a PE core be banned in Australia.

The Xenophon factor

Immediately following the Grenfell tragedy, the federal Senate inquiry into non-conforming building products was asked to also focus on non-compliant cladding. The inquiry released its interim report regarding non-conforming building products on 6 September 2017, in effect, calling for a ban on the importation of ACPs with a PE core. Responding quickly to the Committee's recommendations, Senator Xenophon introduced into parliament on 11 September 2017 the *Customs Amendment (Safer Cladding) Bill 2017* (Cth) (**Bill**). The Bill is intended to amend the *Customs Act 1901* (Cth) to introduce an express prohibition on the importation of 'polyethylene core aluminium composite panels'. The Explanatory Memorandum accompanying the Bill states that *'this Bill is urgently needed in the interests of public safety'*.

Is this a solution?

Whilst the Bill appears to be a step in the right direction, a number of notable issues arise with the proposed solution.

- First, the Bill does not define what constitutes a 'polyethylene core aluminium composite panel'. Are only ACPs with a 100% PE core to be banned? What if an ACP has a 30% PE core – will it be banned? Clarity as to what percentage of polyethylene core is required before the importation of a particular panel is prohibited would be welcomed.
- Secondly, the Bill provides that ACPs with a PE core are taken to be 'prohibited imports' under the *Customs (Prohibited Imports) Regulations 1956* (Cth). However, it does not specify whether the importation is prohibited absolutely or whether they could fall within the class of products that could be imported in the future by permission of the Minister in certain circumstances.
- Thirdly, the Bill does not affect ACPs with a PE core that are presently in the country. It only applies to ACPs with a PE core imported after the Bill receives Royal Assent.
- Finally, whilst importation is intended to be banned, the use of ACPs with a PE core is currently not. Having said that, the increased focus on the use and risks associated with ACPs may mean that, although their use is not banned, having their use signed off by a building surveyor or fire engineer (and any relevant authorities) on a project nowadays may be remote.

Visit *Cladding: the Australian landscape since Grenfell* for a more fulsome summary, by State and Commonwealth, of the recent activities embarked upon as the Federal government and each State try to measure the size of the problem.

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Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017 (Cth)

Andrew Orford | Renae Carrigg

Background

The *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017* (Cth) (**Bill**) has passed both Houses of Parliament. The changes to be implemented by the Bill will have significant impacts for the construction industry.

'Ipso facto' clauses in a contract are clauses that confer rights to a party to *'terminate or modify the operation of a contract upon the occurrence of a specific event'*. Importantly, the new laws will place restrictions on the ability of a party to exercise rights given by ipso facto clauses that may be exercised or come into effect by reason of a party being the subject of a formal restructure (or a party's financial position prior to the formal restructure). Some examples are:

- when the party has publicly announced it will be making an application for, or is the subject of, a compromise or arrangement to avoid being wound up in insolvency;
- when there has been an appointment of a managing controller of a party's property (which includes a receiver and manager of the party's property); or
- when a party is under administration.

Common rights in construction contracts may become subject to the ipso facto laws, if they are exercised specifically by reason of a counterparty going through a formal restructure (or a party's financial position prior to the formal restructure), including:

- the right to terminate a contract by reason of a party's insolvency;
- suspension;
- the ability to access security;
- step-in rights; and
- set-off rights.

Key provisions

Contractual rights to terminate a contract for a party's insolvency, suspend, access security, step-in or exercise set-off rights cannot be enforced during the 'stay period'.

Compromises and arrangements

The stay period for a compromise or arrangement starts from the time the announcement or application is made and ends:

- if the party fails to make the announced application, within 3 months of the announcement (or within such longer period ordered by the court);
- when the application is withdrawn or dismissed by the court; or
- at the end of the compromise or arrangement (or if the compromise or arrangement ends due to a winding up order, when the party has been fully wound up).

Managing controller

Where a managing controller has been appointed, the stay period starts at the appointment of the managing controller and ends when that managing controller's control ceases (or when any court order extending the period ceases to be in force).

Administration

If a party is under administration, the stay period, starts when the party comes under administration and ends when the administration ends (or when any court order extending the period ceases to be in force).

Scope

Contractual rights to terminate a contract for a party's insolvency, suspend, access security, step-in or exercise set-off rights are unenforceable indefinitely after the stay period to the extent the right is being exercised because of:

- the party's financial position before the end of the stay period;
- the party was the subject of the formal restructure; or
- as prescribed by the regulations.

The Minister for Revenue and Financial Services (**Minister**) has broad powers to make declarations in respect of the types of contracts to which the new laws will apply and the kinds of rights to which the laws are not intended to apply.

Exceptions

The person appointed to administer the compromise or arrangement, the managing controller, the administrator, or liquidator (if applicable) may consent to the enforcement of a contractual right.

Upon application by the holder of the right, the court may make orders as to whether the stay on the enforcement of a particular right may be lifted and for particular rights to be enforceable against a counterparty.

The court may also make an order that relevant rights under a contract may only be exercised with the leave of the court and in accordance with any terms it may impose (termination for convenience is given as an example).

The operation of self-executing provisions is restricted.

What does this mean for you

Unfortunately, there is very little that can be done to alleviate the impact of the new laws as they are the result of a clear policy decision to assist companies going through restructuring. The new laws suspend the contractual rights of counterparties to the extent they are triggered by such a restructure and the Minister has been given broad powers to cover off any loopholes.

On a practical note, if you have current contracts that can be extended, you may wish to consider whether it would be beneficial to extend those contractual arrangements instead of entering into new agreements, given the new laws will only apply to contracts entered into after the ipso facto provisions commence.

You should remember that you may be able to exercise rights to terminate, suspend, access security, step-in or set-off under the contract if you are not doing so as a result of the counterparty's formal restructure (or a party's financial position prior to the formal restructure), such as when the counterparty is in breach of performance obligations (including an obligation to make a payment).

Next steps

The provisions that will implement the stay on the operation of ipso facto clauses will commence on 1 July 2018.

The Government has indicated in a media release on 12 September 2017, that it will *'consult with key stakeholders on the Regulations'* to support the new ipso facto laws.

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New South Wales

Transport Legislation Amendment (Automated Vehicle Trials and Innovation) Bill 2017 (NSW)

Nicole Green | David Pearce | Simon Moses

In early August 2017 the New South Wales Government prepared to give the green light to the trialling of driverless vehicles by introducing the *Transport Legislation Amendment (Automated Vehicle Trials and Innovation) Bill 2017* (NSW) (**NSW Bill**) into parliament.

The NSW Bill heralds the next step in the NSW Government's implementation of its Future Transport Strategy and, in particular, the *Future Transport Technology Roadmap* (synopsis | full report) released in 2016. Increasing automation in road vehicles has the potential to revolutionise urban mobility, increase freight and other transport efficiencies, decrease freight and other transport costs, and significantly increase safety.

The NSW Bill represents the Government's progress towards permitting autonomous vehicles (often known as 'driverless vehicles') to operate on roads in New South Wales. Autonomous vehicles are ones where some or all aspects of driving are performed by the vehicle rather than the driver, such as steering, accelerating or braking.

If the NSW Bill is passed as currently drafted, a person will be permitted to apply to the Minister for Roads, Maritime and Freight (**Minister**) or her delegate (being Roads and Maritime Services and Transport for NSW) to trial highly or fully automated vehicles (which could include, among other things, personal vehicles, buses and freight trucks) within a specified part or all of New South Wales for a specified period of time.

Unlike the equivalent legislation introduced in South Australia (*Motor Vehicles (Trials of Automotive Technologies) Amendment Bill 2016* (SA) (**SA Act**), a 'default' condition for all trials in New South Wales is that a person approved by the Minister or her delegate must remain inside the vehicle during all trials and be in a position to take control of the trial vehicle at any time or to stop the trial vehicle in an emergency or if required to do so by an authorised officer of the State of New South Wales.

The requirement to have a dedicated vehicle supervisor is a safety conscious approach which reflects the NSW Government's view of the current state of autonomous vehicle technology, and public confidence in the technology. It is also consistent with the fact most currently proposed trials involve either a single vehicle, or a very small fleet. However, it is likely that this requirement will eventually become redundant as those trialling autonomous vehicle seek to demonstrate their capacity to operate truly autonomously, without human intervention, and in large fleets.

The NSW Government's goal is to have fully connected and automated vehicles readily available and on the road by about 2035. These will be self-driving cars which do not require any human monitoring (known as 'Level 5' AV technology).

One of the first trials to be delivered in NSW is a trial of autonomous mini-buses at Sydney's Olympic Park, scheduled to commence later this month. That trial, involving the NSW Government, NRMA and HMI Technologies, will run for two years, commencing with off-road testing before moving to on-road and passenger borne services.

A key component of supporting and nurturing an innovation culture is embracing collaboration. The NSW Bill takes a slightly different approach to the sharing of trial-related data than that suggested by the National Transport Commission (and adopted in South Australia) with the NSW Bill containing a broad right for the Minister (or her delegate) to request information in relation to a trial. The NSW Bill also allows the Minister to provide any information provided by the trial participant to be shared with any other person or body if the Minister considers it reasonable to do so for the purposes of law enforcement or road safety.

The proposed legislative position is further evidence of the NSW Government's desire to promote a collaborative and innovative economy. It will therefore be interesting to see how the NSW Government works with the private sector and industry bodies, such as the NRMA, to leverage the outcomes of the trials and take advantage of the fast moving pace of innovation and technological change beyond the current pipeline of transport projects.

As the next step in the NSW Government's intelligent transport solution journey and a key milestone in the Future Transport Technology Roadmap, we are excited by the opportunities the NSW Bill presents and welcome the opportunity to talk with you further about what this means for your business.

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Work Health and Safety Regulation 2017 (NSW)

Richard Crawford | Louisa Yasukawa

Background

On 1 September 2017 the *Work Health and Safety Regulation 2017* (NSW) (**2017 Regulation**) commenced, replacing the *Work Health and Safety Regulation 2011* (NSW) (**2011 Regulation**) (repealed 1 September 2017).

The 2017 Regulation continues to prescribe matters under the *Work Health and Safety Act 2011* (NSW) (**Act**).

Significance

- Principals and contractors must ensure they continue to comply with the 2017 Regulation which are essentially the same as the 2011 Regulation.
- Any references to the 2011 Regulation in pro forma templates should be updated to refer to the 2017 Regulation going forward.

Key changes

The object of the 2017 Regulation is to remake the 2011 Regulation, with no significant changes. Accordingly, the 2017 Regulation remains essentially the same as the 2011 Regulation, except for minor changes, including formatting and corrections to typos. The provisions of the 2017 Regulations are substantially uniform with the *Model Work Health and Safety Regulations 2011* prepared by Safe Work Australia.

Noteworthy changes

Amendments to clause 702A (Penalty notice offences and penalties) and Schedule 18A (Penalty notice offences) of the 2011 Regulation

- The 2011 Regulation contained clause 702A(1) (*Penalty notice offences and penalties*), which operated in relation to section 243 (*Infringement notices*) of the Act. Clause 702A(1) had provided that each offence created by a provision in Schedule 18A of the 2011 Regulation was an offence for which a penalty notice may be served.
- In the 2017 Regulation, the content of clause 702A(1) of the 2011 Regulation is now set out in Schedule 18A, with a slight change in wording to be consistent with the *Fines Act 1996* (NSW). In particular, the 2017 Regulation states that penalty notices are to be 'issued' rather than 'served', as stated in the 2011 Regulation.
- Clause 702A(2) of the 2011 Regulation is now parallel in the 2017 Regulation.

Replacement of clause 702A (Penalty notice offences) of the 2011 Regulation with a new clause 702A (Savings)

- In the 2017 Regulation a new clause 702A (*Savings*) has been inserted, replacing Clause 702A (*Penalty notice offences and penalties*) in the 2011 Regulation.
- Clause 702A of the 2017 Regulation:
  - provides that any act, matter or thing that, immediately before the repeal of the 2011 Regulation, had effect under the 2011 Regulation, continues to have effect under the 2017 Regulation; and
  - includes a new note stating that the savings and transitional provisions contained in Schedule 18B of the 2011 Regulation continue to have effect under the 2017 Regulation by operation of section 30(2)(d) (*Effect of amendment or repeal of Acts and statutory rules*) of the *Interpretation Act 1987* (NSW) (**Interpretation Act**).

Removal of Schedule 18B (Savings and transitional provisions) of the 2011 Regulation

- The 2011 Regulation contained Schedule 18B (*Savings and transitional provisions*) which does not appear in the 2017 Regulation.
- Inserted into clauses 143 (*Demolition work required to be licensed*) and 702A (*Savings*) of the 2017 Regulation are notes which provide that Schedule 18B of the 2011 Regulation continues to have effect by operation of section 30(2)(d) of the Interpretation Act.

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Queensland

Building Industry Fairness (Security of Payment) Bill 2017 (Qld)

Michael Creedon | Andrew Orford | David Pearce

Fairer processes for securing payment for subcontractors

On 22 August 2017 the Queensland Government introduced the *Building Industry Fairness (Security of Payment) Bill 2017* (**Bill**), which will repeal and replace the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIPA**), the *Subcontractors' Charges Act 1974* (Qld) (**SCA**) and amend other related legislation.

When introducing the Bill the Minister for Housing and Public Works, Mick de Brenni MP, said it will establish a regime to help ensure subcontractors are paid in full, on time and every time. The Bill is State-specific and in the Explanatory Notes is said to make Queensland the leader in legislative reform in the field of Project Bank Accounts (**PBAs**).

Introduction of Project Bank Accounts

The Bill introduces Project Bank Accounts from 1 January 2018 for government contracts for construction of fixed structures that are wholly or partly enclosed by walls or roofed, and related work, if the contract sum is between $1 million and $10 million.

PBAs are trust accounts into which the government as principal will pay progress payments, retention monies and disputed funds to be held for the benefit of first tier subcontractors and the head contractor.

Replacement of *Building and Construction Industry Payments Act 2004* (Qld)

When enacted and in force the new legislation will repeal and replace BCIPA, and will provide improvements to the progress payment claims process by reducing opportunities for head contractors to delay payment and by streamlining the adjudication process.

A payment schedule will then be mandatory, whether or not the contractor intends to pay the amount stated in the claim. The payment schedule must include all the reasons for non-payment as the right to include new reasons in an adjudication for complex claims has been removed.

Claimants will have more time to make an adjudication application (up to 40 business days from the due date for payment), but respondents will not have more time to respond.

The amount of material that an adjudicator will have to consider will be limited by regulation as both the number and length of submissions for adjudication applications and responses will be prescribed.

Replacement of *Subcontractors' Charges Act 1974* (Qld)

When enacted and in force the Bill will also repeal and replace the SCA. It is intended that the legal effect of the provisions that are currently in the SCA will remain unchanged.

Taking action against illegal 'phoenixing'

The new legislation also proposes amendments to the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**) that will enhance the enforcement powers of the Queensland Building Construction Commission (**QBCC**). Licensing administered by the QBCC will be restricted to take action against corporate 'phoenixing'—the practice of secretly running a construction company that goes bankrupt or has its building licence revoked.

'Excluded individuals', those involved in a company failure in other jurisdictions, or who were directors of a company up to two years prior to a failure, will be excluded from obtaining a building licence, as will an 'influential person' who is not an officer of the company but is in a position to substantially influence or control the company's affairs.

Tougher penalties, including imprisonment

Penalties for unlicensed building work will be increased in a graduated penalty regime. A first offence carries a penalty of up to $31,537.50, a second offence up to $37,845, and third and subsequent offences, or where the work results in tier 1 defective building work, up to $44,152.50.

Penalties of up to $63,075 will be imposed on head contractors that fail to comply with the requirements of PBAs, including failing to establish a PBA and unauthorised ending of the PBA.

New penalties of $12,615 will be introduced for failure to provide a payment schedule, and of $25,230 for failure to pay an adjudicated amount. A head contractor will also face a penalty of $12,615 for failure to give notice to a subcontractor about the end of the defects liability period.

Imprisonment of one year will become a possibility for persons who fail to make payments to subcontractor beneficiaries of PBAs, or who deposit money into a PBA which is not related to the limited purposes of the account. A head contractor could also face one year imprisonment for failure to cover any shortfalls in the PBA.

Imprisonment of two years will become a possibility for head contractors who fail to deposit into the PBA an amount paid by the principal, or who withdraw money from the PBA for other than the limited purposes. A head contractor could also face two years imprisonment for improperly dealing with retention amounts.

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In the Australian courts

Australian Capital Territory

Dunn v Hanson Australasia Pty Ltd [2017] ACTSC 169

Richard Crawford | Adam Hanssen

Catchwords

Building Act 2004 (ACT) – statutory warranties – defects – quantum of damages – contribution and apportionment

Significance

Where defective building work can be remedied by either repairs or demolition and reconstruction, the plaintiff is only entitled to insist upon the meeting of the contractual standard. The apportionment regime under the *Building Act 2004* (ACT) only applies to claims which are building actions.

Facts

In July 2009, the third defendant Ms Qun Cai (**vendor**) contracted with the first defendant Hanson Australasia Pty Ltd (**builder**) to complete residential building work. In April 2010, prior to completion of the construction of the house, the vendor entered into a contract to sell the house and land to the plaintiffs Kathryn and Thurston Dunn (**purchasers**). The fourth defendant Raymond Howard (**certifier**) was the certifier who issued a Certificate of Completion of Building Work prior to settlement.

After settlement, numerous defects in the building work were identified. The purchasers brought claims against the builder and second defendant (the builder's sole director) for breach of statutory warranties implied by section 88 of the *Building Act 2004* (ACT) (**Act**) and misleading and deceptive conduct contrary to the *Trade Practices Act 1974* (Cth). The builder and purchaser settled.

The purchaser also brought a claim against the vendor, for breach of contract in failing to ensure the construction of the house would be carried out in a proper and workmanlike manner, and the certifier, for negligence in the discharge of his professional duties as a certifier. The proceedings against the vendor and certifier were also finalised prior to the hearing of the assessment of damages for the builder.

The court heard expert evidence that estimated the cost of remedying the individual defects to be $346,770, whilst demolishing and rebuilding the dwelling would cost $496,152. In the opinion of the expert, the preferable and safer option was to have the property demolished and rebuilt due to potential additional structural deficiencies.

At issue was the amount of damages to which the purchasers were entitled, repairs or reconstruction, and the proportionate liability of each defendant.

Decision

The court held that the purchasers were entitled to damages to cover the cost of repairs but not complete demolition and reconstruction, and that claims against the builder, in relation to breach of statutory warranties, and the certifier were the only apportionable claims under the Act.

Quantum of Damages

Mossop J held that the primary remedy is rectification so as to produce contractual conformity (enforcement of contractually required standards of building construction): *Bellgrove v Eldridge* [1954] HCA 36. His Honour noted that whilst a plaintiff is not required to settle for a doubtful remedy that may be cheaper and more expedient so far as the defaulting party is concerned, there was no evidence that remedial works could not achieve contractual conformity because the defects, while widespread, were discreetly identifiable defects within the building.

Contribution and Apportionment

Mossop J held that to the extent that the purchaser's action against each of the defendants is a building action, it would be governed by section 141 of the Act and thus apportionable. His Honour held that the definition of building action was limited to claims against those responsible for building work or construction work other than building work. Therefore, the breach of the statutory warranties claim against the builder under the Act and the action against the certifier for negligence constituted building actions and were apportionable under the Act, but the definition of building action did not extend to the vendor for breach of contract or any of the claims for misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth).

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R Developments Pty Ltd v Forth [2017] ACTCA 38

Richard Crawford | Jessica Nesbit | Clare Moran

Catchwords

Standard form building contract – construction of contractual terms – effect and nature of contractual clauses – principles of contractual interpretation – evidence of capacity to pay contract sum

Significance

The court applied a strict interpretation of the contractual provisions and held that the builder had wrongfully terminated the contract.

Facts

We had previously analysed *R Developments Pty Ltd v Forth & Anor* [2016] ACTSC 8 in our December 2015 – June 2016 edition. R Developments Pty Ltd (**builder**) appealed against that decision which found that the builder had wrongfully terminated a contract for construction of Mr Forth and Ms Nemet's (**owners**) residence.

At first instance, the builder claimed breach of contract by the owners in failing to comply with clause 4(a) of the contract (clause 4(a)) which required the owners to supply evidence of their capacity to pay the contract sum. The builder also contended that the owners had failed to provide evidence that the owners had obtained finance in accordance with clause 27(a)(v) of the contract.

The primary judge, Mossop AsJ, had dismissed the builder's claim on the basis that the obligation to provide evidence of capacity to pay was not an ongoing obligation but rather one that passed when the builder commenced works. His Honour concluded that the function of the words 'Before the commencement of the Works' under clause 4 acts to fix the point at which the obligation arises – if the point passes, the obligation no longer exists. Additionally, his Honour held that the builder was not entitled to rely on clause 27(a)(v) of the contract because the builder's notice was defective as it failed to expressly refer to that clause 27(a)(v).

On appeal, the builder claimed the owners' obligation under clause 4 did not cease upon commencement of the builder's works. The builder argued that clause 4 contained two separate obligations, being to provide evidence of capacity to pay prior to commencement of works or, alternatively, within 10 days of entering the contract. The builder also asserted that the contract should be interpreted in accordance with the meaning which would be conveyed to reasonable persons in the situation of the parties, being lay persons using a standard form agreement. The builder argued that it would be an uncommercial and unrealistic interpretation of the contract if, as soon as the builder performed early works such as putting up a fence or installing a portable toilet on site, the obligation of the owners to provide evidence of their capacity to pay was forever extinguished.

Decision

The Court of Appeal dismissed the builder's appeal, and the builder was ordered to pay the owners' costs.

The Court of Appeal agreed with the primary judge's reasoning in respect of clause 4, finding that, even if clause 4 created an obligation on the part of the owners (breach of which entitled the builder to terminate), it was an obligation that ended when the builder commenced the works. The court held that on the facts of the case the builder had elected to waive compliance by the owners with clause 4 and had commenced works on the day the contract was signed. By not electing to wait the 10 days to which the builder was entitled before commencing works, the owners were effectively left unable to comply with clause 4.

The Court of Appeal also held that the builder could not rely on clause 27(a)(ii) or clause 27(a)(v) of the contract. The right of the builder to terminate under clause 27(a)(ii) of the contract related only to circumstances where the owners were in breach of the obligation imposed by clause 4.

In respect of clause 27(a)(v) of the contract, the Court of Appeal held that the builder's notice did not expressly or by implication invoke clause 27(a)(v) of the contract or identify the alleged breach of contract. The court took the view that it was reasonable that the owners on whom a termination notice is served be explicitly informed as to the reason for termination so as to give them adequate opportunity to respond.

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New South Wales

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

Richard Crawford | Philippa Munton

Catchwords

Building and Construction Industry Security of Payment Act 1999 (NSW) – progress payments scheme – requirement of valid reference date under contract – date of practical completion – whether payment claim valid – whether practical completion dependent on building superintendent's opinion, or objective existence of state of facts

Significance

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

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

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

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

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

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

Facts

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

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

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

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

The Supreme Court found in favour of the respondent, quashing the adjudicator's determination and concluding the purported payment claim was not a payment claim within the meaning of section 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**). The claimant appealed this decision.

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

Did 'practical completion' of the work occur:

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

Decision of the Court of Appeal

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

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

- The language of clause 34.6 of the contract between the parties and the use of the present perfect tense ('has been reached') indicated that the actual time of completion was unimportant. In addition,

the fact that the contract specifically referred to a certificate of practical completion – *'evidencing'* the date of practical completion as opposed to *'stating'* the date of practical completion' – further supported this argument.

- The achievement of practical completion was dependent upon the superintendent forming an opinion regarding whether practical completion had been achieved and not on the existence of the underlying elements of practical completion.
- The claimant could not know whether practical completion had been reached until it received the certificate of completion. A lack of certainty as to the precise date of practical completion could be potentially 'commercially disastrous'.
- It would be 'inconvenient in the extreme' if the existence of a reference date under a construction contract turned on the satisfaction of a judge of a set of facts following a trial. The court stated such a conclusion would *'drive a horse and cart (or perhaps a B-double) through the legislation scheme'*.

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AGL Energy Limited v Jemena Gas Networks (NSW) Ltd [2017] NSWSC 765

Richard Crawford | Fiona Elliot | Jessie Jagger

Catchwords

Arbitration – *Commercial Arbitration Act 2010* (NSW) – sections 7(1) and 8(1) – whether arbitration agreement exists – where referral to arbitration made before commencement of litigation

Significance

The case demonstrates when the court will decline to find that an arbitration agreement exists.

Facts

Jemena Gas Networks (NSW) Ltd (**distributor**) operates a gas distribution network. AGL Energy Limited (**retailer**) provides gas services to consumers. The distributor and retailer entered into an agreement which specified how the distributor would supply its services to the retailer (**supply agreement**).

A dispute arose between the parties under the agreement.

On 29 July 2016, the retailer issued a dispute notice to the distributor. Under the supply agreement, the parties were required to convene in an attempt to resolve the dispute. The dispute was not resolved and on 13 October 2016 the distributor referred the dispute to mediation. This was also unsuccessful in resolving the dispute.

On 28 March 2017, the distributor gave notice that it had referred the dispute to arbitration. On 12 May 2017, the retailer commenced litigation in the New South Wales Supreme Court.

The distributor applied to the court for a stay of the proceedings under section 8(1) of the *Commercial Arbitration Act 2010* (NSW) (**Act**), arguing that the supply agreement contained an 'arbitration agreement' within the meaning of section 7(1) of the Act. To be an 'arbitration agreement' under the Act, the agreement in question must make binding provision for compulsory arbitration, whether as a result of an election or otherwise. The retailer opposed the application.

Clause 30.5(a) of the supply agreement (**clause 30.5(a)**) provided:

> *'In the event that discussions under clause 30.4 fail to resolve the Dispute, each Party expressly agrees to endeavour to settle the Dispute by mediation administered by the Australian Commercial Disputes Centre (ACDC) before having recourse to arbitration or litigation.'*

The distributor argued that clause 30.5(a) – which restricted the parties' recourse to arbitration or litigation until after mediation – necessarily implied that after mediation the parties would have that

recourse and clause 30.5(a) has no effective content with respect to arbitration unless it is regarded as a binding arbitration agreement.

The distributor argued that its election to arbitrate prevailed over the retailer's election to litigate because it elected first and that clause 30.5(a) meant that the parties were free to elect either way. The distributor referred to two decisions concerning contracts providing for an election between arbitration and litigation, namely *Manningham City Council v Dura (Australia) Constructions Pty Ltd* [1999] VSCA 158 (***Manningham***) and *Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd* [2001] QCA 471 (***Mulgrave***).

In *Manningham*, clauses 13.01 and 13.02 of the contract in question (in the form of JCC-D 1994) provided that if there was a dispute regarding the contract, either party may give notice to the other identifying the dispute which would be a condition precedent to the commencement of the proceeding. Parties would confer within ten days to attempt to resolve the dispute.

Clause 13.03 and 13.04 of the contract provided:

> *'13.03 FURTHER NOTICE BEFORE ARBITRATION OR LITIGATION*
>
> *In the event that the dispute cannot be resolved in accordance with the provisions of cl13.02 or if at any time either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may by further notice in writing which shall be delivered by hand or sent by certified mail to the other party refer such dispute to arbitration or litigation. The service of such further notice under this cl13.03 shall also be a condition precedent to the commencement of any arbitration or litigation proceedings in respect of such dispute.*
>
> *13.04 REFERENCE OF DISPUTES*
>
> *At the time of giving the notice referred to in cl13.03 the party who wishes the dispute to be referred to arbitration shall provide to the other party evidence that he has deposited with the Chapter of The Royal Australian Institute of Architects or the Master Builders' Association, in each case of the State, Territory or place in which the Site is located, the sum of one thousand dollars ($1000.00) by way of security for costs of the arbitration proceedings. Subject to compliance with the provisions of cl13.03 and the foregoing provisions of this cl13.04 such dispute or difference (unless meanwhile settled) shall be and is hereby referred to arbitration pursuant to the succeeding provisions of this s13.'*

In *Mulgrave* the agreement in question also provided for the exchange of a notice as a precondition to arbitration or litigation. That contract included provisions which were almost identical to clauses 13.02 and 13.03 in *Mulgrave* but no corresponding clause 13.04.

Decision

The court dismissed the distributor's application finding that clause 30.5(a) did not indicate the primacy of arbitration; that is, there was no binding agreement to arbitrate. There was no 'critical' provision in the supply agreement for either party to refer the dispute to arbitration or litigation. To read clause 30.5(a) differently would have the unsatisfactory consequence of:

- operating on a first past the post basis, encouraging a race; or
- a party choosing litigation would be penalised if the other chose arbitration at a later time.

Hammerschlag J considered that the contracts in *Manningham* and *Mulgrave* were distinguishable from the supply agreement as there was no ability for the parties to select one of two alternatives upon a party following the contract procedure. The procedure in clause 30.5(a) displayed the parties' intent to arbitrate as, once it was followed, the parties were forced to participate in the arbitration.

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

Richard Crawford | Ben Christoffel | Jessie Jagger

Catchwords

Building and Construction Industry Security of Payment Act 1999 (NSW) sections 13(6) and 22 – where multiple payment claims, adjudication applications and determinations – whether claim re-agitated – whether issue estoppel or abuse of process

Significance

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

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

Facts

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

Timeline

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

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

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

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

Submissions

The respondent argued:

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

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

Decision

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

McDougall J found that although the respondent had been put to the trouble and expense of repeatedly responding to 'inadequate' adjudication applications by the claimant, there was no abuse of process by the claimant. Section 13(6) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) expressly provides that a claimant is not prevented, in successive adjudication applications, from claiming amounts the subject of prior payment claims.

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

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

Richard Crawford | Ben Christoffel | Jessie Jagger

Catchwords

Building and Construction Industry (Security of Payment) Act 1999 (NSW) – whether payment claim complied with the requirements of sections 13(7) and 13(9) as being accompanied by a compliant supporting statement – where statutory declaration made prior to payment claim – whether adjudication determination void

Significance

A supporting statement referring to a payment claim yet to be made does not comply with sections 13(7) and 13(9) of the *Building and Construction Industry (Security of Payment) Act 1999* (NSW) (**SOPA**).

Facts

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

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

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

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

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

First Ground of Challenge – Supporting Statement

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

Second Ground of Challenge – Void as Being Out of Time

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

Decision

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

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

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

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

Richard Crawford | Misha Chaplya

Catchwords

Building and Construction Industry Security of Payment Act 1999 (NSW) – subcontract for renovation works – where variations directed by principal after date for practical completion – where principal sought to reduce payment claim to nil by way of set-off based on liquidated damages claim for delayed completion – procedural fairness – where adjudicator rejected liquidated damages claim –whether application of prevention principle denial of procedural fairness

Significance

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

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

Facts

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

The claimant served the respondent with a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) in the sum of $2,175,267. The majority of the payment claim was in respect of variations which the respondent had directed after the date for practical completion. In its payment schedule, the respondent set off the claimant's claim with liquidated damages (**LDs**), asserting that the claimant had not applied for, had not been granted, and was not entitled to, any EOT.

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

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

The primary judge, Meagher JA, dismissed the respondent's summons, holding that the adjudicator had *'dealt with Probuild's argument as made'*. Read our analysis of that decision in our December 2016 edition.

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

Decision

The Court of Appeal dismissed the appeal.

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

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

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

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

In this context, despite the claimant having failed to claim EOTs, it was the respondent's failure to exercise its duty of good faith that enlivened the prevention principle to disentitle the respondent from setting off the claimant's claim with LDs. The Court of Appeal found that the respondent failed to exercise the discretionary EOT power under the subcontract honestly and fairly (or at all) having regard to the underlying rationale of the prevention principle.

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

Richard Crawford | Bonnie Doran

Catchwords

Building and Construction Industry Security of Payments Act 1999 (NSW) – fixed reference date – adjudication – whether jurisdictional error – operation of deeming provision in construction contract

Significance

A contractual deeming provision in relation to the reference date for a payment claim will not override the operation of the *Building and Construction Industry Security of Payments Act 1999* (NSW). If a payment claim is served on a date in respect of which no reference date exists, the payment claim will be invalid.

Facts

On 8 June 2015, the plaintiff Regal Consulting Services Pty Ltd (**respondent**) and the first defendant All Seasons Air Pty Ltd (**claimant**) entered into a subcontract under which the claimant undertook to perform mechanical ventilation and air conditioning work for the respondent. The subcontract was a 'construction contract' for the purposes of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Security of Payment Act**).

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

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

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

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

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

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

Decision

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

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

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

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Torbey Investments Corporated Pty Ltd v Ferrara [2017] NSWCA 9

Richard Crawford | Ben Christoffel | Winnie Jobanputra

Catchwords

Construction and interpretation of contracts – purposive interpretation – whether terms imposing procedural requirements and time limits for notices of breach and termination were mandatory – effect of non-compliance

Significance

This decision of the New South Wales Court of Appeal highlights the courts' approach to notice provisions where a notice has been served by a method that has not been provided for under the building contract.

Service of a notice may be valid if the method of service is not provided for under the contract in circumstances where the receiving party has acknowledged receipt of the notice and has provided a response.

Facts

Torbey Investments Corporated Pty Ltd (**builder**) and Vito and Maria Ferrara (**owners**) entered into a building contract for the construction of a residential property. Work by the builder was to be completed by early 2006; however, it was delayed. The work was still incomplete by January 2007. The builder subsequently agreed to finish the work by 30 June 2007 and provided an itemised list of variations.

Despite a rectification order being issued to the builder on 9 July 2007 by NSW Fair Trading, the work was not completed.

On 9 July 2007, the owners sent to the builder, by regular post, a notice of termination for substantial breaches of the contract. Clause 33 of the contract provided that notices must be *'given by certified mail or personally'*.

On 23 July 2007, the builder responded to the notice stating that it wished to not end the contract but wished to remedy any breaches. No further work was completed by the builder, and on 3 August 2007 the owners sent to the builder, again by regular post, a notice terminating the contract.

The builder commenced proceedings in the Consumer, Trader and Tenancy Tribunal (**tribunal**) (now NSW Civil & Administrative Tribunal (NCAT)) seeking payment of a final progress claim under the contract for an amount of $170,114. The owners filed a cross-claim seeking rectification costs of defective and incomplete works.

On 17 May 2013, the tribunal made orders that the owners were liable to pay the builder $38,171.40, and the builder was liable to pay the owners $115,055 for incomplete and defective work. The lesser amount was set-off against the larger amount the builder was required to pay the owners with the balance being $116,580.60.

On 14 June 2013, the builder appealed to the District Court pursuant to section 67 of the *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW). The court concluded that the tribunal had not, with one qualification, made any error in law. The qualification concerned the manner in which the Tribunal dealt with a sum unpaid under the contract. The parties sought a further hearing in which the court dismissed the motion brought by the builder, delivering judgment in favour of the owners.

On 15 January 2016, the builder issued a summons pursuant to section 69 of the *Supreme Court Act 1970* (NSW) in the New South Wales Court of Appeal seeking a review of the decision of the District Court.

The builder argued that the contract had not been validly terminated because the notices issued by the owners did not comply with notice requirements under the contract.

Decision

The court held that the owners' failure to comply strictly with the notice requirements under the contract did not invalidate the termination of the contract.

As the letters giving notice of termination were responded to by the builder, the court found that the builder's response effectively acknowledged receipt of the notice and in turn an understanding that the owners intended to terminate the contract.

While each contract must be construed according to its own terms, the effect of the relevant clause in the contract was to provide a mandatory result if its conditions were followed, but not to invalidate a notice which is non-compliant. The result was that the notice was validly given for the purposes of the contract.

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

Richard Crawford | Ashley Murtha

Catchwords

Building and Construction Industry Security of Payment Act 1999 (NSW) – Aconex – service of payment claim – estoppel – misleading or deceptive conduct – Australian Consumer Law

Significance

An unduly formal and technical approach should not be taken when determining compliance with the requirements of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**).

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

Facts

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

The claimant issued 36 progress claims over the life of the contract. For claims 1 to 35 the claimant issued every document to the respondent via Aconex. However, after the respondent provided a

payment schedule for claim 36, the claimant served a tax invoice purporting to be a payment claim under the Act. This was served only by hand in hard copy at the relevant address of the respondent. The respondent did not issue a payment schedule in respect of this tax invoice.

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

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

Further, the respondent:

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

Decision

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

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

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

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

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

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Victoria

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

Owen Cooper | Tom Kearney | Anna Stephenson

Catchwords

Whether incorrect exclusion of non-claimable second class variations – whether the construction contract contained a method for resolving disputes within the meaning of section 10A(3)(d)(ii) of the *Building and Construction Industry Security of Payment Act 2002* (Vic)

Significance

This decision confirms that section 10A(3)(d)(ii) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) will be satisfied where the contract provides for a method of resolving disputes which, if elected by either party, is capable of resulting in a binding resolution of the dispute.

Facts

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

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

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

The claimant sought judicial review of the adjudication determination.

The key question was whether the contract made arbitration a binding obligation for the parties to enter upon and participate in, and therefore a method for resolving disputes for the purposes of section 10A(3)(d)(ii) of the Act, as set out in *Branlin Pty Ltd v Totaro [2014] VSC 492 (**Branlin**)* (analysed in our December 2014–February 2015 edition).

Decision

The court upheld the decision of the adjudicator finding that:

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

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

His Honour held that the fact that parties may agree a method other than arbitration did not alter the enforceability of the arbitral process available to the aggrieved party. His Honour also held that what was determinative, in this case, for the purposes of section 10A(3)(d)(ii) of the Act was that a party

with a dispute in relation to a second class variation could enforce the resolution of that dispute by a binding process of arbitral determination.

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Mohamady v Protek Building Surveying Pty Ltd (Building and Property) [2017] VCAT 1164

Owen Cooper | Chris Hey | Thomas O'Bryan

Catchwords

Domestic building work – building permit unlawfully issued – damages payable by building surveyor

Significance

An owner who suffers loss in reliance on a wrongfully issued building permit may be entitled to damages from the surveyor to put the owner in the position he or she would have been had the permit never been issued.

Facts

On 24 November 2008, Mohamady (**owner**) applied to Protek Building Surveying (**surveyor**) for a building permit to develop the subfloor space beneath her house. The surveyor was informed by the local council that the site was designated as being affected by uncontrolled overland drainage, and accordingly a report and consent from the council was required before any building work could be carried out. The surveyor issued the building permit on 24 March 2009 without obtaining the required report or consent from the council. Construction of an apartment was carried out in reliance on the building permit.

On 4 September 2013, the council issued a building notice to the owner requesting that the owner show cause why the apartment should not be demolished and the house returned to its original condition as shown in the 'approved plans'. It appeared that the council was not aware that any building permit had been issued in respect of the construction of the apartment. Subsequently, in December 2014, the council issued orders requiring the owner to demolish the apartment.

The owner commenced proceedings in the Victorian Civil and Administrative Tribunal (**VCAT**) seeking damages from the surveyor for the losses sustained by acting on the faith of the building permit the surveyor issued. While the applicant was yet to demolish the apartment, it was not disputed that she was required to do so. The surveyor admitted liability, and the only issue in dispute was quantum.

Decision

VCAT awarded the owner damages of $251,942.23, with costs and a claim for interest to be reserved for further argument.

The amount awarded was a significant reduction on the total damages claimed by the owner of $536,559.50. The tribunal considered that in assessing damages its task was to put the owner in the position she would have been if the permit had never been issued. However, ultimately, the tribunal held that the owner had not produced sufficient evidence to substantiate the amount claimed.

While both parties filed expert evidence, the owner did not call her expert to give evidence. Accordingly, while the tribunal considered that the owner's expert report could be relied upon, the tribunal placed greater weight on the surveyor's expert who was present at the hearing and available for cross-examination.

The vast majority of the damages awarded to the owner related to the costs of construction of the apartment and compliance with the demolition notice.

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Western Australia

Hamersley Iron Pty Limited v Forge Group Power Pty Ltd (In Liquidation) (Receivers and Managers Appointed) [2017] WASC 152

Mike Hales | Millie Richmond-Scott | Sophie van Hattem

Catchwords

Corporations – insolvency – *Corporations Act 2001* (Cth) section 553C – whether section 553C is an exclusive code regulating set-off in insolvency – whether contractual or equitable set-off available in insolvency – requirements for statutory set-off in insolvency – requirements for statutory set-off in insolvency – whether claims, debts or dealings are mutual – whether set-off rights preserved in insolvency by *Personal Property Securities Act 2009* (Cth) section 80(1)

Personal Property Securities – whether PPSA security interest creates a proprietary interest

Significance

The Supreme Court of Western Australia has held that when a company is in liquidation, section 553C of the *Corporations Act 2001* (Cth) (**Corporations Act**) provides an exclusive code regulating the set-off of debts owed to an insolvent company, and creditors cannot rely on contractual or equitable set-off. A creditor will not have any right of set-off against an insolvent company unless their dealings have the mutuality required by law. The attachment of a security interest registered under the *Personal Properties Securities Act 2009* (Cth) (**PPSA**) confers a proprietary interest which is sufficient to remove the mutuality required for set-off under section 553C of the Corporations Act.

Facts

Forge Group Power Pty Ltd (**Forge**) entered into contracts with Hamersley Iron Pty Limited (**Hamersley**) to provide Hamersley with certain engineering, procurement and construction services. Under a security agreement, Forge granted its financier (ANZ) a charge over its rights under those contracts which was registered under the PPSA.

Forge went into voluntary administration and then into liquidation. Hamersley terminated the contracts, owing monies to Forge for unpaid work, but having claims against Forge for damages. Hamersley alleged it had set-off rights because:

- it had an automatic right to set-off under section 553C of the Corporations Act; or alternatively
- it could rely on a set-off clause contained in its contracts with Forge; or alternatively
- the rights Forge granted to ANZ under the security agreement constituted 'accounts' for the purposes of the PPSA, and under section 80(1) of the PPSA, ANZ's rights as the 'transferee' of accounts remained subject to Hamersley's rights as an 'account debtor'.

Decision

Tottle J found that Hamersley did not have rights of set-off against Forge: whether contractual or equitable, or statutory. Section 553C of the Corporations Act was an exclusive code regulating set-off in circumstances where a party is in liquidation. It displaced all other types of set-off.

The attachment of a security interest creates a statutory proprietary interest in favour of the secured creditor. When ANZ gained a proprietary interest in Forge's rights pursuant to the security agreement, the debts that were previously owed between Hamersley and Forge were no longer owed between the same parties in the same right. In these circumstances there was no mutuality necessary for a set-off under section 553C of the Corporations Act. Section 80(1) of the PPSA was not intended to amend the statutory regime set out in section 553C. The protection of Hamersley's rights that would have been offered by section 80(1) of the PPSA was lost when Forge entered liquidation.

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In the United Kingdom courts

MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Limited and another [2017] UKSC 59

Richard Crawford | Kate Morrison | Christabel Moffat

Catchwords

Warranties – breach of contract – design and build contracts – fitness for purpose – standard of care – error in prescribed design – whether the contractor was liable where it complied with the prescribed design which inevitably resulted in the product falling short of the prescribed criteria

Significance

Although this is the decision of the Supreme Court of the UK (previously the House of Lords), it has significant implications for contractual interpretation generally, particularly in multi-authored contracts containing multiple schedules. It serves as a useful reminder that courts are generally inclined to give full effect to the natural meaning of a contractual provision that is clear in its terms, even if it is 'tucked away' in a technical schedule.

Facts

E.ON Climate & Renewables UK Robin Rigg East Limited and another (**E.ON**) and MT Højgaard A/S (**MTH**) entered into a written contract (**contract**) under which MTH was obliged to design, fabricate and install the foundations for the proposed turbines at the Robin Rigg offshore wind farm in the Solway Firth.

The contract provided relevantly that MTH had to design and complete the works so that:

- the works will be fit for purpose (determined with reference to the Employer's Requirements); and
- the design of the works shall be wholly in accordance with the contract and shall satisfy any performance specifications or requirements of E.ON as set out in the contract.

The Technical Requirements section of the Employer's Requirements schedule to the contract provided relevantly that:

- MTH must prepare the detailed design of the foundations in accordance with J101 (an international standard aimed at achieving a service life of 20 years);
- the design of the foundations shall ensure a lifetime of 20 years in every aspect without planned replacement (**Performance Criteria**);
- the requirements contained in this section of the Technical Requirements are the minimum requirements of E.ON to be taken into account in the design; and
- it is the responsibility of MTH to identify areas where the works need to be designed to more rigorous requirements.

MTH designed the works in accordance with J101. Unknown to MTH at the timing of contracting and carrying out the design, J101 contained a significant error which dramatically reduced the service life of the foundations such that compliance with J101 would not provide a design life of 20 years.

Shortly after completion, the foundation structures failed and remedial works were undertaken at a cost of approximately €26 million. Litigation was commenced to determine which party should bear these costs.

Decision

The Supreme Court unanimously allowed E.ON's appeal and held MTH liable, setting aside the decision of the Court of Appeal. It held that:

- MTH had failed to comply with the Performance Criteria.
- There was no inherent inconsistency between the Performance Criteria and the remaining provisions of the contract – even if the Performance Criteria was impossible to achieve if the agreed design specification was adhered to. Based on previous decisions in the UK and Canada, a contractor can be expected to take the risk where it has accepted obligations to achieve certain prescribed criteria whilst at the same time agreeing to implement certain design or specification.
- In any event, there was no actual inconsistency between the provisions as the requirement to comply with J101 was expressed as a minimum requirement and MTH was obliged to identify areas where more rigorous design was needed. The court held that this would have been the finding even if these express provisions had not been included in the contract as it could not have been envisaged that MTH would have been in breach of its obligations had it designed to a more rigorous standard than J101.
- The Performance Criteria was not 'too slender a thread' to support the more onerous fitness for purpose obligation alleged by E.ON as it was clear from the terms of the contract that the provisions of the Technical Requirements were intended to be of contractual effect (and so such obligations did not need to be included in the general conditions).
- Accordingly, there was no reason not to give effect to the natural meaning of the Performance Criteria.

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