MinterEllison

Construction Law Update

November 2017

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Legislative update

New South Wales

NSW introduces legislation to address combustible cladding

Following the Grenfell Tower fire in London on 14 June 2017, a number of jurisdictions in Australia have started to formulate legislative responses to the danger of combustible cladding on buildings. NSW has now introduced its own legislation directed at banning the use of unsafe building products and providing extensive powers to require rectification of buildings affected by unsafe building products. It is expected that the *Building Products (Safety) Bill 2017* (NSW) (**Bill**) will come into force before the end of 2017.

The NSW Building Products (Safety) Bill

Richard Crawford | Jeanette Barbaro

The Bill was introduced on 19 November 2017 and moved quickly through parliament to pass on 22 November 2017. It is clear from the Explanatory Note to the Bill that it has been introduced in response to the Grenfell Tower fire, and although not specifically directed at cladding, it anticipates proposed new powers which will be used to combat the use of certain types of external cladding. It is worth remembering that the Bill has no application to asbestos or asbestos products.

Extensive powers granted to prevent unsafe building products

Where there is a safety risk posed by the use of a particular building product in a building, the Bill gives extensive powers to the Fair Trading Secretary (**Secretary**) to:

- prohibit the use of a specified building product in a building;
- issue an affected building notice for particular buildings;
- issue a general warning about a class of buildings that may be affected buildings.

A relevant enforcement authority (generally a council) will be able to make a building product rectification order for a building requiring the building owner to do such things as are necessary to eliminate or minimise the safety risk and/or to remediate or restore the building following the elimination or minimisation of the safety risk.

A *safety risk* is posed if any occupants of the building are or will likely be at risk of death or serious injury arising from the use of the building product in the building, including where that risk will only arise in certain circumstances such as where there is a fire.

The Secretary can authorise a building product investigation to determine whether a use of a building product in a building is unsafe, or to ascertain the location of any building in which a building product has been used in a way that is or may be unsafe. The Secretary can also require a product assessment be undertaken to determine whether any reasonably foreseeable use of a building product in a building is unsafe.

For the purposes of building product investigations, product assessments or to otherwise investigate and monitor compliance with the Bill authorised officers may exercise specified information gathering powers and a power to enter premises and require the occupier to provide assistance.

What about where use of a banned product is compliant with the National Construction Code?

The Bill makes it clear that, when it becomes law, it will prevail over the National Construction Code (**NCC**), so that a building product may be banned even though the product or certain uses of the product complies with the requirements of the NCC. The fact that a building product or its use is compliant with the NCC is therefore not an excuse for contravention of a ban.

Bans will not be invalid because the ban happens to cover a safe use which was not, and could not reasonably have been, foreseen at the time the ban was made. It is anticipated by the Second Reading Speech that the potential problem of overinclusive bans would be dealt with by interested

persons applying to have the ban amended in light of new, safe uses of a building product that is banned.

What does this mean for manufacturers, suppliers and contractors?

A person can contravene a building product use ban by either:

- causing a building product to be used in a building (including by doing the relevant building work that attaches/incorporates the banned product to the building); and/or
- representing, in trade or commerce, that a building product is suitable for use in a building if such a use would contravene a building product use ban.

Therefore it is possible for manufacturers and suppliers to contravene a building product use ban if they represent that a banned building product is suitable for use, as well as by builders who actually undertake the building work installing the banned product.

The contravention of a building product use ban is an offence and an individual may be fined and/or imprisoned, and a corporation may be fined.

Residential buildings – Home Building Act compliance and implications

For residential building work, a holder of a contractor licence, or a holder of a supervisor or tradesperson certificate would be guilty of improper conduct under section 51 of the *Home Building Act 1989* (NSW) if the person contravened a requirement imposed by the Bill.

The use of a building product in contravention of the Bill would constitute a major defect under section 18E of the *Home Building Act 1989* (NSW). This would mean that the statutory warranty period would extend from 2 years to 6 years after the completion of the building work.

Implications for building owners and occupiers

Building owners and occupiers will be notified with a building product use ban. Building owners can be required to rectify their building, even where the unsafe building product was installed prior to any building product use ban being implemented. A rectification order may be made even where the relevant enforcement authority has not already received an affected building notice or general building safety notice in respect of that building.

If the building owner does not take the required steps to comply with the building product rectification order:

- a strata information certificate provided by the owners corporation under the *Strata Schemes Management Act 2015* would need to include particulars of the outstanding building product rectification order; and
- if the building owner went on to sell the building or the land, it would be an implied warranty of options for purchase of residential property and for contracts for sale of land that there is no outstanding building product rectification order in relation to that land.

Any planning certificates issued by a council under section 149 of the *Environmental Planning and Assessment Act 1979* (NSW) will need to include a statement of any affected building notice, any outstanding building product rectification order, or any intention to issue a building product rectification order in respect of the land.

What does this mean for subsequent purchasers of property?

By amending the *Conveyancing (Sale of Land) Regulations 2017* (NSW), the Bill effectively creates an implied warranty that there is no outstanding building product rectification order for residential property under an option for purchase or contracts for sale.

The picture elsewhere in Australia

For a summary of some of the broader regulatory responses to the use of combustible cladding in Australia, see our previous analysis Cladding: the Australian landscape since Grenfell.

Queensland was first off the mark with the *Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Bill 2017* (Qld). The

Queensland amendment bill was passed on 24 August 2017 with some amendments and is analysed in this edition.

NSW followed by introducing the *Environmental Planning and Assessment Amendment (Fire Safety and Building Certification) Regulation 2017* (NSW), which introduces new requirements affecting the design, approval, construction and maintenance of fire safety measures and came into effect on 1 October 2017.

At the Federal level, Senator Xenophon introduced the *Customs Amendment (Safer Cladding) Bill 2017* (Cth), which is intended to introduce an express prohibition on the importation of 'polyethylene core aluminium composite panels'. The Customs Amendment Bill has not yet progressed past the second reading speech stage since its introduction. (See our analysis in the September 2017 edition.)

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Queensland

Queensland chain of supply legislation commenced on 1 November 2017

True to its word, the Queensland Government has led national work on ways to address non-conforming building products, whether domestically manufactured or imported.

Building and Construction Legislation (Non-Conforming Building Products – Chain of Responsibility and Other Matters) Amendment Act 2017 (Qld)

Michael Creedon | Petrina Macpherson | Sarah Cahill

Background

The Queensland Government introduced the *Building and Construction Legislation (Non-Conforming Building Products – Chain of Responsibility and Other Matters) Amendment Act 2017* (Qld) (**Act**) as a Bill on 25 May 2017. The then Bill was introduced in the wake of London's Grenfell fire in June 2017 and Melbourne's Lacrosse fire in November 2014, which were contributed to by non-conforming cladding. On 26 October 2017, the Queensland Government fixed the commencement date of the Act by proclamation. The Act commenced on 1 November 2017.

Key aspects of the Act that commenced on 1 November 2017

The Act predominantly amends the *Queensland Building and Construction Commission Act 1991* (Qld) by:

- introducing various duties regarding building products upon supply chain participants in the 'chain of responsibility' (designers, manufacturers, importers, suppliers and installers of building products);
- broadening and clarifying the powers of the Queensland Building and Construction Commission (**QBCC**) and the Minister; and
- establishing a Building Products Advisory Committee,

with the aim of ensuring that building products are safe and fit for purpose.

Duties imposed upon those in the chain of responsibility include a primary duty to ensure, insofar as reasonably practicable, that a product is not a non-conforming building product for an intended use. Executive officers must exercise due diligence to ensure their companies comply with duties.

The Act creates offences for the breach of duties, which carry penalties of up to 1,000 penalty units ($126,150).

See our previous Alert on the then Bill for more information. Key amendments made since include the introduction of additional provisions regarding extraterritoriality and a code of practice.

Importantly, some provisions of the Act operate retrospectively regarding non-conforming building products in use or installed prior to 1 November 2017.

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Queensland Government makes non-conforming building products code of practice to assist building and construction industries to comply with new duties

Michael Creedon | Petrina Macpherson | Sarah Cahill

On 3 November 2017, the Minister for Housing and Public Works made the 'Non-conforming building products code of practice—October 2017' (**Code**) to assist the building and construction industries to meet their obligations under the *Queensland Building and Construction Commission Act 1991* (Qld) as amended by the *Building and Construction Legislation (Non-Conforming Building Products – Chain of Responsibility and Other Matters) Amendment Act 2017* (Qld) (**Act**).

The Code states that it is designed to provide additional, technical advice on how to achieve compliance with the recently amended Act.

Section 74ADA of the Act provides that the Chain Minister may make a code of practice that states a way that a person may discharge a duty that they have regarding building products.

Section 74ADB of the Act provides that a code of practice is admissible in proceedings as evidence of whether or not a duty regarding building products has been complied with.

The Code provides guidance around key provisions of the Act, along with:

- examples of when a building product is considered 'associated with a building';
- an example supply chain;
- a two-step process that a person 'may wish to consider' when identifying whether a building product is conforming or not;
- examples of 'required information', which is to accompany a building product, and examples of how that required information might accompany a product; and
- an example of the due diligence that an executive officer must exercise to ensure that their company complies with its duties.

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In the Australian courts

New South Wales

Don't jump the gun on your payment claim

All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd [2017] NSWCA 289

Richard Crawford | Michelle Knight | Jessie Jagger

Key Point

The New South Wales Court of Appeal (**NSWCA**) has confirmed that a payment claim served before a reference date will not be served in accordance with the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOPA**) even where the relevant contract contains a standard clause which attempts to deem the early payment claim to be made on the later reference date.

Significance

The inclusion of such 'deeming' clauses in construction contracts should be reconsidered by parties, as the NSWCA says they lead to confusion rather than certainty in the SOPA process.

Facts

In 2015, Regal Consulting Services Pty Ltd (**respondent**) entered into a written contract (amended AS4903-2000) with All Seasons Air Pty Ltd (**claimant**) for the performance of mechanical ventilation and air-conditioning works on a residential development at Waitara.

Clause 37.1 of the contract (unamended from the standard AS4903-2000) read:

> *'The Subcontractor shall claim payment progressively in accordance with Item 37.* ***An early progress claim shall be deemed to have been made on the date for making that claim*** [emphasis added].'

Item 37 of the contract provided that progress claims were to be made 'on the 20th day of the month'.

The claimant made a payment claim on 20 June 2016. On 12 July 2016 it made a further purported payment claim, and the respondent provided a payment schedule on 26 July 2016 which effectively scheduled nil.

The claimant applied for adjudication and the parties disputed the validity of the 12 July 2016 payment claim. The adjudicator determined that, due to clause 37.1, the reference date for the 12 July 2016 payment claim was 20 July 2016 and it was validly served.

The respondent commenced proceedings in February 2017 in the New South Wales Supreme Court (per McDougall J) challenging the adjudicator's determination. McDougall J found in favour of the respondent – see our analysis in the September 2017 edition).

Decision

On appeal, the NSWCA upheld McDougall J's decision and dismissed the claimant's appeal.

Leeming J and Payne JJA, in reliance on the High Court's judgment in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52 (***Southern Han***), held that entitlement under section 8(1) and service of a payment claim under section 13(1) of the SOPA can only occur, at the earliest, 'on or from each reference date'.

Their Honours agreed with McDougall J that clause 37.1 of the contract operated to start the subcontractor's contractual, as opposed to statutory, rights to payment on the 20th day of the month, even if the claim was served earlier. However, in relation to the subcontractor's statutory rights:

- the claimant's construction of the clause sat 'awkwardly' in light of section 13(5) of the SOPA which prohibits the service of more than one payment claim in respect of each reference date. Their Honours doubted that contravention of section 13(5) by serving more than one payment claim on or from each reference date could be achieved by a deeming provision;
- the claimant's position that an early payment claim became a payment claim for the purposes of the SOPA on 20 July 2016 did not promote the purpose of the legislation. The SOPA requires certainty as to when a payment claim has been served and the claimant's construction would give rise to confusion; and
- the NSWCA's comments in *Abergeldie Contractors v Fairfield City Council* [2017] NSWCA 113 that a payment claim made before a reference date was taken to have been made on the reference date were observations only and not authoritative.

Relevantly, White JA noted that the High Court in *Southern Han* had not expressed a determinative view as to whether a payment claim could be made 'with effect' from a reference date. As there was no reference date at all in *Southern Han*, the question had not arisen in that case.

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No indemnity costs without a genuine offer of compromise

AAP Industries Pty Ltd v Rehau Pte Ltd (No. 2) [2017] NSWSC 1136

Richard Crawford | Kate Morrison | Ashley Murtha

Key Point

The NSW Supreme Court reaffirms the principles that:

- the cost of mitigation will be included in the calculation of damages; and
- a Calderbank offer (ie an offer of settlement expressed to be without prejudice except as to costs) will not support an award of indemnity costs if it is not a genuine offer of compromise.

Significance

It is not unreasonable to reject a Calderbank offer that attaches onerous conditions or fails to provide sufficient information to be able to ascertain the value of the offer. Such an offer will not be seen by the court to be a 'genuine offer of compromise'. As such, it cannot support an award of costs on an indemnity basis.

Facts

We previously analysed *AAP Industries Pty Ltd v Rehau Pte Ltd* [2017] NSWSC 390 in the July 2017 edition.

In those proceedings it was found that Rehau Pte Ltd (**Rehau**) had breached an implied term of a supply agreement with AAP Industries Pty Ltd (**AAP**) (being that of exclusive supply) and had repudiated the supply agreement.

The parties agreed two of the three heads of damages, but the remaining area of dispute, and the key issue in the subsequent proceedings, concerned the loss in respect of raw materials acquired by AAP to be held as buffer stock as a condition of the supply agreement.

AAP claimed damages in respect of the raw materials. The figure was a total of an amount in respect of the loss incurred from the raw materials (less any scrap value) and the cost of mitigating loss by converting some of the raw materials for sale to other customers.

The calculation of the latter mitigating cost relied on the quantity of raw material identified in an affidavit dated 27 October 2016 (**October Affidavit**). This October Affidavit had been excluded as evidence in the earlier proceedings due to its late service.

Rehau contested AAP's calculation of damages on the basis that:

- damages are to be calculated only on the basis of evidence in the prior proceedings; and
- AAP should not be entitled to the costs of mitigation.

In relation to costs, Rehau submitted, amongst other things, that it was entitled to indemnity costs in its favour on the basis that:

- prior to the commencement of proceedings, a settlement conference was held between the parties. While no settlement was reached, following the conference Rehau's solicitors sent a Calderbank letter of offer to AAP;
- the offer included:
  - amounts to purchase the finished goods;
  - conditions of purchase (including testing requirements and the provision of a warranty) together with reimbursement for the testing;
  - an offer to purchase the raw materials at the current scrap rate to be confirmed on the date on which the material is scrapped; and
  - the payment of $50,000 within a period of time after acceptance;
- the total amounts contained in the offer were greater than the amount of damages that AAP was entitled; and
- where a party has unreasonably failed to accept a Calderbank letter, the letter may be tendered in support of an application for a special order for costs.

Decision

Davies J of the Supreme Court held in favour of AAP for all of the issues.

Damages

His Honour found that:

- the October Affidavit was admissible in relation to the assessment of damages as:
  - the question of calculation of damages was at large and was not limited by the earlier judgment;
  - it would be entirely artificial to calculate damages based on the evidence from the earlier proceedings as AAP took the steps to mitigate its damages after those proceedings; and

- there was no prejudice to Rehau in permitting AAP to rely on the affidavit as Rehau was given ample time to consider the material; and

- a plaintiff can recover money reasonably spent on mitigating or attempting to mitigate losses. It was held that the cost of mitigation was not a new or separate head of damage, rather it simply increased the net loss to AAP.

Costs

His Honour found that AAP was not liable for indemnity costs even though the damages that AAP was entitled to was less than the amount contained in the Calderbank letter because it was not unreasonable for AAP to have rejected the offer on the basis that:

- the offer did not amount to a genuine offer of compromise as the conditions attached were onerous and exposed AAP to a considerable legal liability through provision of the warranty;
- the offer in relation to costs (for the finished materials) was not really an offer of anything that Rehau was not already obliged to pay;
- no price had been included in the offer in relation to the scrap material, and so it could not be determined how much that aspect of the offer was worth or whether it was unreasonable for AAP not to accept it;
- the only unconditional offer made in the letter was the offer of $50,000; and
- even if the offer in relation to finished goods had not been conditional, it, combined with the $50,000, was still worth less than the damages AAP was entitled to because the other amounts (in relation to reimbursement for testing) were in effect disbursements.

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A purchaser of a newly developed property can claim compensation from the developer for defects in the builder's works

Barber v Wilson [2017] NSWCATCD 49

Richard Crawford | Misha Chaplya | Sara Mohabbati

Key Point

A builder's warranties under the *Home Building Act 1989* (NSW) (**HBA**) flow onto the subsequent owner, as confirmed by the Civil and Administrative Tribunal of New South Wales (**NCAT**)

Significance

A developer cannot hide behind the builder in the face of a claim from a subsequent purchaser

Facts

The respondent, Ms Wilson (**developer**), engaged Eye Constructions Pty Ltd (**builder**) to construct a residential strata development comprising four townhouses (**development**).

Ms Barber (**applicant**), after purchasing one of the newly constructed townhouses from the developer in December 2013, discovered various defects throughout the property and made a claim for compensation of $15,000 against the developer and the builder.

Having reached a settlement with the builder, the applicant proceeded with the claim against the developer at a reduced amount, claiming the sum of $7,725.40 as costs in respect of the following (allegedly defective) works:

- repairing leaks in the townhouse roof;
- repairing a faulty tap;
- repairing a colour bond fence;
- grouting and repairing stained tiles; and
- installing the exhaust fan in the townhouse ensuite.

Decision

The applicant's claim was originally brought before NCAT as a claim for breach of the contract for the sale of land between the applicant and the developer, which is a claim that is not within the jurisdiction of NCAT. However, Mr Francesco Corsaro SC, sitting as NCAT's senior member, found that NCAT had jurisdiction to hear the applicant's claim as it was essentially a claim for compensation against the developer, from whom she purchased the property, due to the presence of defects in the builder's work.

After hearing the evidence in respect of the defective and incomplete works, NCAT found that:

- the applicant had established a breach by the builder of the warranties in section 18B of the HBA;
- pursuant to section 18D of the HBA, the applicant had the benefit of those warranties as a successor in title to the developer and the developer is deemed to be liable for the builder's breaches of the HBA warranties; and
- the developer's efforts in ensuring that the builder did the construction work properly did not exclude the operation of section 18C of the HBA, the effect of which is to make a developer liable for any breaches by a builder of the warranties implied by section 18B of the HBA.

Accordingly, the applicant was awarded compensation for the costs of rectifying those defects which the applicant was successful in establishing.

This case also highlighted the standard of proof NCAT requires in order for an applicant to establish a claim for compensation in respect of a defect. NCAT held that it was for the applicant to prove a breach of the HBA warranties and satisfy NCAT as to the existence of a claim, even in circumstances where the developer had not pleaded any defence to any of the alleged defects.

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What is the quantum in quantum meruit?

Bradshaw v Complete Coating Commercial Pty Ltd t/as CCC Civil [2017] NSWCATAP 209

Nick King | Jessie Jagger

Key Point

A builder whose contract is found to be unenforceable may nevertheless be able to recover payment under the legal doctrine of 'quantum meruit' (often translated as 'the reasonable value of services'). However, the builder cannot simply rely on the contract sum under the unenforceable contract, but must prove the fair value of the work performed.

Significance

The New South Wales Civil and Administrative Tribunal Appeals Panel (**Appeals Panel**) was prepared to remit a matter for re-hearing because the New South Wales Civil and Administrative Tribunal (**Tribunal**) at first instance failed to require an unlicensed residential builder to appropriately prove its claim for a quantum meruit. The decision confirms that while a builder whose contract is found to be unenforceable under the *Home Building Act 1989* (NSW) (**HBA**) may be entitled to payment for the value of the work performed, this requires the builder to establish how much benefit the work has actually provided.

Facts and decision at first instance

- Mr and Mrs Bradshaw (**homeowners**) engaged CCC Civil (**builder**) to perform pavement works on their residential property. The homeowners alleged the works were defective and withheld partial payment . The homeowners then applied to the Tribunal for damages to be paid by the builder and the builder claimed separately for full payment from the homeowners.
- The Tribunal made various findings including:
  - the work performed by the builder was 'residential building work' under the HBA;
  - the contract between the homeowners and the builder was not compliant with section 7 of the HBA as it was not in writing, nor dated nor signed by both parties;

- section 10 of the HBA, therefore, prevented the builder from enforcing the contract;
- the builder had repudiated the contract, but could make a quantum meruit claim; and
- the homeowners had lawfully terminated the contract and were entitled to damages.

- In assessing the homeowners' damages claim and the builder's opposing quantum meruit claim, the Tribunal accepted the contract price as the valuation of the builder's quantum meruit claim.
- The homeowners appealed the Tribunal's decision. The thrust of their objection was, put simply, the alleged failure of the Tribunal to appropriately consider the homeowners' evidence and the Tribunal's acceptance of the contract price as reflecting the value of the builder's work, without due scrutiny.

Appeal allowed – the Tribunal did not come to grips with valuation

The Appeals Panel allowed the appeal on the basis that the Tribunal had made an error of law and remitted the matter back to the Tribunal for re-determination of the value of the quantum meruit claim.

Applying common law principles, the Appeals Panel stated that the builder had to establish three things for its claim to succeed:

- that the builder's work had 'enriched' or benefitted the homeowners;
- that this benefit was at the builder's expense; and
- that it would be 'unjust' in the circumstances to allow the homeowners to retain that benefit without paying for it.

However, the Tribunal had:

- used the contract price as a starting point for the quantum meruit valuation, assuming that the contract price reflected fair market value (and so the benefit to the homeowners) without enquiring as to whether that assumption was appropriate;
- not required the builder to tender invoices and receipts to demonstrate the cost to the builder; and
- failed to consider evidence from the homeowners which suggested that the material used by the builder was not that anticipated by the contract, potentially reducing the benefit to the homeowners and rendering the contract price irrelevant.

The Appeals Panel added that the Tribunal's failure to require the builder to establish more than the contract price for the works permitted the builder to enforce the terms of the otherwise unenforceable contract, which was an unsatisfactory result having regard to the provisions of the HBA.

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Mischief managed – court confirms strict interpretation of section 109ZK

Dino Dinov v Allianz Australia Insurance Limited [2017] NSWCA 270

Richard Crawford | Andrew Hales | Bonnie Doran

Key Point

The Court of Appeal considered whether an indemnity provided in relation to a contract of insurance could be time barred by operation of section 109ZK of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) in circumstances where the indemnity was triggered by a third party claim arising out of or in connection with defective building work.

Significance

Insurers will be breathing a sigh of relief as, in dismissing the appeal, the NSW Court of Appeal has confirmed that insurers can continue to rely on indemnities provided by directors of building companies arising from builders' home warranty insurance obligations despite the 10-year long stop for commencing a building action. The Court of Appeal suggested that a claim must be directly linked to defective building work and concern one or more parties to the relevant building contract, in order to be correctly categorised as a 'building action' for the purposes of Part 4C of the EPA Act. Accordingly, the clock may not start ticking on a liability that is only indirectly connected with defective building work until the existence of the defective building work is discovered or, in the case of an insurance-related indemnity, when the obligation to indemnify has been triggered in accordance with its terms.

Facts

The Court of Appeal of the Supreme Court of New South Wales considered a decision on appeal from the District Court of New South Wales – analysed in our October 2017 edition – that concerned a number of indemnities that had been provided by the directors of a building company, Great Wall Constructions Pty Ltd (**builder**) in favour of an insurer, Allianz Insurance Limited (**Allianz**).

In order to obtain the insurance required by the *Home Building Act 1989* (NSW) (**HB Act**), the directors and shareholders of the builder (**indemnifiers**) were each required to provide individual deeds of indemnity in favour of Allianz, the terms of which indemnified Allianz against *'all loss damage, costs, charges, or other liabilities incurred or paid as a result of any claim arising under the policy…'*. The insurance policy was issued, and the builder subsequently completed the construction of a residential strata development in late 2003.

In July 2009 the Owners Corporation made a claim against Allianz for indemnity under the policy in connection with defects in the common property. The builder was subsequently deregistered, and Allianz accepted liability under the policy in August 2011. Allianz in turn made a demand upon each of the indemnifiers, pursuant to the terms of their individual deeds of indemnity.

The indemnifiers claimed that Allianz was time-barred due to the 10-year limitation on a party's ability to bring a 'building action' in respect of 'defective building work', pursuant to section 109ZK of the EPA Act. Citing the definition of a 'building action' under the EPA Act, the indemnifiers claimed that Allianz's demand was *'an action for loss or damage arising out of or concerning defective building work'*.

The primary judge, Dicker SC DCJ, considered that the definition of building action must be limited with reference to the 'context' and the 'mischief' that section 109ZK sought to overcome. The mischief to which that section of the EPA Act was directed was the open-ended outcome arising from the application of existing limitation periods with respect to claims for latent defects. His Honour ultimately decided that the cause of action was based on a failure to meet a contractual obligation *'which [was] only indirectly connected to defective building work'* and accordingly that section 109ZK did not bar Allianz's claim.

The indemnifiers appealed the primary judge's decision, arguing that the primary judge erred in giving the definition of a 'building action' a narrower construction than the meaning that was apparent from the plain words in section 109ZK of the EPA Act.

Decision

The Court of Appeal upheld the decision of the primary judge, dismissing the appeal by finding in favour of Allianz. McDougall J noted that the process of construction of a statute requires the interpreter to both consider the intention of the legislature and read the plain words of a statute in light of the objects that it sought to achieve.

The Court of Appeal found that an action for damages involving parties who were not parties to a building contract, and did not have statutory liability for the performance of residential building work, should not be characterised as a 'building action' for the purposes of the EPA Act. It was noted that:

- neither Allianz nor the indemnifiers were parties to the building contract;
- the existence of defective building work was not of itself enough to trigger the indemnities in favour of Allianz as a 'demand', and failure to pay were essential elements of Allianz's cause of action against the indemnifiers; and
- the recurrent theme in Part 4C of the EPA Act is that it is concerned with participants in the building industry.

McDougall J noted that the words of Part 4C could be given a sufficiently wide interpretation to achieve the statutory purpose, without requiring the extension of the protections of Part 4C to people who did not perform building work and had no contractual, statutory or other legal responsibility for it or its sufficiency.

McDougall J succinctly concluded that *'where an action is brought against someone who did not perform defective building work by a plaintiff who does not claim damages for defective building work, section 109ZK has no operation'*.

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When does practical completion for residential building work occur?

Owners Corp SP 82076 v Taricon Pty Ltd [2017] NSWCATCD 37

Richard Crawford | Michelle Knight | Kelly Wu

Key point

The case illustrates the risks involved in determining limitation periods based on the date of completion of residential building work provisions in section 3B and section 3C of the *Home Building Act 1989* (NSW) (HB Act).

Significance

The Civil and Administrative Tribunal of New South Wales (**Tribunal**) was willing to deal with the matter of limitation on a preliminary basis and was prepared to accept that an unsigned occupation certificate was valid for the purposes of demonstrating the date of completion of the work, meaning that the application was brought out of time.

Facts

On 17 March 2016, the Owners Corporation SP 82076 (**applicant**) sought an order regarding incomplete rectification works at its residential premises in Silverwater.

Taricon Pty Ltd (**builder**) contended that the proceedings should be dismissed as having been brought out of time, with the relevant limitation period being 7 years under section 18E of the HB Act (as the contract for residential building work was entered into before 1 February 2012). The builder contended that the date of completion of the building work under section 3C(2)(a) of the HB Act as 29 January 2009, being the date of issue of the occupation certificate, and the fact that the occupation certificate (**OC**) held by the council was not signed was merely a trivial error.

The applicant contended that:

- the issue of limitation should not be dealt with by the Tribunal on a preliminary basis;
- the builder is estopped from raising limitation as a defence due to an agreement facilitated by the Office of Fair Trading in October 2013 whereby the builder agreed to carry out incomplete and repair works; and
- section 3B of the HB Act is the applicable section for determining the date of completion of the work. Section 3C deals with new buildings in an existing strata scheme and the present strata scheme was not set up until around 26 February 2009.

Decision

The Tribunal ruled against the applicant on all three contentions and the application was dismissed.

Preliminary Issue

The Tribunal considered that it was consistent with the guiding principle in section 36(1) of the *Civil and Administrative Tribunal Act 2013* (NSW) and the Tribunal's practice in other matters arising under the HB Act to determine the issue of jurisdiction as to whether the application was brought outside of the limitation period, on a preliminary basis.

Estoppel

The Tribunal determined that the relevant issue to be considered is whether an estoppel can be pleaded in the face of section 48K(7) of the HB Act which provides that the Tribunal does not have jurisdiction in respect of claims arising from a breach of statutory warranty if the claim is made out of time. Since the Tribunal found that the application was made out of time pursuant to section 18E of the HB Act, estoppel could not apply as to confer jurisdiction on the Tribunal.

Date of Completion

The Tribunal considered that there was insufficient evidence to establish when the strata scheme was formed, and as such section 3C of the HB Act was not the HB Act section that would determine the date of completion in the present circumstances. Accordingly, section 3B of the HB Act applied to

determine when practical completion occurred. Section 3B(3) relevantly provides three ways of determining when practical completion occurred, being the earliest of:

- the handing over of the work (section 3B(3)(a));
- the last date the builder attended on the site (except for defect rectification) (section 3B(3)(b); and
- issue of the occupation certificate (section 3B(3)(c)).

Further, due to insufficient evidence regarding the handing over of the work and the builder's last attendance at site, section 3B(3)(c) was considered to be the only applicable section.

The Tribunal held that the unsigned OC was a valid occupation certificate. The Tribunal referred to *Burwood Council v Ralan Burwood Pty Ltd (No 3)* [2014] NSWCA 404 in support of the position that, where mandatory language is used in the statute, an act done in breach of a statutory provision is not necessarily invalid and noted that:

- the identity of the certifier was not in doubt (being the council), and no issue was raised by the council as to the validity of the occupation certificate; and
- the OC is stated to be a final as opposed to interim certificate, and the OC authorises the occupation and use of the building.

Therefore, the date for practical completion of the residential building work was 29 January 2009 (as determined by section 3B(3)(c) of the HB Act), and the application made by the applicant on 17 March 2016 was out of time.

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Northern Territory

Limitation on extending time for making an adjudication determination

INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor (No 2) [2017] NTSC 61

James Kearney | Lisa Papanicolaou

Key Point

An adjudicator is under a time limit to decide if he or she needs more time to make a determination.

Significance

An adjudicator cannot extend time for making a determination under the *Construction Contracts (Security of Payments) Act* (NT) (**NT Act**) after the time for making that determination has expired. Further, an order in the nature of mandamus is unlikely to be consequential to an order in the nature of certiorari.

Facts

On 15 June 2017, the Supreme Court of the Northern Territory made an order in the nature of certiorari which quashed a determination by the adjudicator in a payment dispute application under the NT Act between INPEX Operations Australia Pty Ltd (**claimant**) and JKC Australia LNG Pty Ltd (**respondent**) (see our analysis of *INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor* [2017] NTSC 45 in the July 2017 edition). The court sought submissions from the parties in relation to any ancillary orders that should be made as a consequence of that order.

The respondent submitted that the court remit the application back to the adjudicator by making an order in the nature of mandamus and orders ancillary to allow the adjudicator to perform its functions and make a decision to dismiss or make a determination as to liability to be made within certain time limits under the NT Act (section 33(1)(b)).

In order for this to be effected, the respondent sought an order requiring the adjudicator to seek the consent of the Construction Contracts Registrar under section 34(3)(a) of the NT Act to extend the time for the adjudicator to perform its functions under section 33(1) of the NT Act.

Decision

The court held that it would not be appropriate to attempt to refer to the matter back to the adjudicator to make a determination on the merits on the orders sought by the respondent.

Of primary interest, the court found that section 34(3) of the NT Act does not allow an adjudicator to extend time after the expiry of the prescribed time (as defined by section 33(3) of the NT Act). The court noted that to decide otherwise would require an assumption the legislature intended the adjudicator to be able to extend the time for making a decision after the NT Act deemed them to have already made one.

The court also found that it was not open for the respondent to seek orders for mandamus in the proceedings, noting that the respondent could have, at the outset, brought a counterclaim seeking orders in the nature of mandamus.

The court also observed that the orders sought did not reflect how the respondent ran their arguments at trial, in which the respondent contended that it, and its subcontractors, would have no way of obtaining payment on an interim basis if the order for certiorari was granted.

Further, any available remedy would depend on the willingness of the adjudicator to extend the time for making the determination and the willingness of the registrar to consent to any such extension.

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Queensland

Independent expert determination upheld

Drane v Aqualyng Holdings & Anor [2017] QSC 233

Jennifer McVeigh | Michael Thomas

Key Point

The determination of an independent expert made in accordance with contractual provisions will be binding.

Significance

If two parties contract to be bound by the decision of an independent expert they will be bound by the independent expert's decision provided that the independent expert has acted in accordance with the provisions in the contract.

Facts

Under a share sale agreement (**contract**), Mr Drane, the plaintiff, agreed to sell his shares in Integrated Chemical and Environmental Systems Pty Ltd (**ICES**) to Aqualyng Holdings and Aqualyng O&M Pte Ltd, the defendants. There was a dispute about the determination of the current year actual EBITDA of ICES. The parties appointed an independent expert to determine the current year actual EBITDA of ICES in accordance with the dispute resolution process under the contract.

The plaintiff and defendants each made submissions to the independent expert. The independent expert made a determination which was consistent with the position of the plaintiff's accounting expert.

The defendants argued that it was not open to the independent expert to prefer the assessment of the plaintiff's expert over the original auditors, whose report the defendants relied upon in their submissions.

At trial, the defendants relied on a report from a different accounting firm which criticised the independent expert's report (**additional report**). The additional report assumed that the assessment of the original auditor had to stand unless there was a sufficient basis to overturn it. The additional report also alleged that the independent expert was not sufficiently clear as to how his conclusions were reached.

The court was asked to determine whether the determination of an independent accounting expert appointed by the parties under the contract's dispute resolution procedure involved 'manifest error'.

Decision

The court held that the parties were bound by the independent expert's decision.

The court found that the defendants had failed to demonstrate a manifest error in the independent expert's determination. When appointed, an independent expert is required to reach his or her own conclusion. Therefore, it does not follow that the independent expert would be bound to follow the opinions expressed by previous auditors.

Further, the suggestion that a lack of detail in the independent expert's reasons indicated a manifest error was erroneous. Although the independent expert's written determination did not expose the full nature and extent of his analysis, there was nothing in the contract's dispute resolution process which compelled him to do so.

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South Australia

Stuck in the middle – clarifying opt-in or opt-out rights after the repeal of the *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA)

ASC AWD Shipbuilder Pty Ltd v Ottoway Engineering Pty Ltd [2017] SASCFC 150

James Kearney | Jessica McBride

Key Point

The Full Court of the Supreme Court provides clarity on the appeal rights of parties to an arbitration agreement in light of the 'opt-in' requirements of section 34A of the *Commercial Arbitration Act 2011* (SA) (**2011 Act**) in circumstances where the contract was entered into prior to the repeal of the *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA) (**1986 Act**).

Significance

Where contracts straddle the 1986 Act and the 2011 Act, there is a significant risk that while the parties started out with a right of appeal under the 1986 Act, they will not have a sufficiently clear agreement to opt in to appeal rights pursuant to section 34A of the 2011 Act.

Facts

In September 2009, Ottoway Engineering Pty Ltd (**contractor**) and ASC AWD Shipbuilder Pty Ltd (**principal**) entered into a contract for the fabrication, assembly and supply of various pipework to ASC. Clause 25 of the contract constituted an arbitration agreement, providing that any dispute arising between the parties was to be referred and finally resolved by arbitration.

At the time of the parties entering into the contract, section 38(2) of the 1986 Act gave parties a statutory right to seek permission to appeal to the Supreme Court on any question of law arising out of an arbitral award, unless the parties had agreed in writing to exclude the right of appeal (ie an 'opt-out' regime). On 1 January 2012, the 1986 Act was replaced by the 2011 Act, which prescribed under section 34A a right of appeal on a question of law arising out of an arbitral award, only if the parties had agreed that such an appeal may be made, and leave was granted by the Supreme Court (ie an 'opt-in' regime).

In 2016, a dispute arose between the parties. In November 2016, an arbitrator made an award in favour of the principal. Pursuant to section 34A of the 2011 Act, the contractor sought leave to appeal against the award on the grounds that the arbitrator erred in law by not providing sufficient reasons for the decision.

In May 2017, the contractor was granted leave to appeal. The court found that it was an implied term of the contract that there was to be a statutory right of appeal against the arbitral award on a question

of law as provided for by section 34A of the 2011 Act. In making this finding, the court held that it was the contractual intention of the parties at the time of entering into the contract that there was to be a right of appeal, and that the five conditions regarding implied terms as set out in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266 (***BP Refinery***) had been satisfied. Additionally, the court held that the criteria for the grant of leave to appeal within section 34A of the 2011 Act had been met.

The principal appealed on the basis that the court erred in finding an implied term of a statutory right to seek leave to appeal from the arbitral award and that, even if the respondent did enjoy a statutory right to seek leave to appeal, the court erred in finding that the mandatory criteria for leave prescribed by section 34A(3) of the 2011 Act had been satisfied.

Decision

The Full Court of the Supreme Court allowed the appeal and found in favour of the principal (Nicholson J, with Kourakis CJ and Stanley J agreeing). The contractor's application for leave to appeal against the arbitration award was dismissed.

The Full Court found that there was no implied term of the contract that there was a statutory right to seek leave to appeal from the arbitral award and held there was no statutory right to seek leave to appeal, by way of implied term or otherwise.

Nicholson J considered that it could not have been the objective intention of the parties, at the time of entering the contract in 2009, that there be a right of appeal in accordance with section 34A of the 2011 Act. In making this finding, his Honour emphasised that the parties had no knowledge of the 2011 Act at the time of entering the contract and could not have foreseen that the 1986 Act might be amended or repealed. The court did not consider the third category of the *BP Refinery* decision to be made out in that, if the parties were confronted in 2009 with the possibility that the legislation may have changed in the future, it was not so obvious as to go without saying how they would have responded.

Further, Nicholson J and Kourakis CJ canvassed established authorities regarding the second 'business efficacy' category of *BP Refinery*. In this regard, the Full Court emphasised that both the 1986 Act and the 2011 Act allowed for the parties to exclude the right of review, and therefore it could not be contended that an implied term giving rise to a right of appeal was necessary to give business efficacy to the contract.

In relation to the principal's second ground of appeal, both Kourakis CJ and Nicholson J had doubts as to whether the criteria for leave under section 34A(3) of the 2011 Act had been met by the principal but declined to express a final view in this respect.

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Simple rules for a payment schedule

Fabtech Aust P/L v Exact Contracting P/L [2017] SADC 44

James Kearney | Rebecca Clafton

Key Point

A response to a payment claim must satisfy the basic requirements of section 14 of the *Building and Construction Industry Security of Payment Act 2009* (SA) (**SA Act**).

Significance

Whilst the courts will not take an overly technical approach in determining whether a response is a payment schedule, where a response does not satisfy the basic requirements of section 14, and does not give adequate notice of the respondent's position, it will not be a payment schedule within the meaning of the SA Act. Consequently, section 15(2)(a)(i) of the SA Act will apply and the full amount of the payment claim will be recoverable as a debt due.

Further, a party who fails to respond to a payment claim on the basis they are seeking to reach agreement with the claimant does so at great risk absent express agreement that the payment claim is withdrawn.

Facts

Fabtech Aust Pty Ltd (**claimant**) was engaged by Exact Contracting Pty Ltd (**respondent**) to supply and install materials and undertake construction in relation to a dam at Seppeltsfield Wines. The claimant purported to serve a payment claim pursuant to the SA Act.

Following receipt of the payment claim the respondent sent the claimant an email (**Email**), rejecting various assertions made in the payment claim. The Email was sent in the context of discussions held by the respondent and the claimant regarding the merits of certain variation claims and how they might be resolved.

Once the time for a payment schedule had elapsed, the claimant asserted that the Email did not constitute a valid payment schedule under the SA Act, and that it was therefore entitled to recover the payment claim amount as a debt due under section 15(2)(a)(i) of the SA Act. The claimant subsequently sought summary judgment for the amount of the payment claim.

The respondent initially took the position that the payment claim was invalid and therefore denied that a payment schedule was required. However, before the court the respondent conceded that the payment claim was valid and contended that its Email constituted a payment schedule (although not formally described as such), because it intended to serve the purpose of identifying the respondent's response to the payment claim and described the elements of the payment claim that the respondent disputed.

The respondent contended in the alternative that the claimant should be estopped from taking advantage of the SA Act as the parties had agreed to a different course.

Decision

The claimant was successful in its application, and the court entered summary judgment in its favour.

Muecke ADCJ took into account the fact that the claimant had initially strenuously denied the payment claim was valid and considered that, in the circumstances, it followed that the respondent could not have intended to respond with a valid payment schedule.

Further, his Honour canvassed established authorities regarding what the courts will look at when considering whether documents purporting to be payment claims or payment schedule comply with the relevant mandatory requirements of the legislation. The court emphasised that it will approach the matter in a practical, non-technical and common sense way. However, at a minimum, a payment schedule must identify with sufficient detail how much the party intends to pay so that the claiming party will be on notice. This will require clear identification of:

- the payment claim to which the payment schedule relates; and
- the amount that the party making payment intends to pay and, if the amount is less than that set out in the payment claim, reasons for the reduction.

The court noted that the Email did not identify the payment claim to which it related, or identify the amount that the respondent intended to pay in order to satisfy the payment claim, and it could not therefore be seen to be a valid payment schedule.

Muecke ADCJ found there was no factual basis for the estoppel alleged and as a consequence did not consider it necessary to decide whether the respondent was entitled to maintain that defence pursuant to section 15(4)(b)(ii) and section 33 of the SA Act.

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In the United Kingdom courts

Interpreting 'mutual trust and cooperation' in NEC3

Costain Ltd v Tarmac Holdings Ltd [2017] EWHC 319 (TCC)

Steven Yip | Sonia Ngan

Key Point

This recent judgment of the Technology and Construction Court (**TCC**) has shed significant light on the interpretation and operation of the overarching obligation to act '*in a spirit of mutual trust and cooperation*' in the NEC3 contracts.

Significance

Until this judgment, the '*mutual trust and cooperation*' provision in NEC3 contracts has remained largely uncertain due to the lack of judicial guidance. While the crux of this case rested upon the issue of whether or not there was a binding arbitration agreement between the parties, the TCC explored and offered insightful guidance on the substance of the '*mutual trust and cooperation*' provision. Although this provision did not alter the TCC's analysis on the facts of this case, it is noteworthy that this provision has been given due consideration in the TCC's interpretation of other NEC clauses. This overarching duty is certainly not toothless in terms of its application in the context of the NEC3 contracts as a whole.

Facts

Costain (**claimant**) engaged Tarmac (**defendant**) to supply concrete for the construction of a new crash barrier on the M1 motorway pursuant to a sub-contract agreement. The sub-contract agreement incorporated, among others, the NEC3 Framework Contract conditions (**Framework Contract**), which governed the seeking and the provision of the quotation, and the NEC3 Supply Short Contract conditions (**Supply Contract**), which governed the actual supply of the concrete with specifications.

Both the Framework Contract and the Supply Contract contained an identical clause 10.1 that stipulated the overarching obligation to '*act in a spirit of mutual trust and cooperation*' in NEC3 contracts (**clause 10.1**). They, however, stipulated two sets of conflicting dispute resolution provisions:

- the Framework Contract allowed for adjudication 'at any time' and was silent on arbitration;
- the Supply Contract, at clauses 93.3 and 93.4, required the parties to first refer a dispute to adjudication with a specified timeframe and a strict time bar, followed by arbitration if a party was dissatisfied with the adjudicator's decision.

The dispute between the parties

It was common ground that the concrete supplied by the defendant was defective. However, a dispute arose as to the scope and costs of the appropriate remedial works as a result of the defective concrete. The defendant referred the dispute to adjudication and, in reliance on clause 93.3 of the Supply Contract, succeeded in its defence by contending that the claimant was time-barred from the pursuit of its claim.

The claimant subsequently advanced the dispute by launching court proceedings in the TCC and sought to recover damages of £5.8 million by way of breach of contract. Relying upon clause 93 of the Supply Contract, the defendant sought to stay the court proceedings under section 9(1) of the *Arbitration Act 1996* on the basis that an arbitration agreement had been entered into between the parties and that the correct forum was arbitration, even though the claimant would be out of time to commence an arbitration claim.

In an attempt to resist the stay application, the claimant maintained that the Framework Contract included another provision which provided for adjudication without time limit. The claimant argued that, as a matter of construction, the parties were allowed to either adjudicate, arbitrate or litigate, and that the '*mutual trust and cooperation*' provision obliged the parties to liaise among themselves and to determine which dispute resolution avenue was most viable on a case-by-case basis. Alternatively,

the claimant contended that the arbitration agreement was 'inoperative'. One of the grounds was that the defendant was estopped from relying upon the time-bar provision at clause 93 of the Supply Contract as the defendant had a duty to indicate to the claimant its intended reliance on that defence but stayed silent and relied on the same. The claimant also maintained that the defendant was, in any event, in breach of the 'mutual trust and cooperation' provision, under which it was obliged to make known to the claimant the nature, scope and potential effect of clause 93 of the Supply Contract.

Decision

The court granted the application of the defendant to stay the proceedings.

Coulson J rejected all of the claimant's submissions against the enforceability of the contractual arbitration agreement on the ground that they were without merit. The judge then went on to consider whether the '*mutual trust and cooperation*' provision in both the Framework Contract and the Supply Contract would affect his analysis and determined in the negative.

Meaning of '*Mutual Trust and Cooperation*'

In allowing the stay application of the defendant, Coulson J endorsed the commentary in *Keating* on NEC3 (First Edition 2012), which referred to the propositions set out in a leading Australian case, *Automasters Australia PTY Limited v Bruness PTY Limited* [2002] WASC 286, and drew a parallel between the duty to act in '*a spirit of mutual trust and cooperation*' and an obligation of 'good faith'. This overarching obligation is one which requires the parties to refrain from improperly exploiting the other party's legitimate interest to enjoy the fruits of the contract as delineated by its terms. His Honour expressed the view that this duty may impose a positive obligation on a party to correct an obvious false assumption of another party, but it does not go so far as to require a party to disregard its self-interest. However, in adopting the interpretation in *Keating* on NEC3, Coulson J added a caveat that the general duty to act 'fairly' may be too subjective to be policed.

Application

The obligation of '*mutual trust and cooperation*', when taken at its highest, meant that the defendant could not mislead the claimant into wrongly believing that the time-bar provision at clause 93 of the Supply Contract was either inoperative or would not be relied upon.

On the facts of the case, Coulson J concluded that the defendant did not say nor do anything which could have implied that it had waived its contractual entitlement to arbitrate. The fact that the defendant had been silent on the time-bar provision also did not amount to a sharp practice. Therefore the defendant's conduct did not mislead the claimant in any manner. his Honour further held that the defendant would have no reason to believe that the claimant was under a false assumption regarding clause 93 of the Supply Contract and therefore was not in breach of clause 10.1. On this basis, the '*mutual trust and cooperation*' provision did not assist the claimant's case of estoppel, and accordingly the defendant was not estopped from relying upon the time-bar provision.

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Assessment of Compensation Events under NEC3 Contracts

Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited [2017] NIQB 43

Steven Yip | Sonia Ngan

Key Point

In this recent decision, the High Court of Northern Ireland examined the proper approach in retrospectively assessing compensation events under the NEC3 contracts, ie where the actual impacts of the compensation events are already known. In particular, the decision considered that a retrospective assessment should take place with reference to the actual time and costs incurred as opposed to just forecasts (which is normally the way assessment is carried out).

Significance

While the NEC3 contracts envisage a prospective regime for the assessment of compensation events, ie that the impacts of a compensation event should be assessed at the time it arises on a forecast

basis, this decision offered a slightly different approach when information relating to actual time and costs incurred was actually available.

There have been concerns that this decision may, depending on the circumstances, open the door to the parties exploiting one another and creating uncertainties. Employers may, on one hand, be incentivised to adopt a wait-and-see approach and not to notify or assess a compensation event in a prompt manner in anticipation of a retrospective assessment based on evidence of actual costs. On the other hand, however, contractors may be encouraged to seek early quotations in view of a prospective assessment with reference to forecasted costs. The practical implications of this decision remain to be seen. Nevertheless, with due regards to Coulson J's decision in Costain Ltd v Tarmac Holdings Ltd [2017] EWHC 319 (**TCC**), the parties should be cognisant to their overarching obligation of '*mutual trust and cooperation*' in the NEC3 contracts, under which they are obliged not to 'improperly exploit' one another.

It should be noted that this decision from Northern Ireland is not strictly binding on the courts of England and Wales (and certainly not courts in Australia and Hong Kong), and it remains to be seen whether a similar approach will be adopted by the other courts.

Facts

Northern Ireland Housing Executive (**employer**) and Healthy Building (Ireland) Ltd (**consultant**) entered into two contracts in the form of NEC3 Professional Services Contract (**contracts**), whereby the consultant was engaged to provide consultancy services in relation to assessing asbestos in buildings. The employer communicated an instruction to the consultant which changed the scope of the works. Yet, it failed to notify this instruction as a compensation event and also failed to instruct the consultant to submit quotations for assessing the compensation event, as it was obliged to do so under the contracts.

After four months, the consultant notified the instruction as a compensation event and provided quotations to the employer for assessment of the compensation event. The employer rejected the quotations and subsequently conducted its own assessment and valued the impact of the compensation event at zero.

The dispute before the High Court

The dispute was referred to adjudication and went before the court subsequently. The parties disagreed as to the relevance of the consultant's time sheets as to the actual costs incurred in assessing the impacts of the compensation event. In essence, the court had to consider the following two questions:

- whether, on proper construction of the contracts, the assessment of the effect of a compensation event should be calculated on the basis of the forecast or the actual costs incurred by the consultant; and
- whether actual costs were relevant to the assessment process.

The employer contended that the actual costs incurred by the consultant should be taken into account in the assessment process. To the contrary, the consultant sought to rely on clause 63.1 of NEC3 to contend that the actual time charge was irrelevant. Clause 63.1 stipulated that:

> *'changes to the prices are assessed as the effect of the compensation event upon the actual Time Charge for the work already done and the forecast Time Charge for the work not yet done'*. It went on to provide that *'the date when the employer instructed or should have instructed the consultant to submit quotations divides the work already done from the work not yet done'*.

As the parties had agreed that the employer should have instructed the consultant to submit quotations on the same date of the giving of the instruction, the consultant submitted that actual time charge was only relevant before that date. Since there was no actual time charge before that date, it followed that the actual time charge was not relevant to the assessment.

Decision

The court concluded that, unless otherwise provided in the contracts, actual costs evidence was relevant and indeed the best evidence to determine the impacts of the compensation event. It followed that the court should not *'shut [its] eyes and grope in the dark'* where actual costs evidence is available.

On its construction of clause 63 of NEC3 as a whole, the court held that clause 63 contemplated a situation where the employer complied with the contract to give notification and to seek quotation from the consultant at the time of the giving of the instruction. In the present case, however, the employer did not comply with the contracts to notify or to assess the compensation event. By adopting an efficacious and business-like interpretation on clause 63, the court ruled that a 'forecast' would not be applicable since the consultant was in reality making a claim for work already done. Accordingly, a construction of this clause which was consistent with business common sense required that an assessment as to the impact of the compensation event should be informed by the best information relating to the actual costs and time incurred. The court went further to express its view that the refusal of the consultant to disclose actual time sheets for the works done would be *'entirely antipathetic'* to the overarching obligation of mutual trust and cooperation in NEC3 contracts.

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