MinterEllison

Construction Law Update

December 2017 to February 2018

Contents

Tasmania

- **Denial of natural justice**
  Modscape Pty Ltd v Sive [2017] TASSC 71

Victoria

- **Victorian Court of Appeal restrains call on security on basis of implicit prohibition in contract**
  Dedert Corporation v United Dalby Bio-Refinery Pty Ltd [2017] VSCA 368
- **An example of when the building of a home does not, under security of payment legislation, make a builder 'in the business of building residences'**
  Golets v Southbourne Homes & Anor [2017] VSC 705
- **Circumstances in which a court will grant summary judgment under Security of Payment Legislation**
  Maxcon Constructions Pty Ltd v Ily Australia Pty Ltd [2017] VCC 1382 and *Maxcon Constructions Pty Ltd v Ily Australia Pty Ltd* [2017] VCC 1769
- **Guidance from the courts on what must be included in a valid payment schedule**
  Teleios Group Pty Ltd v Wright Children Pty Ltd [2017] VCC 449
- **Does a reference date arise where there is no right to payment under a construction contract?**
  Westbourne Grammar School v Gemcan Constructions Pty Ltd & Ors [2017] VSC 645

Western Australia

- **No damages for you – only contractual liability can be claimed under the Construction Contracts Act**
  Bocol Constructions Pty Ltd and Keslake Group Pty Ltd [2017] WASAT 15
- **Respondents failing to participate in adjudications do so at their peril**
  Certa Civil Works Pty Ltd V Ghosh [2017] WASC 327

Legislative update

Commonwealth

Government response to the Australian Small Business and Family Enterprise Ombudsman Inquiry

Richard Crawford

Background

In November 2017, the Australian Government released its response (**Response**) to the Australian Small Business and Family Enterprise Ombudsman's (**Ombudsman**) Payment Times and Practices Inquiry in Australia for small businesses.

In her report, the Ombudsman, Ms Kate Carnell OA, made 10 recommendations. The Response supports three recommendations, notes six recommendations and does not support one.

Three supported recommendations

The Government supports the following three recommendations (one with amendment and two in full):

- by July 2018, all levels of government to consider adopting a 15 business day payment time;
- the Government to publish its payment times and policies, and for all its agencies and entities, with performance against best practice benchmarks; and
- Governments should encourage the adoption of technology solutions, such as e-invoicing, to assist business to streamline administrative tasks and facilitate payment practices.

The Government will mandate that by July 2019 all non-corporate Commonwealth entities (**NCCEs**) are to pay all invoices for contracts up to $1 million within 20 calendar days (equivalent to 15 business days) on receipt of a correctly rendered invoice.

In addition, the payment of interest on late payment policy which applies to payments over 30 days for contracts up to $1 million will be adjusted to 20 calendar days starting from July 2019 to complement the new payment policy.

The reason the Government has adopted the recommendation to reduce its payment times is to *'demonstrate leadership and set an example of best class payment policy to industry and other levels of government'*.

The response also notes that agencies will need time to transition to the new business process, which is why the Government will aim to adopt the 15 business day payment time by July 2019, not July 2018 as recommended.

The Government will increase the transparency and accountability of agencies in complying with the Supplier Pay On-Time or Pay Interest Policy by mandating that NCCEs report payment performance against the stated policy, which will include a breakdown on the proportion of invoices paid within 20 and 30 days.

The Government also acknowledges that the adoption of technology solutions should be driven by the market, and that technology can play a vital role to streamline administrative tasks and facilitate payment practices. In the 2016-17 Budget, the Government had announced that it would undertake a study into the costs and implementation of Government adoption of e-invoicing. The results of the study have yet to be released, but the response notes that the study will help the Government identify how the Government can play a leadership role in embracing emerging technology solutions.

Six noted recommendations

The Government notes the following six recommendations:

- the Government to require its head contractors to adopt the payment times and practices of the procurement through its supply chain;
- the Government to extend its payment policies to all its agencies and entities;
- the Government to mandate the use of Project Bank Accounts (**PBAs**) in public works and construction projects;
- industry codes which regulate business to business transactions to include best payment practices including set payment times;
- the Government to introduce legislation for larger businesses to publicly disclose all of their payment times and practices and performance against those terms (larger businesses being the top 100 listed on the ASX and multinationals); and
- the Government to introduce legislation which sets a maximum payment time for business to business transactions. Certain industries may need terms greater than the maximum which can be agreed providing they are not grossly unfair to one party. Where a longer term is called into dispute it will be considered an unfair contract term.

Currently the Commonwealth Procurement Rules (**CPRs**) set out the basic rules that apply to entity procurement activities. The rules do not extend to the procurement or contracting practices of suppliers and, instead, enable suppliers to organise their commercial arrangements as they see fit.

The accountable authorities of NCCEs must govern their entities in a way that is not inconsistent with the policies of the Commonwealth while carrying out non-commercial, 'core' government functions.

The Government notes in the response that PBAs are currently used on Commonwealth projects where appropriate. What is also acknowledged is that there is a significant difference between jurisdictions in approaches to security of payment laws. Mr John Murray AM was appointed by the Government in December 2016 to conduct a national review of security of payment laws in the building and construction industry. Mr Murray's review is due to conclude by 31 December 2017, and is expected to identify best practices across jurisdictions and make recommendations on how laws can be strengthened.

The Business Council of Australia 'Australian Supplier Payment Code' (**Code**) launched in late May 2017 and is endorsed by the Council of Small Business Organisations of Australia. It is the Government's preference that business and industry self-regulate in the first instance, providing more flexibility than a mandatory Code. However, the Government recognises that the Code will need time to work and that the Government is monitoring the effectiveness of the Code to determine whether it is insufficient in addressing the trend of payment times and practices.

The Code requires signatories to fulfil compliance and reporting commitments. This includes putting in place clear, fair and efficient processes for dealing with complaints and disputes about payment times and practices and reporting on company policies and practices to comply with the Code. Over time, the Government encourages the Business Council of Australia to consider performance reporting that helps determine whether signatories are meeting their obligations.

In response to the recommendation that the Government should introduce legislation which sets a maximum payment time for business to business transactions, the Government notes that it should not intervene in markets unless it is absolutely necessary, particularly where intervention would mandate restrictions on private interactions. The Government acknowledges that rather than imposing more legislation and red tape, a more effective step to improving supplier payment culture is by educating and making businesses more aware of the impacts from late payments and poor practices on suppliers.

While the Government would prefer not to impose more legislation, on 16 November 2016, the unfair contract term protections in the Australian Consumer Law were extended to small business. Under the law, a small business can now apply to the court to have an unfair term in a standard form contract declared void if, at the time of agreeing to the contract, it has fewer than 20 employees and the contract does not exceed $300,000 or $1 million for contracts longer than 12 months.

One recommendation not supported

The Government does not support the recommendation that the Government procure from businesses which have supply chain payment times and practices equal to or better than its practices.

The reason for not supporting this recommendation is that the Government does want to introduce an additional regulatory burden of verification requirements to bid for Government tenders.

In addition, limiting the number of businesses from which the Commonwealth can procure risks undermining the Commonwealth's capacity to achieve value for money.

Conclusion

The shorter payment time requirement for all NCCEs to pay all invoices for contracts up to $1 million within 20 calendar days will no doubt be welcome in the small business community. Cash flow is crucial and reduced payment periods can help businesses get on with running their business. However, as the implementation of the recommendations are voluntary, legislation mandating the payment period would assist with the late payment of invoices, save money on interest payments and free up capital for investment.

| back to Contents

2018 brings in updated CPRs

Michael Brennan | David Moore | Amanda Story

The new year has brought in updated Commonwealth Procurement Rules (**CPRs**) which commenced on 1 January 2018. According to the CPRs Explanatory Statement, the updated CPRs seek to reflect Australia's international trade obligations on government procurement.

Key changes

1. Procurement methods

The updated CPRs set out rules as to how a multi-stage procurement can be conducted. For example, a multi-stage procurement could include an expression of interest stage followed by a request for tender stage. In particular, an initial approach to market for a multi-stage procurement must include, for every stage:

- the criteria that will be used to select potential suppliers; and
- if applicable, any limitation on the number of potential suppliers that will be invited to make submissions.

In practice, this may have an impact on relevant entities procurement timeframes as it requires relevant entities to plan every stage of a multi-stage procurement prior to the initial approach to market (noting that this may not always be possible for very complex procurements). The Department of Finance has published Guidance on multi-stage procurement.

In addition, the updated CPRs remove:

- pre-qualified tender as a procurement method for procurements at or above the relevant procurement threshold other than for procurements under the existing Legal Services Multi-use List; and
- procurement of repetition construction services as a condition for limited tender.

2. Additional information in request documentation

The updated CPRs now expressly require that request documentation for procurements at or above the relevant procurement threshold must describe:

- the relative importance of evaluation criteria, if applicable to the evaluation. If weightings are used, the specific weighting should be provided;
- any dates for the delivery of goods or supply of services, taking into account the complexity of the procurement; and
- an estimated quantity of the goods and services to be procured, where the quantity is not known.

Whilst a number of relevant entities may already as a matter of good practice disclose this information, it will be important to review request documentation templates to ensure that the additional requirements are reflected. The Department of Finance has published Guidance on request documentation, including some specific examples

3. Minimum time limits

The updated CPRs require relevant entities to extend the 25 day minimum time limit to approaches to market for procurements at or above the relevant procurement threshold by 5 days in each of the following circumstances:

- request documentation is not available electronically from the date the approach to market was published; and/or
- submissions are not accepted electronically.

In addition, relevant entities will no longer be able to reduce a minimum time limit to no less than 10 days:

- in the case of second or subsequent recurring procurements; and
- unless the details of a planned procurement have been published in an annual procurement plan for at least 40 days (rather than 30 days) and not more than 12 months.

Next steps

As the updated CPRs commenced on 1 January 2018, relevant entities should:

- review their existing and planned procurements, including request documentation and timelines, to ensure compliance with the new rules; and
- review its procurement policies and templates to ensure they comply with the updated CPRs.

| back to Contents

New South Wales

Building product safety laws came into effect in NSW

Richard Crawford

The *Building Products (Safety) Act 2017* (NSW) commenced operation on18 December 2017.

The Act's primary purpose is to prevent the unsafe use of building products in buildings and to ensure the identification and rectification of affected buildings.

If you are in the building and construction industry, including commercial, industrial and home building, you will need to be aware of the new legislation.

The legislation has been covered widely in the media and by MinterEllison. For more details see our recent commentary: *NSW introduces legislation to address combustible cladding*.

| back to Contents

New strata building bond and defect inspection scheme came into effect on 1 January 2018

Nicole Green | Louisa Yasukawa

The new strata building bond and defect inspection scheme established under the *Strata Schemes Management Act 2015* (NSW) commenced operation in NSW on 1 January 2018.

The new scheme applies to contracts entered into from 1 January 2018 for building work to construct residential or partially-residential strata properties that are four storeys or more.

Implications for developers

In order to avoid fines and delays in receiving an occupation certificate, developers must comply with their new obligations under the scheme and ensure that any contracts in negotiation and signed after 1 January 2018 reflect the new requirements.

Key changes

- **Building bond**: Developers are now required to lodge a building bond equivalent to 2% of the building contract price with NSW Fair Trading.
- **Appointment of a building inspector**: Developers must source and appoint an independent building inspector from the strata inspector panel, with the approval of the owners corporation.
- **Interim inspection**: Between 15 and 18 months after the building work has been completed, the inspector will conduct a first inspection of the strata property and prepare an interim report identifying any defective building work.
- **Defects rectification**: If no defects are identified, the building bond may be released to the developer two years after the date of completion. If defects are identified, they must be rectified by the developer.
- **Final inspection**: Between 21 and 24 months after the building work has been completed, the inspector will conduct a final inspection of the strata property and prepare a final report.
- **Payment of building bond**: If no defects are identified, the building bond may be released in full to the developer. If defects remain, the building bond may then be used to pay the costs of rectification.

| back to Contents

Victoria

Victorian Government authorises trial of automated vehicles

David Pearce | Amy Dunphy | Michael Thomas

On 30 November 2017 the Victorian government passed the *Road Safety Amendment (Automated Vehicles) Bill 2017* (**Bill**). The Bill establishes a permit scheme to authorise the trial of automated vehicles on Victorian roads.

Victoria now joins New South Wales and South Australia as the third Australian jurisdiction with specific laws in place to facilitate autonomous vehicle trials.

How will driverless trials be regulated?

The proposed scheme is based on the permit scheme for human learner drivers under the *Road Safety Act 1986* (Vic). In this case, it is the 'automated driving system' that is 'learning' to drive.

A person will apply for an automated driving system permit, setting out the vehicles and system they proposed to trial. They will need to appoint a vehicle supervisor who will be deemed to be 'in charge' of the vehicle when it is operating autonomously.

The applicant must demonstrate that it has appropriate safety management mechanisms. VicRoads has broad discretion about granting a permit, setting the conditions that apply to it or cancelling, suspending or varying the permit as it sees fit.

Who is 'driving' the vehicle?

Under the bill, the 'permit holder' (which may be a company) is taken to be 'driving' the vehicle while it is operating in autonomous mode.

When the vehicle is not in autonomous mode the vehicle supervisor (ie an individual) will be deemed to be the 'driver'.

Who has liability for offences?

All duties presently imposed on a human driver by the *Road Safety Act 1986* (Vic) will be imposed on the 'permit holder' when the vehicle is operating in autonomous mode.

Offences in the *Road Safety Act 1986* that relate to persons in charge of a motor vehicle, rather than the driver of a vehicle, will apply to the vehicle supervisor, for example drink-driving and drug-driving offences.

How does it fit in with the national state of play?

VicRoads plans to revisit its scheme as the National Transport Commission (**NTC**) continues to develop its national legislative reform framework for autonomous vehicles. See our alerts of 4 August 2017, 25 October 2017 and 26 October 2017 and for more details on those reforms.

The Victorian scheme is generally aligned with the NTC's current recommendations.

The Victorian scheme expressly contemplates that a permit could be granted without having a fall back driver in the vehicle. In this way the Victorian bill goes one step further than the South Australian legislation, which is silent on the matter, and the New South Wales legislation, which requires a vehicle supervisor to be present in the trial vehicle at all times, except in circumstances where the minister determines otherwise. Provided that the permit allows, and appropriate safety mechanism are in place, it is possible for the vehicle to be unmanned while operating in autonomous mode. That is, the supervisor of the trial may be outside the vehicle. This will allow for fully 'autonomous' vehicle trials.

Stay tuned

The Bill is a further demonstration of the enthusiasm within Australia for legal reform in order to facilitate innovation for autonomous vehicles and their adaptation to local driving conditions and rules.

We will continue to provide updates in this exciting field as they progress.

| back to Contents

VBA state-wide audit of combustible cladding has commenced

Jeanette Barbaro

With 2018 now in full swing, a timely reminder that the VBA's state-wide audit of combustible cladding has commenced.

Unlike the first audit conducted by the VBA that focussed on high-rise buildings in and around the CBD, this audit will be wide reaching and will be targeted at:

- apartment complexes, motels and hotels (of three storeys and above)
- buildings where Victorians gather as large groups (such as sporting arenas); and
- schools, private hospitals and aged-care facilities (of two storeys and above).

The VBA's formal announcement made on 15 January 2018 can be viewed here.

The audit gives effect to a recommendation made in the Victorian Cladding Taskforce Interim Report released in December last year. The Interim Report can be downloaded here.

| back to Contents

United Kingdom

The UK has taken a significant step towards implementing regulation to allow fully connected and autonomous vehicles (CAVs) to operate on public roads in the UK

Automated and Electric Vehicles Bill UK

David Pearce | Amy Dunphy | Michael Thomas

Over 120 years after the Locomotives on *Highways Act 1896 (*UK) was introduced to regulate motorised vehicles in the UK, the House of Commons passed the *Automated and Electric Vehicles Bill* (UK) (**AEVB**) on 29 January 2018.

The AEVB extends the current 'human driver' centric insurance scheme to account for accidents involving an autonomous vehicle that causes an accident whilst driving itself. It also sets out a regime for electric vehicles and charging.

What is an automated vehicle under the AEVB?

An 'automated vehicle' under the AEVB is a vehicle detailed in a list prepared by the Secretary of State that is, in the Secretary of State's opinion, designed or adapted to be capable in at least some circumstances or situations, of safely driving themselves. The list must be published when first prepared and upon each revision.

As a result of these provisions, the AEVB provides certainty to insurers (and the public) who will be able to check if a vehicle is on the list and accordingly know whether the AEVB applies to that vehicle.

What is the AEVB Insurance Model?

The current insurance regime in the UK covers the driver for accidents they cause, not accidents caused by their car operating autonomously.

As the Rt Hon Chris Grayling MP, Secretary of State for Transport stated during parliamentary debate:

> *'… when you drive your car…, it is you who is insured, not the vehicle. As a result of the Bill, in future the vehicle will equally be insured'.*

This highlights the issue that the AEVB attempts to resolve. The new liability scheme only applies to an autonomous vehicle which is capable of driving itself without human oversight for some, or all, of the journey and will only apply to accidents occurring while the vehicle is driving itself.

The AEVB liability scheme aims to:

- ensure third parties injured by a CAV can claim against an insurer without having to resort to other legal avenues for compensation (such as through a product liability claim);
- extend these rights to the driver of the autonomous vehicle, who while the vehicle's autonomous mode is engaged is essentially a passenger;
- allow insurers to have a claim for contributory negligence against 'any other person liable to the injured party in respect of the accident'. This could include parties such as the manufacturer or the designer of the vehicle's software; and
- permit an insurer to exclude or limit their liability for an accident occurring as a direct result of:
  - software alterations prohibited under the policy made by the insured person or with the insured person's knowledge; or
  - a failure on behalf of the insured person to install safety-critical software updates that the insured person knows or ought reasonably know are safety-critical.

The carve out in relation to unauthorised alterations or failures to update software is an interesting inclusion . It demonstrates one way in which the law might address private and corporate autonomous vehicle owners who fail to update the vehicle's software or modify it against the guidance of the manufacturer. This is an important consideration, as a failure to update the software in an autonomous vehicle is likely to have much

larger implications than the inconvenience that can be experienced from a failure to update the software on other devices, such as smart phones.

Additionally the carve out will have implications for manufacturers. Currently, it only applies to failures to update software where the insured person 'knows or ought reasonably know' that the update was 'safety-critical'. This arguably places a burden on the manufacturer to take reasonable steps to make the owner aware that a software update is 'safety-critical'. The AEVB sets out that a software update will be 'safety-critical' if it would be unsafe to use the vehicle in question without the update being installed.

What is the significance for Australia?

The regulation of the general use of CAVs on public roads is a significant step forward for the UK. It pushes the UK past the current state of play in Australia which, to date, has been focused on the regulation of trials of CAVs (although the National Transport Commission continues to investigate legislative reform options as set out in our alerts of 4 August 2017, 25 October 2017 and 26 October 2017).

If the AEVB passes into law, it will give manufacturers, insurers and potential consumers in the UK confidence that the government is supportive of the introduction of autonomous vehicles. Additionally, it will give road users a significant degree of confidence that if an accident occurs and it is caused by an autonomous vehicle, they will be compensated for damage arising from that accident without having to resort to product liability claims against the manufacturer.

It appears that the AEVB has general cross-party support and is likely to pass the House of Lords with minimal amendment to the fundamental insurance regime proposed in the Bill.

We will keep you updated as the Bill progresses through the UK Parliament.

| back to Contents

Keeping the lights on: continuity of essential services in UK Government contracts

Jonathon Williams | Sian Keast

A tale of the recent demise of a key UK Government contractor, and five lessons about procuring essential services that governments can learn from it.

Keeping the lights on during and after corporate distress is never easy. The recent demise of Carillion Plc in the UK highlights how important it is for Government to have protections in contracts for provision of essential services. It also highlights the need for a clear strategy for Government principals in the unlikely event that corporate distress affects their service providers.

What happened?

Carillion Plc and its subsidiaries are parties to a large number of contracts with the UK Government, as well as Government clients in Canada and the Middle East. Carillion provides essential services to hospitals, schools, prisons and defence facilities. It is also involved in various large scale construction projects. In July 2017, the company announced significant write-downs on the value of its contracts. The group issued further profit warnings in the second half of 2017 and had a recapitalisation planned for 2018. At the start of January it appears Carillion attempted, without success, to broker a rescue package with plans to enter voluntary administration.

We expect Carillion's attempt to enter administration triggered default provisions in its various contracts. Given Carillion's key role in providing essential services, the UK Government discussed the possibility of a tax-payer funded bailout but decided not to proceed. It would appear the UK Government also decided not to exercise any rights it may have had to either step in or terminate under its direct service arrangements with Carillion. Notwithstanding the UK Government's short term actions, the very nature of liquidation means either a more permanent solution to Carillion's woes will need to be found (and relatively quickly) or Carillion will be wound up and/or its component companies sold.

What about the PPPs?

Carillion's write-downs reportedly included three public private partnership (**PPP**) projects. In a PPP, Government places its bets on the ability of, and incentive for, equity investors and lenders to intervene in order to keep the project running. No doubt, there will have been some urgent and uncomfortable conversations between the UK Government and the relevant debt and equity financiers about what should happen next. No doubt also, the UK Government will have looked to ensure that the project special purpose vehicle (**SPV**) companies shared some financial pain, but Government probably took the view there was little to be gained from a default termination of the PPPs themselves.

Rights to step in or terminate are all very well as a protection against project level SPV failure, but the collapse of a provider such as Carillion puts Government and PPP investors in more or less the same boat with the same limited options. In the short term, everyone has an interest in allowing the service provider to continue its activities, at least to the extent necessary to ensure continuity of service and continuity of associated service payments. In the meantime, other longer term options can be explored by all.

Lessons for Government contracting

Lesson 1: Negotiate appropriate contractual rights

Neither Government nor a service provider likes contemplating what should happen if the service provider (or a key subcontractor) is unable to provide services due to financial distress or insolvency. However, it is important for everyone that contractual arrangements provide appropriate options to anticipate and deal with these circumstances should they arise. This can include periodic verification of contractor solvency and considering whether (and how much) performance security should be provided. It may also include the ability to require new or increased performance security in the event of actual or pending financial distress. None of these options should be lightly negotiated away.

Lesson 2: Contractual rights facilitate other alternatives

Step in rights and rights to terminate are commonly considered Government's primary recourse if an essential services provider cannot in fact provide those services. Yet, it may not always be practicable, desirable or appropriate for Government to step in or terminate. In some cases, Government may choose to exercise those rights. In many others, they will not be exercised. Instead, it is the prospect of those rights being exercised that guides the negotiation path to a sensible, practicable alternative outcome.

Lesson 3: Think about security offensively and defensively

The existence of a security interest in Government's favour can provide Government with additional options in the event of financial distress. Depending on the project and the circumstances, there may be scope for Government to require a security interest, allowing it to rank ahead of ordinary creditors. A security interest can also allow Government to appoint a receiver, thus providing another option for the relevant project or services to continue while protecting Government's interests. The scale of the relevant project or undertaking, commerciality and market practice may all mitigate against this option, but it should be, at the least, considered when preparing and negotiating the relevant contracts.

Lesson 4: Government is not isolated from the risk by a PPP

While no bailout package was agreed between the UK Government and Carillion, the UK Government is now providing funds to Carillion's liquidator to ensure service continuity as well as ongoing employment (at this point in time) to Carillion's 20,000 plus UK workforce. If not a bail out, this is certainly a life raft.

Default termination of a PPP is by no means a cost free option for Government. If a key subcontractor becomes insolvent, there is an alignment of interests between Government and the project SPV to ensure survival of the PPP and continuity of performance. Equity investors may have some scope to contribute to the cost of this and Government should expect equity to step up. However, realistically, equity has limited scope (or agility) to refinance in order to provide a unilateral financial lifeline to its FM subcontractor. Even if this were not the case, only Government has the scale to respond to such a business-wide failure.

Lesson 5: Market concentration risk is a real concern

Governments enter into contracts one at a time. Eventually, many contracts add up to an exposure that is exaggerated by both scale and concentration on a portfolio view. This may justify additional preconditions at the procurement stage or additional protections for Government within its contracts.

Put simply, there are issues and risks that arise from having all of one's eggs in the same basket. Particularly in a smaller market (such as Australia), Carillion's collapse highlights the reason it is so important for Government to try and foster a sufficiently wide and well-equipped market of service providers.

| back to Contents

In the Australian courts

Commonwealth

What terms may be 'unfair' under the Unfair Contract Laws?

Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd [2017] FCA 1224

Owen Cooper | Chris Hey | Sarah Kennedy

Key Point

This is the first case decided under the amendments to the Australian Consumer Law (**ACL**) contained in the *Treasury Legislation Amendments (Small Business and Unfair Contract Terms) Act 2015* (Cth) (**Act**), which is commonly known as the Unfair Contract Laws. The case is a reminder to parties entering into small business contracts to ensure their standard form contracts contain fair and balanced terms.

Facts

On 12 November 2016, amendments to the ACL contained in the Act commenced, extending the unfair contract terms regime to standard form small business contracts.

JJ Richards & Sons Pty Ltd (**respondent**) operate a business providing waste management services in Australia. The Australian Competition and Consumer Commission (**ACCC**) contended that since the commencement of the Act the respondent had entered into approximately 26,000 contracts, including small business contracts and that certain terms in those contracts were 'unfair' within the meaning of section 24 of the ACL. On that basis, the ACCC sought declaratory and injunctive relief against the respondent that the 'unfair' terms were void under section 23(1) of the ACL.

Eight of the terms contained in the respondent's standard form 'Terms and Conditions' were alleged to be unfair contract terms (**impugned terms**) including:

- clause 1 (**automatic renewal**): providing that the contract is automatically renewed, binding customers to subsequent contracts unless they cancel the contract within 30 days before the end of the initial term;
- clause 4 (**price variation**): allowing the respondent to increase its prices unilaterally;
- clause 6 (**agreed times**): removing liability for the respondent where its performance is prevented or hindered in any way;
- clause 7 (**no credit without notification**): allowing the respondent to charge customers for services it was not able to perform;
- clause 9(i) (**exclusivity**): granting the respondent exclusive rights to remove waste;
- clause 16 (**credit terms**): allowing the respondent to suspend its service if payment is not received but continue to charge the customer;
- clause 17 (**indemnity**): allowing an unlimited indemnity in favour of the respondent; and

- clause 18 (**termination**): preventing customers from terminating their contracts if they have payments outstanding and allowing the respondent to charge customers for rental of equipment after the termination of the contract.

Decision

The court held that the impugned terms were unfair contract terms within the meaning of section 24 of the ACL and declared those terms void by operation of section 23 of the ACL.

The court was satisfied that the impugned terms were unfair as:

- they would cause a significant imbalance in the parties' rights and obligations arising under the contract (contrary to section 24(1)(a) of the ACT);
- they were not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the terms (contrary to section 24(1)(b) of the ACL); and
- they would cause detriment (whether financial or otherwise) to a party if they were to be applied or relied on (contrary to section 24(1)(c) of the ACL).

In addition, Moshinsky J considered that the fact that the impugned terms were drafted in legal language, densely packed and in very small font meant that the terms were not transparent. His Honour held that the automatic renewal and termination clauses were likely to operate in a way that was particularly detrimental to customers.

| back to Contents

The unintentional consequences of omitting 'unintentional'

Certain Underwriters at Lloyd's Subscribing to Contract Number NCP106108663 v Aquagenics Pty Limited (in liquidation) [2018] FCAFC 9

Owen Cooper | Chris Hey | Anna Stephenson

Significance

An insurance policy for commercial purposes is a commercial contract and should be given a businesslike interpretation. Both intentional and unintentional acts of the insured may fall within the definition of an *'act, error or omission'* under an insurance policy. A deliberate refusal to undertake further act is still an act committed in the course of professional services. Courts may take a broad approach in determining what losses arise as a result of a *'claim'* against an insured.

Facts

Aquagenics Pty Limited (**contractor**) entered into a design and construct contract with the Break O'Day Council (**principal**) to design, construct, test, commission and *'process prove'* a wastewater treatment plant.

The arbitral award

A dispute arose between the principal and the contractor over whether the contractor had conducted the pre-commissioning tests it was required to under the contract. As a result of the dispute, the contractor stopped work and the principal took the pre-commissioning and commissioning works under the contract out of the hands of the contractor. Subsequently, the principal discovered design flaws in the contractor's work that were not known at the time the contractor left site. The dispute was referred to arbitration, and an award was made in favour of the principal with the arbitrator finding that the contractor had:

- failed to undertake pre-commissioning and commissioning as required by the contract; and
- failed to comply with the design and construction specifications under the contract.

Insurance claim

Following the award, the contractor went into administration and subsequently liquidation. Its administrator made a claim under its professional indemnity policy in respect of the damages, interest, costs and fees awarded by the arbitrator. The insurer disputed the contractor's claim on the grounds that:

- the reference to an '*act, error or omission'* in the definition of *'wrongful act'* meant an *'unintentional act'*, which was not the case here as the contractor had deliberately stopped work;
- if there was an act, it was not committed *'in the course of professional activities'*; and
- no *'claim'* had been made against the contractor in respect of the defective design work during the policy period.

The primary judge found in favour of the contractor, and the insurer appealed the decision to the Full Federal Court.

Decision

The court dismissed the appeal and upheld the decision of the primary judge.

Allsop CJ, Dowsett and Kerr JJ held that the policy was a commercial contract and should be given a businesslike interpretation. The omission of the word *'unintentional'* before *'act, error or omission'* in circumstances where *'unintentional'* was used in the preceding paragraphs was significant and demonstrated that the term *'wrongful act'* was not intended to be limited to unintentional acts.

Further, the court considered that the decision of the contractor to stop work amounted to a refusal to take further steps under the contract and was thus an act committed in the course of the professional activities of the contractor.

Finally, the fact that neither the principal nor the contractor were aware of the contractor's defective design work at the time the *'claim'* was submitted did not limit the liability of the insurer in respect of the defective design work as the insuring clause covered *'the sums which the insured was legally liable to pay as a result of the claim [emphasis added]'*. Although the original claim on the insured was not about the defective work, as a result of the *'claim'*, work was done by others and defective design was discovered. It followed that the costs of rectifying the defects were covered by the policy.

| back to Contents

Pay when entitled not when paid

Maxcon Constructions Pty Ltd v Vadasz [2018] HCA 5

Peter Wood | Andrew Orford | Richard Crawford | Tom French | Andrew Hales | Nikki Miller | Amy Dunphy | Alexandria Hammerton

Head contract cannot influence when retention amounts are released to subcontractors

The High Court has held that provisions relating to the release of retention under a subcontract contingent on an event under a head contract are void under the 'pay when paid' prohibition contained in the *Building and Construction Industry Security of Payment Act 2009* (SA) (**SOP Act**).

The broad view taken by the High Court of 'pay when paid' provisions is important because:

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

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

Facts

The facts of the case are set out in our March 2017 edition of Construction Law Update.

In summary:

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

Decision

The High Court unanimously dismissed the appeal finding that the adjudicator had not erred in law in determining that the retention provisions were 'pay when paid provisions' under the SOP Act.

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

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

| back to Contents

High Court rules: To err is human, and permanent for adjudicators' non-jurisdictional errors of law!

Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 4 and *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5

Peter Wood | Andrew Orford | Richard Crawford | Tom French | Andrew Hales | Amy Dunphy | Nikki Miller

On 14 February 2018 the High Court delivered two landmark judgments which unequivocally confirm that the Security of Payment (**SOP**) legislation (at least in NSW and South Australia) removes a court's jurisdiction to overturn an adjudicator's determination infected by non-jurisdictional errors of law.

Key takeouts

Limited options for review of adjudication decisions

The High Court's decisions in both *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 (***Probuild***) and *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5 (***Maxcon***) mean that parties left unhappy by an erroneous adjudication determination will have very limited options to bring a challenge.

The decision emphasises the interim nature of adjudication determinations. The High Court reinforced that instead of challenging an adjudication determination parties can seek final determination by a court or other agreed alternative dispute procedures.

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

Facts

The facts in both *Probuild* and *Maxcon* are summarised in our February 2017 edition of Construction Law Update.

In brief:

- **Probuild** concerned a payment claim brought by Shade Systems which Probuild refused to pay on the basis that it was owed a higher amount for liquidated damages than being claimed. The adjudicator rejected Probuild's liquidated damages claim and awarded an amount to Shade Systems; and
- **Maxcon** concerned a payment claim brought by Mr Vadasz in response to which Maxcon deducted a retention sum and other administrative charges. The adjudicator concluded that the retention provisions were 'pay when paid provisions' and Maxcon was not entitled to retain the retention amount.

The High Court granted special leave to hear appeals from:

- **Probuild** to overturn the New South Wales Court of Appeal's decision which had found that adjudication determinations are not open to judicial review for non-jurisdictional errors of law; and
- **Maxcon** to overturn the South Australian Supreme Court's decision, which had followed the NSW Court of Appeal's decision in *Probuild*.

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

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

It was critical for the High Court that the NSW SOP legislation:

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

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

Having reached its decision in *Probuild* the High Court consistently dismissed the appeal in *Maxcon*. Interestingly, the High Court held that, in any event, the adjudicator did not err in law in determining that the retention provisions were 'pay when paid provisions'.

National inconsistencies in SOP legislation

The decision highlights the nuances and inconsistencies between the operation of SOP legislation in different Australian jurisdictions.

Given that the cases concerned the SOP legislation in New South Wales and South Australia the implications for each State and Territory may be different.

It is, for example, considered unlikely that the High Court's decisions will impact upon the position in Victoria where the Victorian Supreme Court has previously determined (on the basis of the Victorian legislation and Victorian Constitution) that it is open to a party to seek judicial review in relation to determinations that contain non-jurisdictional errors of law.

| back to Contents

Australian Capital Territory

Adjudicators can't escape with errors of law in the ACT

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

Richard Crawford | Georgie Roest

Significance

This case emphasises the importance of submitting payment claims on time and the importance of having regard to reference dates. This case also illustrates the difference in approach to allowing appeals of adjudicators' decisions. In NSW, appeals of adjudicators' decisions are precluded except for jurisdictional error, while the ACT expressly allows appeals based on errors of law. Accordingly, the recent High Court decisions, which in respect of NSW adjudications limited the right of challenge to errors of law going to jurisdiction, do not apply to adjudications in the ACT.

Facts

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

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

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

The respondent sought both judicial review of the determination under the *Administrative Decisions (Judicial review) Act 1989* (ACT) (**ADJR Act**) and also appealed from the determination on the basis of error of law. The *Building and Construction Industry (Security of Payment) Act 2009* (ACT) (**Act**) expressly allows for an appeal of an adjudicator's decision on a question of law. Both the matters were heard together, with the evidence in one being treated as evidence in the other.

The ADJR Application

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

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

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

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

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

Clause 16.3(a) of the contract said:

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

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

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

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

The Appeal

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

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

Decision

The ADJR application

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

- **Payment Claim**: The court considered that the adjudicator erred in finding in clause 16.9 of the contract a period within which the claimant could serve its payment claim.
- **Reference Date**: The court accepted the respondent's submission that the words 'to that time' in clause 16.3(a) of the contract must mean to the date immediately before the lodgement of the payment claim. As no work was done in the month before 20 May 2016, the payment claim was not served on a reference date, and was invalid.

- **Incorrect delegation**: The court, although accepting that the adjudicator was entitled to have assistance, what had occurred was far more than the benign description of 'assistance' and that the parties were entitled to have their dispute decided by a person who has agreed to decide it – which did not occur. The court was not satisfied on the balance of probabilities that the adjudicator actively engaged in the decision-making process of all aspects of the adjudication he was required to undertake. The adjudicator took into account documentation prepared by his colleague without active engagement. This is a failure to comply with section 24(2) of the Act.

The appeal

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

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

| back to Contents

New South Wales

Legally Unreasonable the new Error of Law?

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

Richard Crawford | Michelle Knight | Karla Nader

Significance

While only an interim decision, the court's finding that there was a serious case to be tried that the adjudicator acted outside her jurisdiction in reaching a conclusion that was 'legally unreasonable' is of particular interest. With the Court of Appeal confirming that a determination cannot be set aside for an error of law on the face of the record in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2017] NSWCA 379, which has now been confirmed by the High Court, industry participants will be eager to learn how the argument of 'legally unreasonable' is fleshed out by the parties in submissions and dealt with by the Supreme Court.

Facts

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

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

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

The adjudicator also concluded that, in accordance with section 20(2B) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**), the respondent's expert evidence could not be considered because it relied on 'new rates' that were not referred to in the payment schedule.

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

Decision

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

Serious case question to be tried

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

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

Balance of convenience

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

| back to Contents

Watch your words – a deed may not be required for an agreement to settle

Buildum Construction Pty Ltd v Pile & Bucket Pty Ltd [2017] NSWSC 1260

Richard Crawford | Ashley Murtha

Key Point

An agreement to settle a dispute does not necessarily need to be put in writing to be considered binding and enforceable by the court.

Facts

How did the agreement come about?

These proceedings arise out of an adjudication pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**).

The first defendant in the proceedings, Pile & Bucket Pty Ltd (**claimant**), was successful under the Act in obtaining an adjudication determination in its favour and registered the certificate as a judgment in the local court.

The plaintiff, Buildum Construction Pty Ltd (**respondent**), commenced proceedings to have the adjudication determination declared void or set aside. During the course of the proceedings the respondent paid approximately $70,000 into court.

Subsequently the parties and their solicitors attended an informal settlement conference. After some negotiation the solicitor for the claimant informed the respondent that it had agreed to receive the amount of $40,000 to settle the dispute.

The parties exchanged drafts of a deed of settlement that were not signed. The terms of settlement provided for the claimant to be paid $40,000 out of the moneys paid into court, with the balance to be released to the respondent, and the proceedings to be disposed of with no order as to costs.

After the settlement conference the parties fell into dispute as to whether a binding and enforceable settlement agreement had been reached.

The parties presented their arguments by reference to the well-known tripartite categories adopted in *Masters v Cameron* (1954) 91 CLR 353. The respondent argued that:

- the case fell into the first category such that the parties agreed on all essential terms of a bargain, albeit contemplating that a formal deed would later be drawn up to give effect to those terms and perhaps other non-essential terms; and
- alternatively, the case fell into the second category such that the parties agreed to be bound to terms reached at the settlement conference, albeit that enforceability of those terms was conditional upon the execution of a deed.

The respondent disputed that any binding or immediately enforceable agreement was reached at the settlement conference. It contended that the case fell into the third category adopted in Masters v Cameron whereby the parties had agreed that they would not be bound unless a deed was agreed.

Decision

How the court determined the agreement was binding and enforceable

The court held that a binding and enforceable settlement had been reached without the deed.

Parker J found that, when the $40,000 figure was agreed, the parties reached a binding and enforceable settlement agreement for their settlement of the dispute. Given that the deed was mentioned after a binding and enforceable agreement had come into existence, it did not form an element of the agreement and the deed was not necessary to give effect to the agreement.

His Honour noted that a release was probably implicit in the agreement and likely to be documented in the form of a deed. However, its preparation was of no consequence as once the court orders were made to give effect to the settlement terms, the doctrines of res judicata and abuse of process would prevent any future claims being made.

| back to Contents

Contractors are still serving multiple payment claims for the same reference date

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

Richard Crawford | Louisa Yasukawa

Key Point

A contractor cannot serve a second payment claim for the same reference date and then make an adjudication application under the *Building and Construction Industry Security of Payments Act 1999* (NSW) (**Act**) in relation to the second payment claim.

Significance

The decision of the New South Wales Supreme Court has reaffirmed the prohibitory nature of section 13(5) of the Act, which provides that a claimant cannot serve more than one payment claim in respect of the same reference date under the construction contract.

Facts

The contract

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

Payment claims

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

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

Adjudication application

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

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

Decision

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

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

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

back to Contents

Factor that you may lose your SOPA rights if you Factor

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

Richard Crawford | Bonnie Doran

Key Point

This majority decision of the New South Wales Court of Appeal creates issues for a party seeking to rely on the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**) to enforce a debt that has been assigned to a third party.

While the language of the SOP Act creates a broad entitlement in favour of a person who 'claims to be entitled to a progress payment', the court found that by expressly stating on an invoice that the entitlement to payment had been assigned to a third party, the debtor is no longer claiming to be entitled to a progress payment.

Significance

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

Facts

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

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

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

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

Decision

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

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

| back to Contents

South Australia

Supreme Court of South Australia expands the grounds of defence relating to an application for summary judgment under the Act

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

James Kearney | Rebecca Clafton

Key point

The full court of the Supreme Court has found that in proceedings to recover as a debt an unpaid portion of a claimed amount, the *Building and Construction Industry Security of Payment Act 2009* (SA) (**Act**) does not preclude reliance on estoppel or misleading conduct in respect of the question of valid service.

Significance

This decision brings South Australia into line with New South Wales and Queensland Courts of Appeal authorities with respect to the availability of a defence of misleading conduct under the respective security of payment Acts. The full court concluded that defences of misleading conduct and estoppel are not of a type that can be categorised as being *'in relation to matters arising under the construction contract'*.

The decision expands the grounds on which an application for summary judgment, in reliance on an entitlement under the Act, may be defended.

Facts

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

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

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

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

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

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

The Master awarded summary judgment to the claimant and held that service had been validly effected, in compliance with section 109X of the *Corporations Act 2001* (Cth) and following obiter in *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* [2006] NSWCA 259. The Master also followed the decision in *Lucas Stuart Pty Ltd v Council of the City of Sydney* [2005] NSWSC 840 (***Lucas***) in which case the respondent was precluded from advancing a defence of misleading conduct or estoppel by the equivalent provision in the *Building and Construction Industry Security of Payment Act 1999* (NSW). The respondent appealed.

Decision

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

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

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

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

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

| back to Contents

Tasmania

Denial of natural justice

Modscape Pty Ltd v Sive [2017] TASSC 71

Alison Sewell | Tom Kearney | Alyssa Dixon

Key Point

An adjudication determination under the *Building and Construction Industry Security of Payment Act 2009* (Tas) (**Act**) will be quashed where an adjudicator fails to consider a respondent's adjudication response, fails to act in good faith or decides a payment dispute on points not contended for by either party without inviting further submissions from the parties.

Facts

Fairbrother Pty Ltd (**claimant**) as head contractor subcontracted Modscape Pty Ltd (**respondent**) to provide construction works, including joinery works, in relation to the redevelopment of the Royal Hobart Hospital. The respondent then entered into a sub-sub-subcontract with the claimant that required the claimant to undertake the joinery works (**sub-sub-contract**).

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

The respondent sought judicial review of the adjudication determination.

Decision

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

Blow CJ held that:

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

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

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

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

| back to Contents

Victoria

Victorian Court of Appeal restrains call on security on basis of implicit prohibition in contract

Dedert Corporation v United Dalby Bio-Refinery Pty Ltd [2017] VSCA 368

Owen Cooper | Nikki Miller | Chris Hey | Anna Stephenson

Significance

This decision reinforces the importance of drafting rights of recourse to security clauses with sufficient precision identifying whether an amount claimed to be owing is sufficient, or whether the amount must be due and payable under the contract for the principal to be entitled to call upon security.

Facts

The case involved an appeal from a decision of the Victorian Supreme Court in which the trial judge refused to grant an injunction preventing United Dalby Bio-Refinery Pty Ltd (**principal**) from having recourse to security. Dedert Corporation (**contractor**) entered into a contract for the supply and installation of a Swiss combo eco-dry system at the principal's refinery. As required under the contract, the contractor provided the principal with a bank guarantee. After supply and installation, the principal gave the contractor notice of its intention to call on the bank guarantee in respect of losses sustained as a consequence of alleged defects in the system that required rectification.

The issue before the court was whether the contract between the principal and the contractor contained an implicit prohibition against calling on a bank guarantee. The clause in question, clause 5.2, prescribed that:

> *'Security shall be subject to recourse by a party who remains unpaid after the time for payment where at least 5 days have elapsed since that party notified the other party of intention to have recourse.'*

At first instance, the trial judge found that clause 5.2 did not preclude a call on security in respect of bona fide claims for amounts which may become due from the contractor for breach of contract.

Decision

The court by a majority of 2-1 allowed the appeal and set aside the trial judge's decision. As a result, an injunction was granted restraining the principal from calling upon the security.

Kaye JA , with whom Priestly JA agreed, held that the clause contained an implicit prohibition against recourse to the security in circumstances other than where the principal remained unpaid after the time for payment. Given that the basis for the principal's attempt to call on the security was a claim for unliquidated damages for breach of contract (which had not been the subject of certification or adjudication), it was not an amount which was due and payable under the contract. The principal was therefore not in a position where it was unpaid after the time for payment and had no basis to call upon the security under clause 5.2.

Whelan JA, delivering the dissenting judgment, held that the balance of convenience favoured refusal of the injunction. His Honour considered that decisions of trial judges in these type of applications should not be the subject of appeal where the aggrieved party would suffer no substantial detriment if the decision was ultimately found to be wrong.

| back to Contents

An example of when the building of a home does not, under security of payment legislation, make a builder 'in the business of building residences'

Golets v Southbourne Homes & Anor [2017] VSC 705

Alison Sewell | Tom Kearney | Anna Stephenson

Key Point

A building owner is not in the business of building residences for the purposes of the *Building and Construction Security of Payment Act 2002* (Vic) (**Act**) when, amongst other things, the building work is not for profit and the primary purpose of the work was to secure a dwelling house for the building owner.

Facts

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

In June 2017 the claimant purported to serve a payment claim for $438,870.63 under the Act. The respondent served a payment schedule stating that NIL would be paid for a number of reasons, including

that the claim was not a valid payment claim under the Act because the contract was excluded from the application of the Act by section 7(2)(b) of the Act.

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

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

Decision

The court quashed the adjudication determination.

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

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

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

| back to Contents

Circumstances in which a court will grant summary judgment under Security of Payment Legislation

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

Alison Sewell | Tom Kearney | Anna Stephenson

Key Point

A special purpose vehicle was found to be in the business of building residences for the purposes of the *Building and Construction Industry Security of Payment Act 2002* (Vic).

Facts

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

By a payment claim under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) on 28 August 2016, the claimant claimed the sum of $559,002.20 from the respondent. By a final payment certificate the superintendent, on behalf of the respondent, certified payment of the full amount claimed in the payment claim.

The respondent failed to make payment to the claimant.

Application for summary judgment

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

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

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

Decision

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

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

The business of building residences

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

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

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

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

Reference dates under the contract

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

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

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

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

Service of the payment claim

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

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

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

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

| back to Contents

Guidance from the courts on what must be included in a valid payment schedule

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

Owen Cooper | Chris Hey | Frank Aloe

Significance

A response to a payment claim will be a valid payment schedule if it meets the requirements of section 15 of the *Building and Construction Industry Security of Payments Act 2002* (Vic) (**Act**) irrespective of its form and whether the respondent intended it to be a payment schedule under the Act.

Facts

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

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

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

Issues considered

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

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

Decision

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

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

Lewitan J also referred to the reasoning of the New South Wales Supreme Court in *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140, in noting that payment claims and payment schedules are required to be produced quickly and often refer to matters in shorthand that can be readily understood by the parties. As such, the references to known defects, the termination for default provisions and liquidated

damages under the contractual set off clause were sufficient reasons to enable the claimant to understand the nature of the case it would have to meet in any adjudication.

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

| back to Contents

Does a reference date arise where there is no right to payment under a construction contract?

Westbourne Grammar School v Gemcan Constructions Pty Ltd & Ors [2017] VSC 645

Alison Sewell | Chris Hey | Alyssa Dixon

Key Point

Section 48 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) is not enlivened where the right to payment is validly suspended under a construction contract.

Significance

This decision confirms that the Act does not grant claimants an independent right to payment. The right to make a payment claim under the Act is premised on the existence of a reference date under the contract.

Facts

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

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

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

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

The respondent sought judicial review of the adjudication determination.

Decision

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

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

Robson J applied the reasoning of the High Court in *Southern Han Breakfast Points Pty Ltd (in liquidation) v Lewence Constructions Pty Ltd* [2016] HCA 52 (analysed in our Roundup of 2016 security of payment cases)

in holding that the right to make a payment claim under the Act is premised on a contractual right to make that claim. If, under the terms of the contract, there is no right to make a payment claim as the right to payment or a reference date has been suspended, then there is no contractual right of payment which the claimant can enforce under the Act.

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

| back to Contents

Western Australia

No damages for you – only contractual liability can be claimed under the Construction Contracts Act

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

Tom French

Significance

The Western Australian State Administrative Tribunal has confirmed that only contractual rights can give rise to claims under the *Construction Contracts Act 2004* (WA) (**Act**) and distinguished this from common law claims for damages that are merely referable to a contract.

Facts

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

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

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

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

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

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

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

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

Decision

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

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

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

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

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

| back to Contents

Respondents failing to participate in adjudications do so at their peril

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

Tom French

Significance

The Supreme Court of Western Australia has clarified that the *Construction Contracts Act 2004* (WA) (**Act**) will extend to contracts for professional services when those services are related to construction works and cautions against parties pursuing judicial review of adjudication determinations where they have chosen not to participate in the adjudication process.

Facts

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

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

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

- the claim was not made under a construction contract;

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

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

Decision

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

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

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

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	Tom French	**T** +61 8 6189 7860
Darwin	Lachlan Drew	**T** +61 8 8901 5921
Hong Kong	Steven Yip	**T** +852 2841 6843

ME_143681349