MinterEllison

Construction Law Update

October 2017

Contents

Legislative update

Queensland

Pre-trial case management for civil litigation in the Supreme Court

Petrina Macpherson | Michael Thomas

Summary

In June 2017, the Supreme Court of Queensland announced it would be trialling a new system of pre-trial case management for 12 months. This system is to ensure all civil matters are subject to court supervision from the time the request for trial date (**RFTD**) is filed until it is assigned to a judge, often shortly before trial. The new process aims to assist the court to identify poorly prepared cases, effectively identifying and narrowing the real issues before the commencement of the trial.

Currently, the caseflow management system encompasses some matters, but management usually ceases once the RFTD is filed. This lack of supervision can lead to additional costs and delay.

On 4 September 2017, the court appointed a Resolution Registrar, Ms Julie Ruffin, who will manage the new case management process.

Key Changes

The new case management process is triggered by the filing of a RFTD. The new system will require the parties to participate in two case management conferences.

The first conference will require the parties to prepare and submit certain documents necessary for the proper preparation of the case for trial, as envisaged by Practice Direction No. 9 of 2010, comprising:

- a list of issues;
- a statement of matters not in dispute;
- a trial plan; and
- an index to an agreed bundle of documents.

At the conference the registrar will review the matter, identifying any inadequacies in the documents. A date for the trial of the matter will be allocated at the first conference.

At or about six weeks before the trial, the parties will be required to attend a second case management conference. In preparation for the second conference, the parties will confer in order to agree on any necessary revision of the documents to ensure they are up to date. The parties will also record their plan for the conduct of the trial. The parties will be required to re-visit and confirm their estimate as to likely duration of the trial. At the end of the second conference the matter will be allocated to a judge who will then supervise the matter.

At either conference the registrar may suggest resolution or narrowing of issues or the whole case. The parties are permitted to engage in 'without prejudice' communications; however, the registrar will not conduct mediations.

Cases requiring judicial supervision or estimated to take more than five days to hear will continue to be placed on the Supervised Case List.

Next steps

The court is expecting a threefold benefit to the new case management process:

- a reduction in the wastage of court resources and costs to litigants caused by the inappropriate allocation of trial dates and/or forced adjournment of trials;
- information gathered during the pre-trial process assisting the senior judge in the allocation of matters to trial judges; and
- trials being prepared and run more efficiently, saving the court and the parties time and costs.

| back to Contents

Victoria

Occupational Health and Safety Regulations 2017 (Vic)

Owen Cooper | Tom Kearney | Anna Stephenson

Background

On 18 June 2017 the *Occupational Health and Safety Regulations 2017* (Vic) (**2017 Regulation**) commenced, replacing the *Occupational Health and Safety Regulations 2007* (Vic) (**2007 Regulation**) (repealed 18 June 2017).

The 2017 Regulation continues to prescribe matters under the *Occupational Health and Safety Act 2004* (Vic).

Significance

- Principals and contractors must ensure they continue to comply with the 2017 Regulation which is largely the same as the 2007 Regulation.
- Any references to the 2007 Regulation in pro forma templates should be updated to refer to the 2017 Regulation.

Key changes

The changes are primarily targeted towards certain industries and activities, including:

- asbestos removal;
- construction work; and
- operation of a mine or other major hazardous facility.

Noteworthy changes

Alignment with the Model Work Health Safety Laws

- The 2017 Regulation represents Victoria's first move towards alignment with the Model Work Health Safety Laws (developed by Safe Work Australia in 2011 as a model to be adopted nationwide, which have been substantially adopted in all other Australian jurisdictions).
- Relevant changes include the definition of 'health' being expanded to include psychological health.

Construction Inductions

- The 2007 Regulation contained a requirement for registration with WorkSafe Victoria to perform construction work.
- Under the 2017 Regulation the requirement for registration has been discontinued, however there is still a requirement for workers to complete construction induction training and hold a construction induction card.

Prevention of falls

- The 2017 Regulation makes clear that legislative obligations apply to the risk of falls even at a height below two metres.
- There is no longer a requirement to comply with the previous controls for working at height.

Mandatory emergency procedures for certain works

- Under Regulation 331 of the 2017 Regulation, employers and self-employed persons are now required to develop emergency procedures if there is a risk of a person becoming engulfed by soil or other materials when construction work is being performed.

Further information

Further information is available from WorkSafe Victoria, including a detailed guide relating to the changes.

| back to Contents

In the Australian courts

New South Wales

Allianz Australia Insurance Limited v Dino Dinov [2016] NSWDC 342

Richard Crawford | Claire Laverick | Bonnie Doran

Catchwords

Deed of indemnity – *Environmental Planning and Assessment Act 1979* (NSW) – *Home Building Act 1989* (NSW) – building action – statutory construction principles

Significance

This case determined that the statutory time bar of 10 years in respect of building actions under section 109ZK(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**Act**) does not apply where the action has only an indirect connection with defective building work. In this case the indirect connection was a claim under an indemnity given by directors of a building company to a home building warranty insurer.

Facts

On 2 December 2002, Allianz Australia Insurance Limited (**insurer**) issued an insurance policy to Great Wall Constructions Pty Ltd (**builder**) for residential building work pursuant to the *Home Building Act 1989* (NSW) (**policy**).

Prior to the policy being issued, the insurer required six individuals (each being either directors of the builder, or associated with directors of the builder) (**directors**) to sign a deed of indemnity in favour of the insurer in which each director unconditionally and absolutely agreed to indemnify the insurer for all loss, damage, costs, charges or other liabilities incurred or paid as a result of any claim arising under the policy (**deed of indemnity**).

From then on, the builder carried out the building works, and a final occupation certificate was issued in December 2003. In July 2009 the owners lodged a claim against the insurer for indemnity under the policy in connection with building defects. In November 2010 the builder was deregistered, and in August 2011 the insurer subsequently accepted liability under the policy for part of the owners' claim.

The insurer then commenced proceedings in August 2015, relying on the deeds of indemnity to claim payment from the directors in respect of the owners' claim on the policy.

The directors denied liability on the basis that the action against them was time barred pursuant to section 109ZK(1) of the Act, which states that an action for loss or damage arising out of or concerning defective building work (**building action**) may not be brought in relation to any building work more than 10 years after the date on which the relevant final occupation certificate is issued.

Decision

The court rejected the directors' defence, finding in favour of the insurer.

In considering the directors' defence, the court needed to determine whether the insurer's claim constituted a building action for the purposes of section 109ZK(1) of the Act. The court found it had to consider whether the action is an action for:

- loss or damage arising out of or concerning defective building work; or
- damages for failure to meet a legal obligation which is only indirectly connected to defective building work.

Dicker SC DCJ found that the insurer's action was only indirectly connected to defective building work, as it related to a breach of the indemnification obligation in the deed of indemnity and not the defective building work alone.

The language of section 109ZK(1) of the Act, taken by itself, is broad in its application and could, without some limitation, prevent causes of action which could not have been objectively intended to be prevented under the Act. The proper limitation is to have regard to the purpose underlying the Act. Dicker SC DCJ was satisfied that the purpose of the Act was to overcome the indeterminate liability of building professionals to successors in title for latent building defects.

This decision was appealed. The Court of Appeal has just released its decision dismissing the appeal. An updated note will be provided in the next edition of Construction Law Update explaining the Court of Appeal's reasoning.

| back to Contents

Angus Developments Pty Limited v Kim [2017] NSWSC 584

Richard Crawford | Jessica Nesbit | Jessie Jagger

Catchwords

Contractual interpretation – relevance of prior non-binding document to interpreting development agreement – evidence of mutual intention in deletion or amendment – commercial result

Significance

A number of landowners were required to sell their parcel of land pursuant to a development agreement. One of the landowners could not rely on a prior, non-binding, memorandum of understanding with the developer (who was the counterparty to the development agreement) as evidence of mutual intention of the parties as the language in the development agreement regarding the parties' intention was not sufficiently ambiguous.

Facts

The defendants (**Kim**) owned a parcel of land in Dulwich Hill. They, and other landowners in the area, entered into an agreement with the developer for rezoning, marketing, obtaining development approvals and sale of the land as part of a development project (**development agreement**).

The developer was able to secure a buyer for the land and the majority of other landowners voted to accept an offer of $25.21 million for the land. However, Kim refused to sell their parcel arguing that the development agreement was conditional on the developer obtaining approvals.

The developer brought proceedings against Kim seeking an order requiring Kim to exercise the put and call option in place with the subsequent purchaser company and an order for specific performance of the development agreement. Kim cross-claimed alleging breach of fiduciary duties and also alleging that the development agreement was subject to a condition precedent requiring the obtaining of development approvals before the put and call option was triggered.

Kim's Argument

Kim argued that clause 8.1 and the definition of 'Project' in the development agreement supported the 'condition precedent' interpretation. Clause 8.1 of the development agreement (**clause 8.1**) referred to the sale of the project land '*immediately following the obtaining of development consent*'. Kim contended that the developer had to await the outcome of the planning approval process and obtaining development consent, subject to the expiry of the term, before it was able to call upon them to sell.

Kim also pointed to a prior memorandum of understanding as being relevant to the intention of the parties in relation to the development agreement. The memorandum of understanding expressly limited the developer's entitlement to initiate and manage the sale process after an acceptable development approval was achieved.

Developer's Argument

The developer conversely contended that the full operation of the marketing and sale process was not contingent upon the relevant development consents being obtained. Clause 8.1 stated '*At any time, including prior to Development Consent being achieved, the Developer may initiate and manage a marketing and/or sale process for the Project Land*'.

The developer argued that the timing in clause 8.1 must necessarily include the conduct of the sale to completion as the clauses dealing with the sale were not expressed to be contingent upon development consent being obtained. The developer argued that it would be 'bizarre' if clause 8.1 meant that it could start but not finish a sale as the outcome would be commercially 'inconvenient' at the least.

Decision

The court found for the developer, stating that the interpretation of the development agreement contended for by Kim is '*deeply unattractive; not supported by the language of clauses 8.1 to 8.4* [of the development agreement] *in which the relevant obligations of the parties are set out; and offends the principle that the parties should be assumed to have intended a commercial result*'.

Kim could not rely on the prior memorandum of understanding as evidence of parties' alleged intention for the sale not to occur until the relevant development approvals were obtained. Pembroke J held that if a particular construction of the meaning was open on the face of the agreement but during the drafting process the parties had deleted or amended terms that would have more clearly lead to that construction or result, when faced with ambiguity in the final agreement it would be possible for the court to determine that both parties had mutually intended that the result that would come from that deleted or amended construction would not apply.

However, his Honour noted that '*what will usually always matter most is the language which ultimately appears in the agreement, together with its syntax*'. Pembroke J determined that this was not a case where there was sufficient ambiguity.

His Honour noted that the principle (acknowledged by the majority of the High Court in *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 (at [35])) that the construction which avoided commercial inconvenience should apply in cases of ambiguity over a commercially impractical result supported the developer's argument. Pembroke J rationalised that even though the market value of land is typically enhanced by its development potential, especially when an application for development consent is lodged, experienced purchasers often take the risk of the likelihood of approval. The development agreement accounted for this commercial reality.

Appeal

Kim sought leave to appeal Pembroke J's decision. The New South Wales Court of Appeal dismissed the application because, despite Kim's contentions being 'reasonably cogent':

- the appeal would delay the outcome of the substantive proceedings between Kim and the developer; and
- Kim would have a right to appeal against Pembroke J's determination should they fail an appeal from final orders made in the substantive proceedings.

As such, there is a possibility that the above decision will be revisited in the future.

| back to Contents

Bayside Council v V Corp Constructions Pty Ltd [2017] NSWCA 120

Richard Crawford | Kate Morrison | Jessie Jagger

Catchwords

Breach of contract – negligence – no loss - developer required by contract to 'procure replacement' of above ground electricity cables with underground cables in accordance with Energy Australia's requirements – Energy Australia refused permission to undertake the works – whether developer's resultant failure to procure the works constituted breach of contract – whether certifier negligent in issuing interim occupation certificate – whether council suffered loss and damage

Significance

The case shows the application of contractual interpretation principles:

- where words of a contract are capable of two meanings, only one of which is lawful, the lawful interpretation will be preferred; and
- a term will be implied so as to give legal effect to the obligation on the assumption the parties are unlikely to have intended to agree to something unlawful.

The case also provides that a developer will not be held to be under an absolute obligation to perform works where such works are contingent on receipt of certain consents or approvals.

Facts

In October 2004, Bayside Council (**council**) granted consent for the construction of a four storey mixed use development at 1-3 Elizabeth Avenue, Mascot. One of the consent conditions required V Corp Constructions (**developer**) to enter into an agreement with the council to provide for the replacement of existing above ground power cables with underground cables to the standards of Energy Australia.

Under the relevant statute, replacing the cables without Energy Australia's consent would have been unlawful.

The council and the developer entered into a contract on 30 May 2006 that required the developer to procure the replacement of existing above ground power cables with underground cables in accordance with the standards and requirements of Energy Australia.

Energy Australia refused to approve the laying of underground cables. Following negotiations between the council and the developer, it was agreed the developer would pay the council $10,000 instead of replacing the cables. On the development being substantially completed, the certifier issued an interim occupation certificate.

The council commenced proceedings against the developer for breach of contract and against the certifier for negligence in issuing the occupation certificate when the underground cabling works had not been undertaken. Both claims were dismissed and the questions on appeal were whether:

- given the refusal of Energy Australia to consent to underground cabling, the developer still had an obligation under the contract to carry out the works; and
- the certifier was negligent in issuing the occupation certificate in these circumstances.

Decision

The court upheld the trial judge's decision and dismissed the council's appeal on both claims.

The court agreed it was appropriate to imply additional words into the contract such that the developer was obliged to procure the replacement cables '*with the approval of and*' in accordance with the standards and requirements of Energy Australia so as to give legal effect to the obligation. Basten JA noted it was '*necessary and obvious*' to imply such a term so as to exclude from the scope of the obligation work which would be unlawful where it was unlikely the parties would have intended to

agree to something unlawful. As a result of the implied term, the developer was not in breach of contract.

Ward JA also noted that the same outcome would be reached by general principles of contractual interpretation, namely that where words of a contract are capable of two meanings, only one of which is lawful (ie the obligation was subject to Energy Australia granting approval), the lawful interpretation should be preferred.

In any event, the court upheld the trial judge's finding that the council had not suffered any loss. If Energy Australia were not willing to consent to the work being undertaken (and such work could not be undertaken without Energy Australia's consent), then it could not be said that the council had suffered any loss because the expenditure would not take place.

The claim against the certifier failed for the same reason. Even if the issue of the interim occupation certificate involved a breach of duty, no loss was shown to result. In order to demonstrate loss, the council had to prove that, had the interim occupation certificate not been issued, it would have taken steps to ensure the developer completed its obligations under the contract – this could not be shown given compliance with the contract was contingent upon Energy Australia's consent.

| back to Contents

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

Richard Crawford | Michelle Knight | Karla Nader

Catchwords

Challenge to jurisdiction of adjudicator's determination – whether there was a reference date – whether claimant was a head contractor and required to provide a supporting statement with payment claim – whether adjudicator erred in finding response not served in time

Significance

The court has again determined that a term of a construction contract, which requires an additional condition be met in order for a reference date to arise or a contractor to be entitled to a progress payment, is void under section 34 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**). In this case, the court held that an oral term requiring that completed works be signed off on by an engineer and surveyor before the final payment claim could be made did not facilitate the contractor's statutory entitlement to payment.

Even so, the adjudicator's determination was still quashed on the basis that a supporting statement was not provided with the payment claim.

Facts

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

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

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

- no 'reference date' had arisen as the engineer and surveyor had not provided the sign-off required under the contract;

- the claimant was a head contractor and did not serve a supporting statement with the payment claim; and
- the adjudicator wrongly concluded that the respondent did not provide an adjudication response within time (ie two business days after the date on which the adjudicator's acceptance was received).

Decision

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

No reference date

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

No supporting statement

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

Service of Response

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

| back to Contents

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

Richard Crawford | Ben Christoffel | Kelly Wu

Catchwords

Quantum meruit – whether costs incurred for work were reasonable – whether deductions should be applied to a quantum meruit claim

Significance

The decision of the Supreme Court of New South Wales further clarifies the position concerning entitlement to recover amounts on a quantum meruit basis. The court accepted that it may be necessary to estimate the fair value of what is supplied, because for one reason or another, the actual

costs are not available or it is not appropriate to separate out the cost of the supply of materials and labour in calculating the value of what is supplied.

Facts

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

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

On 21 August 2013, the contractor made an adjudication application under the *Building and Construction Industry Security of Payment Act 1999* (NSW) in respect of the last progress claim (**PC 21**) for $1,052,036.15 (including GST). The adjudicator subsequently determined the amount payable by the developer to the contractor in respect of PC 21 was $557,697.09.

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

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

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

Decision

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

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

His Honour found that the contractor's approach was mistaken, relying upon the principles for assessing the amount recoverable for work performed under an unenforceable contract established by Deane J in *Pavey & Matthews Pty Ltd v Paul (1987) 16*2 CLR 221; [1987] HCA 5 at [263], being a fair value for the benefit provided. That is remuneration calculated at a reasonable rate for work actually done or the fair market value of materials actually supplied.

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

| back to Contents

Ku-ring-gai Council v Chan [2017] NSWCA 226

Richard Crawford | Andrew Hales | Christabel Moffat

Catchwords

Breach of warranties under the *Home Building Act 1989* (NSW) – negligence – existence of a duty of care owed by a principal certifying authority to subsequent purchasers of residential premises when issuing an occupation certificate under the *Environmental Planning and Assessment Act 1979* (NSW) – structurally defective building works – vulnerability of subsequent purchasers

Significance

This judgment overturns the decision in *Chan v Acres* [2015] NSWSC 1885 in respect of the liability of the local council acting as principal certifying authority (**PCA**) in tort to the purchasers of residential premises. The Court of Appeal held that the PCA did not owe a duty of care to avoid pure economic loss to the prospective purchasers of the property when issuing the occupation certificate.

This decision highlights the difficulties that a subsequent purchaser of residential premises will face in advancing a claim against a PCA for damages arising from defective building work and, in particular, establishing that the PCA owes a duty of care when such a purchaser is able to protect itself by negotiating the terms of purchase and has the benefit of the owner-builder's statutory warranty protections under the *Home Building Act 1989* (NSW) (**HBA**).

In seeking to establish such a duty, a plaintiff is required to show vulnerability in the sense of an inability to protect itself from the consequence of a defendant's want of care; showing that the negligence was a cause of the loss and that the loss was reasonably foreseeable will not be enough.

Facts

The first and second respondents, Ms Chan and Mr Cox (**purchasers**) bought a house from the third respondent owner-builder, Mr Acres (**owner-builder**). Several years earlier, the owner-builder had carried out significant renovations and extensions to the house.

The owner-builder had contracted with Mitchell Howes Civil & Structural Engineers Pty Ltd (**Structural Engineer**) to prepare structural drawings and undertake inspections of the works from time to time. The owner-builder had also engaged Ku-ring-gai Council (Council) as the PCA under the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA**). The purchasers negotiated the purchase of the property in its existing condition and accepted several minor defects outlined in a pre-purchase inspection report.

After settlement, the purchasers discovered serious structural defects in the house that had not been mentioned in the inspection report. A number of the defects were 'common' defects in that they were alleged to have arisen as a result of both the services of the Structural Engineer and the Council.

The plaintiffs sued:

- the owner-builder - for breach of statutory warranties under the HBA;
- the Structural Engineer - for breach of a duty of care owed in relation to its inspections of the structural works carried out on behalf of the owner-builder; and
- the Council - for breach of a duty of care owed in relation to its capacity as PCA and various statutory duties under the EPA.

The owner-builder cross-claimed against the Council for indemnification in contract and tort.

At first instance in the New South Wales Supreme Court, McDougall J held in favour of the purchasers, finding that the owner-builder was liable for breach of statutory warranties under the HBA, and the Council owed a duty of care to the purchasers to take reasonable care acting as PCA in issuing an occupation certificate. His Honour dismissed the purchasers' claim against the Structural Engineer. His Honour also held that the Council was liable to indemnify the owner-builder in respect of

the cost of rectifying the structural defects. The Council appealed to the New South Wales Court of Appeal.

The main issues to be determined by the Court of Appeal were:

- Did the Council, as PCA, owe the purchasers of residential premises a duty to take reasonable care in the issue of an occupation certificate to avoid their suffering economic loss as a result of the previous owner-builder's defective building work?
- Was the Council liable to indemnify the owner-builder for the costs of defect rectification?

Decision

The Court of Appeal unanimously allowed the appeal, setting aside the first instance decision against the Council.

The Court of Appeal held that the Council did not owe a duty of care to avoid economic loss to prospective purchasers of property when issuing an occupation certificate. Consequently, the Council was not liable for the purchasers' defect rectification costs nor was it liable to indemnify the owner-builder.

The Court of Appeal considered that the following features supported its conclusion that no duty of care was owed to the purchasers:

Reliance and assumption of responsibility

The Court of Appeal held that the purchasers' evidence did not constitute reliance of the kind that would bring them within the class of persons who were owed a duty of care. No more than a general expectation existed that the Council had acted properly or reasonably in issuing the occupation certificate.

The purchasers proceeded to buy the property after having expressly acknowledged in the contract for sale that the occupation certificate may be incorrect.

The Council did not agree to take responsibility for the owner-builder complying with the statutory conditions and approvals under their retainer, and, in any event, the PCA's role is regulatory.

Vulnerability

The prospective purchasers were capable of protecting themselves from the risk of economic loss arising from latent defects by:

- negotiating the purchase terms with the owner-builder; and
- benefitting from the statutory warranties under the HBA and home warranty insurance.

Consequently, the purchasers were not vulnerable to any want of care on the part of the Council in issuing the occupation certificate. Accordingly, there was no reliance, assumption of responsibility or vulnerability to any want of care on the part of the Council in issuing the occupation certificate that was sufficient to establish a duty of care.

The builder's cross-claim

The Court of Appeal concluded that the Council was not liable to indemnify the owner-builder for the rectification costs of the latent defects. As owner and builder, Mr Acres remained liable for ensuring compliance with the statutory requirements, consents and approvals. The contract between Mr Acres and the Council did not pass that responsibility on to the Council.

Further, irrespective of whether the Council issued the occupation certificate, the latent defects would have existed, unrectified. As such, no loss would have even been suffered by the owner-builder as a consequence of the Council carelessly issuing the occupation certificate. It was the purchaser that suffered the loss in paying the purchase price that reflected an assumption that the property was defect-free.

| back to Contents

Lipman Pty Ltd v Empire Facades Pty Ltd (formerly known as Empire Glass and Aluminium Pty Ltd) [2017] NSWCA 217

Richard Crawford | Andrew Hales | Kelly Wu

Catchwords

Dispute resolution clause – final and binding expert determination – where right to litigate in relation to the dispute if '*the determination of the expert does not resolve the dispute*' – no precondition that only an invalid expert determination will not 'resolve' the dispute

Significance

This case involved competing interpretations of the dispute resolution mechanism as to the circumstances in which a party could commence litigation following expert determination. A court is unlikely to uphold a strained interpretation of a dispute resolution clause where it appears to be clear that the parties intended that a right of appeal would exist if a party was dissatisfied with the expert determination.

Facts

Under a contract dated 21 November 2014, Empire Glass and Aluminium Pty Ltd (**contractor**) agreed to supply Lipman Pty Ltd (**principal**) with design, supply, construction and associated works for the refurbishment of a lobby.

Clause 42 of the contract contained a tiered dispute resolution mechanism: following the service of a notice of dispute, if the dispute was not resolved by negotiation between senior executives, clause 42.3 of the contract required the dispute to be referred for expert determination. A clause in the form of an expert agreement in the contract stated that the expert's determination is 'final and binding' on the parties unless provided otherwise under the contract. Clause 42.11 of the contract provided that the determination of the expert will be final and binding unless a party gives notice of appeal to the other party within 15 business days of the determination and the determination is reversed, overturned or otherwise changed in litigation. Relevantly, clause 42.12 of the contract provided that '*if the determination of the expert does not resolve the dispute, then subject to clause 42.11, either party may commence proceedings in relation to the dispute*' (**precondition**).

The expert made two determinations on 29 November 2016 in favour of the principal. The contractor subsequently gave notice of appeal in accordance with clause 42.11 of the contract and commenced proceedings seeking to re-agitate the same issues considered by the expert.

The principal applied to dismiss the proceedings on the grounds that the disputes had been resolved by the expert determination and it was not open for the contractor to re-agitate those issues. The principal contended that if the determination of the dispute has been made by an expert in accordance with the requirements of the contract or expert agreement, it must follow that the determination does '*resolve the dispute*' for the purpose of clause 42 of the contract and therefore neither party is entitled to litigate the dispute.

In response, the contractor argued that the precondition is to be interpreted as saying that, by triggering the appeal process, a dispute is not 'resolved' for the purposes of the contract and consequently either party may commence litigation.

The primary judge held that the parties had made it clear that they intended the appeal process to involve a rehearing by a court, and that the interpretation advanced by the principal does not sit easily with the words of the contract and does not really provide for a right of appeal at all.

The primary judge, Ball J, also held that the precondition is expressed as a condition on the right to commence court proceedings, and makes sense where the condition is the service of a notice of appeal within the specified time but less so where the condition is a failure on the part of the expert to comply with the requirements of the contract.

Decision

The NSW Court of Appeal unanimously agreed with the primary judge and dismissed the principal's appeal.

Gleeson JA held that the principal's argument would give the words '*determination of the expert*' an unusual meaning, because a purported determination not done in accordance with the terms of the contract is not a determination at all. His Honour held that nothing in clauses 42.11 or 42.12 of the contract suggests that reversing, overturning or otherwise changing the outcome of the determination of the expert is contingent upon the prior agreement of the parties or a finding by a court that the determination of the expert is a nullity.

| back to Contents

PND Civil Group Pty Ltd v Bastow Civil Constructions Pty Ltd [2017] NSWCA 159

Richard Crawford | Andrew Hales | Bonnie Doran

Catchwords

Construction contracts – defect rectification – management expenses – damages

Significance

A party to a construction contract will not be entitled to recover the cost of management expenses incurred in the rectification of another party's defective work, unless there is adequate evidence that those management expenses are incurred over and above the usual employee costs payable by that party. That is costs such as overtime expenses, additional remuneration of existing staff, or the cost of engaging additional staff or contractors to deal with the defective work or to attend to tasks which existing staff have been redirected from as a result of the defect rectification work are claimable.

Facts

Bastow Civil Constructions Pty Ltd (**contractor**) contracted with Energy Australia (**Ausgrid**) to undertake work that involved constructing trenches in public roads, installing cable ducts in those trenches and backfilling and sealing the trenches. The contractor subcontracted some of that work to PND Civil Group Pty Ltd (**subcontractor**).

When the work was nearly complete, Ausgrid claimed that some of the work was defective. The contractor subsequently commenced proceedings in the District Court of New South Wales against the subcontractor for the cost of the defect rectification works.

The primary judge found that the work done by the subcontractor was defective and quantified the contractor's loss at the cost of rectification in the amount of $269,355. In reaching that figure, the primary judge excluded an amount of $43,669 claimed by the contractor for the cost of management time that its employees spent in connection with the defects and their rectification, on the basis that '*there is no evidence that the allocation of this time resulted in any additional cost to* [the contractor]'.

The contractor challenged this conclusion in its cross-appeal filed in the New South Wales Court of Appeal.

Decision

The Court of Appeal unanimously found against the contractor in respect of this ground of the contractor's cross-appeal, concluding that there was no evidence that the contractor had:

- incurred any additional management expenses as a result of the subcontractor's defective work;
- paid staff overtime, or any other compensation or additional remuneration;
- employed additional staff or other contractors to deal with the subcontractor's defective work and its consequences.

McDougall J reasoned at paragraph 71 of the judgment: '*I can understand that where existing staff are paid more, or additional staff are employed, to manage a breach of contract and its consequences, the damages recoverable may include the amounts so paid. I can understand, also, that if no additional staff were employed, but the diversion of management time to the breach of contract meant that the employer lost other valuable business opportunities, then damages might be allowed, although their quantification may be a matter of some difficulty*'. However, there was no such evidence in this case.

| back to Contents

Port Macquarie-Hastings Council v Diveva Pty Limited [2017] NSWCA 97

Richard Crawford | Carly Roberts

Catchwords

Contract between Council and successful tender – proper construction of option – calculation of damages for breach of contract

Significance

Option clauses should always be drafted with clarity and specificity. In particular, they should expressly state by which party, and in which circumstances, the option is exercisable.

Facts

Diveva Pty Limited (**Diveva**) successfully tendered and entered into a contract with Port Macquarie-Hastings Council (**Council**) for the supply and laying of asphalt (**Contract**). The Contract contained an option clause that stated that the Contract was '*for the period: 1 August 2011 to 31 July 2013 with a further 12 month option available*'.

In 2012, Diveva undertook asphalt works which showed signs of failure (**Ocean Drive Works**). The Council alleged that Diveva was responsible for the failure because Diveva had not carried out testing for in situ voids, which the Council asserted was required under the specifications in the Contract.

On 11 March 2013, the Council advised Diveva that it had reviewed the current tender contract specifications and determined that it would not exercise the option to extend the Contract. On 4 April 2013, Diveva gave notice of its exercise of the option. The Council responded, asserting that the option could only be exercised by mutual agreement.

The Council invited tenders for the period after 31 July 2013, identifying different specifications to be included in the tender contract. Diveva did not participate in the tender.

Diveva brought proceedings against the Council seeking damages for breach of the Contract. The primary judge found that the Council had breached the Contract and awarded Diveva $247,443 in damages. The primary judge's key findings were:

- on its proper construction, the Contract conferred an option on Diveva which it could exercise unilaterally to extend the Contract for a further 12 months; and
- the Contract did not contain a specification requiring Diveva to carry out testing for in situ voids.

The Council appealed to the NSW Court of Appeal, arguing that the primary judge's findings as to the construction of the Contract were incorrect and that his Honour's award of damages was incorrect.

Decision

The court dismissed the Council's appeal.

Construction of the Contract

The Court of Appeal agreed with the primary judge that the proper construction of the option clause conferred a unilateral right to exercise the option on Diveva. Payne JA explained this conclusion:

- the language '*12 month option available*' indicated that the extension was offered by the Council to the successful tenderer. The option clause did not qualify the right to exercise the option, whereas several other clauses in the Contract did contain qualifications;
- the Council had a right to terminate the Contract other than for repudiation or breach of an essential term by Diveva, and this supported the view that the commercial purpose of the option was to permit Diveva to extend the term of the Contract;
- the commercial purpose of the option was as an inducement to tenderers;
- Diveva needed to arrange its affairs to ensure it had sufficient resources to comply with the Contract. If the Council had a unilateral right to invite further tenders at the expiry of the initial Contract period, that would be inconsistent with the commercial context where Diveva needed to put itself in a position to fulfil the Contract; and
- the option was not exercisable solely by mutual agreement, as contended by the Council. The use of the word 'option' indicated that it was not an agreement to agree, which would have no real content.

Damages

The Council contended that Diveva had failed to mitigate its loss by not participating in the tender process for the 2013 contract.

The Court of Appeal upheld the primary judge's finding that Diveva's conduct in not participating in the tender was not unreasonable. The primary judge had made several findings of fact in support:

- the Council had taken a strong adverse view of Diveva based on the Council's incorrect view that Diveva had not complied with the specifications in the Contract in the performance of the Ocean Drive Works;
- it would have been futile for Diveva to tender for the 2013 contract, given the strong adverse views held by the Council against Diveva; and
- it was not reasonable to expect Diveva to have participated in the tender, given that the relationship between the Council and Diveva was strained due to the dispute about the Ocean Drive Works.

The Court of Appeal agreed with the primary judge that it was unnecessary for Diveva to engage in the likely '*futile and expensive process*' of tendering for the 2013 contract. Payne JA also noted that the tender was only being conducted because the Council had repudiated the Contract.

The Council also argued that the primary judge was incorrect to award damages to Diveva to compensate Diveva for lost opportunities to participate in future tenders. The Council argued that:

- there was no evidence that Diveva would have been successful in future tenders; and
- it was not established that, but for the Council's breach of Contract, Diveva would likely have retendered and won the future contracts.

The Court of Appeal agreed with the primary judge's award of damages in relation to Diveva's lost opportunities to tender for future contracts. In particular, Payne JA disagreed with the Council's argument that its conduct in relation to the Ocean Drive Works dispute was not relevant to the award of damages because the only breach of Contract found against the Council was its repudiation. Payne JA stated that it was not correct to analyse the conduct of the Council relevant to damages as limited to construction of the option without considering the course of conduct leading to the Council's repudiation of the Contract. If not for the Council's incorrect view of the Contract in relation to testing for in situ voids which led to the Ocean Drive Works dispute, the option would have been exercised and Diveva would have had a good chance of success in the next two tender processes.

| back to Contents

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

Richard Crawford | Aaron Bicknell

Catchwords

Building and Construction Industry Security of Payment Act 1999 (NSW) – requirement for adjudicator to afford claimant and respondent natural justice – procedural fairness – necessity for absence of real of apprehended bias

Significance

An adjudicator appointed under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) may be disqualified by reason of apparent bias (there need not be actual bias). Where there is doubt as to the presence of actual or apprehended bias (in the opinion of a fair-minded lay observer), an adjudicator may, but is not mandated to, seek advice from the parties as to their opinion on the matter. In this particular case, if a party is seeking to have an adjudication determination overturned, the Authorised Nominating Authority should not appoint that adjudicator to determine a subsequent adjudication between the same parties.

Facts

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

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

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

Decision

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

Procedural fairness in adjudication

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

Apprehension of bias

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

Appointment of adjudicators

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

| back to Contents

Taouk v Assure (NSW) Pty Ltd [2017] NSWCA 227

Richard Crawford | Ben Christoffel | Christabel Moffat

Catchwords

Construction of a deed varying an agreement for the development of a site – whether the variation deed intended to effect a fundamental change in the financial arrangements between the parties – necessity to construe the variation deed in context

Whether the appellant denied procedural fairness by entry of judgement on the respondent's cross claim – whether determination of separate questions on liability left issues of quantum unresolved

Significance

The decision of the New South Wales Court of Appeal further clarifies the position concerning ambiguity in a contract and when it is appropriate for the court to have regard to objective circumstances that exist at the time the parties enter into the contract.

Facts

On 12 June 2012 the respondent, Assure (NSW) Pty Ltd (**Assure**), entered into a development agreement (**Development Agreement**) with Berowra Development Pty Ltd (**builder**), of which the appellant, Mr Taouk, was the sole director and shareholder. The development was for townhouses on four parcels of land at Kita Road, Berowra, of which Assure was the registered proprietor. Mr Taouk provided Assure with a guarantee and indemnity of the performance of the builder's obligations under the Development Agreement.

On 28 May 2015, the Development Agreement was varied by deed, altering the terms on which Assure was to pay the 'consideration amount' (**Deed of Variation**). Under the Deed of Variation, a new clause was inserted into the Development Agreement so that the balance of development costs had to be paid or reimbursed to the 'relevant parties' prior to Assure paying the consideration amount (**New Clause**).

The builder failed to perform its obligations under the Development Agreement by the completion date, requiring Assure, at its expense, to retain a third party to complete the development.

In proceedings, Mr Taouk claimed that he was entitled to be reimbursed by Assure for the financial contributions that he had made to the development. The primary issue for the court was whether Mr Taouk was entitled to be reimbursed under the Development Agreement and subsequent Deed of Variation. Assure cross-claimed to enforce the guarantee and indemnity provided by Mr Taouk.

The primary judge found that the Deed of Variation was not intended to amend the Development Agreement to permit Mr Taouk to recover the moneys that he had contributed to the development and that Mr Taouk was liable to Assure under the guarantee and indemnity for the sum of $3,266,518.14. The primary judge found that it was necessary to have regard to the circumstances surrounding the Deed of Variation and the commercial objects of the Deed of Variation and Development Agreement.

On appeal by Mr Taouk, the primary issue was whether the Deed of Variation amended the Development Agreement so as to entitle Mr Taouk to be reimbursed for his monetary contribution to the development. Mr Taouk also contended that he had been denied procedural fairness by the primary judge in entering judgement of $3,266,518.14 on the cross-claim.

Decision

The Court of Appeal allowed Mr Taouk's appeal in part finding that Mr Taouk was not entitled to reimbursement under the Development Agreement but set aside the judgment against Mr Taouk in relation to the cross-claim.

Deed of Variation

Sackville AJA upheld the primary judge's decision, with whom Beazley P and White JA agreed, that the Deed of Variation did not intend to vary the respective payment obligations of Assure or Mr Taouk under the Development Agreement. Objectively construed, the New Clause simply varied the time at which Assure is to pay the consideration amount to Mr Taouk, until the balance of development amounts have been paid or reimbursed. It is only the objective circumstances known to both parties that can be considered in construing the Deed of Variation.

Procedural Fairness

The court unanimously held that procedural fairness required Mr Taouk to be given an opportunity to dispute the quantum of Assure's cross-claim. Consequently, the judgment for $3,266,518.14 was set aside. Despite this outcome, the court by majority (Beazley P and White JA) held that Mr Taouk must pay 75 per cent of Assure's costs of the appeal.

| back to Contents

Queensland

Delta Pty Ltd v Team Rock Anchors Pty Ltd & Anor [2017] QSC 115

David Pearce | Petrina Macpherson | Ben Garvey

Catchwords

Contract – defective work – insurance policies – indemnity – property loss – economic loss

Significance

This case demonstrates that movement of a retaining wall, even to a dangerous degree, will not result in property loss unless the movement damages the wall itself, or some other tangible property. Any costs incurred in remedying a defective retaining wall will be economic loss.

Facts

In September 2006, Delta Pty Ltd (**contractor**) engaged Team Rock Anchors Pty Ltd (**subcontractor**) to install anchors to secure the retaining walls for excavation works the contractor was undertaking. The subcontractor was insured under a policy issued by the subcontractor's insurer, Mecon. That policy provided limited cover to the contractor.

The subcontractor's performance was deficient, and the great majority of anchors were not installed in accordance with design specifications. The superintendent appointed pursuant to the head contract between the contractor and Watpac (**excavation contract**) issued a number of directions to the contractor to backfill against a retaining wall which was moving to an unacceptable degree. The movement of the retaining wall culminated in the superintendent directing the contractor to backfill the entire excavation and essentially start again.

Significant costs and delay were incurred as a result of the subcontractor's defective performance. Watpac made a claim against the contractor for its own costs and delay. The contractor settled with Watpac. The terms of the settlement were addressed by a deed made in 2010.

The contractor made a claim against its own insurer HSB for the amount of its losses, as well as the amount of Watpac's claim. HSB paid part of this claim.

The contractor then sued the subcontractor in 2012, eventually settling the claim.

Finally, the contractor proceeded directly against the subcontractor's insurer as an insured under the subcontractor's policy. 'Property Loss' was defined in the policy as '*physical loss, damage of destruction of tangible property including resultant loss of use of such property*'. The contractor claimed:

- for the shortfall between the payments to which it argued it was entitled under the excavation contract and the amount agreed to be paid to it in the settlement with Watpac; the contractor argued that this was a claim for 'Property Loss';
- that the retaining wall movement itself was property loss; and
- for costs incurred for '*temporary protective repairs undertaken to prevent immediate threat of Property Loss*' under the policy, seeking indemnity for the costs of backfilling the site, and then re-excavating.

Decision

The court dismissed the contractor's claim against the subcontractor's insurer.

The court confirmed that the contractor fell within the extended definition of 'insured' within the subcontractor's policy so as to be able to make a limited claim under the policy. This limited claim was '*for amounts which* [the insured] *become legally liable to pay in compensation for … Property Loss*'. The court dismissed the contractor's claim it had suffered 'Property Loss' for a number of reasons, key among them that the loss suffered by the contractor was in fact economic loss.

The court pointed to the actual loss incurred by the contractor, being the costs incurred in backfilling the site, re-testing the existing anchors, and installing supplementary anchors, as well as the delay caused by these factors. The loss occasioned in the circumstances was said to be economic loss. While the court pointed out that third parties may have suffered property loss as a result of the retaining wall subsidence, the contractor was not liable to compensate Watpac for this property loss, and in fact Watpac itself lost no property.

The court held that movement of a retaining wall cannot be loss or damage to tangible property, unless the wall itself was damaged, or other property was damaged by the movement.

The court also dismissed the claim for costs incurred for temporary protective repairs as the contractor had already been paid by its own insurer, HSB, for the relevant amount.

| back to Contents

Tomkins Commercial & Industrial Builders Pty Ltd v Majella Towers One Pty Ltd & Anor [2017] QSC 202

David Pearce | Clare Turner | Michael Thomas

Catchwords

Contract – whether moneys due and payable – whether recourse may be had to a bank guarantee

Significance

Recourse to a bank guarantee not allowed where there was a notice of dispute in relation to a final progress certificate.

Facts

Tomkins Commercial and Industrial Builders Pty Ltd (**contractor**) entered into a building contract with Majella Towers One Pty Ltd (**principal**). The contractor provided security pursuant to the contract in the form of two bank guarantees. The contract provided that the principal could only have recourse to the security for amounts unpaid after the time for payment and only after having given notice.

The superintendent issued a final certificate, certifying amounts due from the contractor to the principal. The contractor subsequently issued notices of dispute in relation to the assessment under the final certificate.

The principal gave notice of its intention to have recourse to a bank guarantee. The contractor contended that the principal was required to return the bank guarantee within 14 days of the final certificate being issued, and the principal was not permitted to draw on the bank guarantee as a notice of dispute had been issued in relation to the whole of the final certificate, and accordingly no amount was payable.

The principal contended that a debt had been created at the time of certification, which the contractor was required to pay on an interim basis pending the outcome of any dispute. The principal further contended that, if recourse could not be validly had to the bank guarantee, there was no obligation for the principal to return the bank guarantee.

Decision

The court ordered the principal to return the bank guarantee to the contractor. The only provision in the contract, which facilitated the return of the bank guarantee, provided for its return to the contractor 14 days after the final certificate was provided, regardless of whether the final certificate was in dispute.

The court was not satisfied that the risk of non-payment was intended to be borne by the contractor while the final certificate was in dispute. Accordingly, as there was no other mechanism for the bank guarantee to be returned, the court determined that the principal was required to return the bank guarantee to the contractor. The provisions in the contract which provided for the principal to have recourse to the bank guarantee in the event of contractor default allocated risk to the principal pending the outcome of a disputed final certificate.

The court held that a final certificate only evidenced an amount which was due and payable if the certificate remained unqualified. The right to challenge the determination of the superintendent in a final certificate was preserved by the contract. As the certificate was disputed, the contract operated to prevent the certificate from making moneys due and payable. Accordingly, her Honour rejected the argument that there was an obligation on the contractor to pay the amount provided in the certificate as there was a dispute to the principal's entitlement which was in the process of being resolved.

| back to Contents

Tasmania

Modscape Pty Ltd v Francis [2017] TASSC 55

Owen Cooper | Chris Hey | Maiken Hansen

Catchwords

Building and Construction Industry Security of Payment Act 2009 (Tas) – natural justice – procedural Fairness – duty to invite further submissions

Significance

This decision confirms that:

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

Facts

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

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

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

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

Decision

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

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

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

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

| back to Contents

Victoria

H Troon v Marysville Hotel and Conference Centre [2017] VSC 470

Owen Cooper | Tom Kearney | Christian Camilleri | Gabrielle Paino

Catchwords

Unconditional undertaking – application for interlocutory injunction to restrain recourse to security

Significance

The Supreme Court of Victoria confirmed that courts will not prevent beneficiaries from recourse to security absent fraudulent conduct, unconscionable conduct or circumstances where the call on security constitutes a breach of contract.

Facts

The applicant H Troon (**builder**) entered into an amended AS 2124-1992 contract (**contract**) with the respondent Marysville Hotel and Conference Centre (**owner**) for the construction of a hotel and conference (**project**). The builder provided security for the project in the form of two unconditional undertakings, each in the sum of $750,000.

The first undertaking was returned to the builder on the achievement of practical completion under the contract.

The builder claimed that, after the expiry of the contractual defects liability period, it had submitted to the owner a final payment claim and had also requested the return of the second undertaking.

The owner did not issue a final certificate or return the second undertaking, claiming that:

- the final payment claim was submitted to the wrong party and was therefore not duly received under the contract; and
- there were outstanding unrectified defects.

On 12 July 2017, the owner sought to call upon the second undertaking in its full amount (which was in excess of the amount which it alleged was owed). On 13 July 2017, the builder obtained ex parte an urgent interim injunction restraining the owner from calling upon the second undertaking.

The builder then applied to the courts for permanent injunctive relief to restrain the owner from calling upon the second undertaking. The builder alleged that there were serious issues to be tried:

- that the owner was acting unconscionably; and
- that the owner was in breach of a negative stipulation in the contract, namely that any call on security was limited to '*pay for any costs, expenses, loss or damage which the principal claims to have incurred or might in the future incur*' and excluded amounts in excess of that.

Decision

The court dismissed the builder's application for injunctive relief.

Digby J held that there were no contractual restraints on the owner in making a demand on the second undertaking. The contract reflected the parties' intent: that the owner may make a demand on, or use any of the security sum provided by, the builder to pay for any costs, expenses, loss or damage which the owner claimed it has incurred (or might incur) as a consequence of any act or omission by or on behalf of the builder (where the owner asserts that such act or omission constitutes a breach of the contract by the builder).

His Honour held that at all material times the owner had reasonable bases upon which to assert that the builder had breached the contract and upon which to make a claim for costs, expenses, loss and damage.

Digby J noted that, on 14 July 2017, the owner informed the builder that it did not claim the full amount of the second undertaking and that its claim was limited to the disputed amount. Therefore the owner no longer claimed, as it did on 12 July 2017, an amount in excess of what it alleged was owed.

His Honour noted the following general approach and rule applied to performance guarantee clauses in construction contracts that a court will not enjoin the beneficiary of the security from recourse to such security, subject to three principal exceptions, namely:

- fraudulent conduct;
- unconscionable conduct; and
- circumstances where the call on security constitutes a breach of contract.

His Honour construed the contract to have a commercial purpose and determined that the owner's conduct had not been unconscionable and concluded that the owner had acted in good faith and reasonably.

| back to Contents

Construction Law Update editor

Melbourne	Soo-Kheng Chia	**T** +61 3 8608 2989

Contributing partners/senior lawyers

Email firstname.lastname@minterellison.com

Sydney	Richard Crawford	**T** +61 2 9921 8507
Melbourne	Owen Cooper | Alison Sewell	**T** +61 3 8608 2159 / 2834
Brisbane	David Pearce	**T** +61 7 3119 6386
Canberra	Richard Crawford	**T** +61 2 9921 8507
Adelaide	James Kearney	**T** +61 8 8233 5685
Perth	Mike Hales / Kip Fitzsimon	**T** +61 8 6189 7825 / 7855
Darwin	Lachlan Drew	**T** +61 8 8901 5921
Hong Kong	Steven Yip	**T** +852 2841 6843

ME_142266888