MinterEllison

Construction Law Update

March 2018

Contents

Legislative update

New South Wales

Fair Trading NSW calls for public consultation on whether ACPs should be banned

Jeanette Barbaro

The Commissioner for Fair Trading NSW is calling for public submissions as to whether the use of ACPs, polystyrene products and other similar substances should be banned under the *Building Products (Safety) Act 2017* (NSW) (**BPSA**).

Since the BPSA came into effect late last year, we have all been waiting for a list of banned ACPs to be published. Instead, the Commissioner has chosen to use her powers under section 13 of the BPSA and call for submissions from the public as to whether ACPs, polystyrene products or similar substances should be banned from use in any external cladding, external walls, external insulation, facades or rendered finishes on buildings of two or more storeys and, if so, the terms on which they should be banned.

Submissions are requested to consider whether a ban should:

- apply to all uses or only specific uses;
- apply to all buildings or only specific class of buildings;
- apply to the public at large or permit a specific person or class of persons to use the banned building product;
- apply subject to exceptions, and if so what exceptions; or
- apply subject to conditions.

Submissions should be made in writing to the Commissioner by 23 April 2018.

| back to Contents

Victoria

Cladding with Prescribed Combustible Products - No building permit without BAB blessing

Jeanette Barbaro

In a Ministerial Guideline that has been gazetted here by the Victoria Government, from 22 March 2018, municipal and private building surveyors **must not** issue a building permit for type A or B construction in Victoria which includes the use of a 'Prescribed Combustible Product' as part of an external wall (including as an attachment) **unless** the building permit includes a determination by the Building Appeals Board (**BAB**) that the use of the Prescribed Combustible Product complies with the *Building Act 1993* (Vic) and the regulations (including the National Construction Code (**NCC**)).

A Prescribed Combustible Product is defined to mean:

- a panel that comprises a polyethylene core or lamina bonded to one or more sheets of metal panels including an aluminium composite where the core or lamina is more than 30% or more polyethylene by mass; or
- an expanded polystyrene product used in an external insulation and finish (rendered) system.

Using his powers under section 188(1)(c) of the *Building Act 1993* (Vic), the Minister for Planning issued the Ministerial Guideline. Section 188(7) of that Act states that municipal and private building surveyors **must** have regard to the Ministerial Guideline in carrying out their functions, which includes

the issuing of building permits. Failure to do so carries penalties and disciplinary action for the relevant building surveyor.

The Ministerial Guideline was accompanied by the release of a Building Product Safety Alert by the Victorian Building Authority here.

What is the impact of the Ministerial Guideline?

Is it a ban on the use of Prescribed Combustible Products?

No. Whilst the Ministerial Guideline does not have the effect of banning the use of certain cladding products, it is aimed at changing behaviours and driving consistent outcomes in fire risk management when it comes to using certain types of cladding products by:

- making Prescribed Combustible Products more difficult to use freely; and
- requiring the blessing of the BAB before a building permit is issued for building works that involve the use of Prescribed Combustible Products.

Does this impact existing buildings with cladding comprised of Prescribed Combustible Products?

No. However, if you are undertaking works on an existing building's façade that requires a building permit, including if you are rectifying a non-compliant façade, the issuing of a building permit for such works will be caught by these new requirements.

Will this change what we currently do?

Yes. A building permit for type A and B construction must not be issued by the relevant building surveyor unless it is accompanied by a BAB determination that permits the use of a Prescribed Combustible Product. This of itself mean that:

- the choice of façade product will need to be made before application is made for a building permit (or the relevant building permit stage);
- if you are thinking about using a Prescribed Combustible Product, whether in your new construction or the rectification of a non-compliant façade, whether as a deemed-to-satisfy or an alternate/performance based solution, you will need to make application to the BAB first before making application for a building permit as the permit application will need to include the BAB determination;
- the need to make a BAB application may involve additional time and additional cost, particularly if it is contested or the façade design is not approved by the BAB;
- the BAB is likely to be bombarded with similar applications so plan ahead to avoid delays to project delivery;
- if after the building permit is issued an alternate product is nominated, the relevant building surveyor may require an application be made to the BAB for its blessing before the nominated alternate product is approved for use if the nominated product is also a Prescribed Combustible Product, so again plan ahead; and
- if you are intending to use a Prescribed Combustible Product, ensure that a thorough analysis has been undertaken by the project team, including the designers and fire engineers, to demonstrate that the requirements of the NCC are achieved, as the BAB will be independently assessing whether those requirements are met.

On a practical level, the additional hurdles and the uncertainty of the outcome of a BAB process may be obstacles that are likely to deter the continued use of Prescribed Combustible Products in Victoria as industry looks to other solutions that will not cause delay or extra costs. The landscape continues to change ….

| back to Contents

PPP Projects in Victoria see new standards set

Stewart Nankervis

Last week the Treasurer launched Partnerships Victoria's PPP Standard Project Documents. These are now available on the PV website, and include Change Compensation Principles Schedules (specific to each model), the Termination Payments, Intellectual Property and Augmentation Process Schedules, and the Guidance Notes.

MinterEllison is proud to have been part of the team that contributed to the review of these documents. Our congratulations goes to everyone involved, particularly the Partnerships Victoria team who delivered on the vision to improve Victorian PPPs.

These documents will help define and provide certainty in relation to the delivery of significant Availability and Linear Infrastructure PPP projects in Victoria's future such as the North East Link and the next tranche of Victorian Schools.

| back to Contents

In the Australian courts

Commonwealth

All for one and one for all – Recognition of professional registrations between states

Andriotis v Victorian Building Authority [2018] FCAFC 24

Owen Cooper | Chris Hey | Frank Aloe

Significance

The reciprocal granting of equivalent registrations between Australian states and territories can only be refused if one of the grounds of refusal under the *Mutual Recognition Act 1992* (Cth) (**Act**) applies.

In the context of the registration of building practitioners in Victoria, registration may not be refused on the grounds that the Victorian Building Authority (**respondent**) is not satisfied that the applicant is 'a fit and proper person to practise as a building practitioner' (being the relevant test under section 170(1)(c) the *Building Act 1993* (Vic) (**Building Act**)).

Facts

Nikolas Andriotis (**applicant**) was issued with an 'Endorsed Contract Licence – Waterproofing' in New South Wales in March 2015. In June 2015 the applicant lodged an application with the Victorian Building Practitioners Board (**Board**) seeking Victorian registration as a 'Domestic Builder Class W – Waterproofing'.

The applicant sought registration pursuant to the Act, which provides for the recognition of equivalent registration (including licensing, approval, admission certification or any other form of authorisation related to the carrying on of an occupation, trade or profession) between Australian states and territories.

The Board rejected the application for registration on the grounds that the applicant did not meet the character requirements for registration in Victoria. At the time of the decision, the Building Act required that applicants for registration be of *'good character'*. This requirement has subsequently been amended such that the respondent must be satisfied that an applicant is *'a fit and proper person to practise as a building practitioner'*.

The Board's decision was appealed to the Administrative Appeals Tribunal (**tribunal**). The tribunal affirmed the Board's decision and the applicant commenced proceedings in the Full Court of the Federal Court of Australia seeking judicial review of the tribunal's decision.

Although the court considered a number of grounds of review, their Honours largely focused on whether the Act conferred an entitlement to registration by reason of the fact that the applicant held a comparable licence in another state. The applicant submitted that the tribunal (and the Board) was obliged to recognise his New South Wales licence and grant registration in Victoria.

Decision

Flick J held that the Act confers an 'entitlement' to registration and it was not open to the tribunal to refuse registration on the basis that the tribunal was not satisfied that the applicant was of *'good character'*.

His Honour considered that if a tradesperson has satisfied all of the qualifications and has accumulated such experience as allows them to carry on the trade in one state, he or she is thereby entitled to be registered elsewhere. Such an interpretation was held to be consistent with the legislative intent of the Act.

Although his Honour noted the potentially counter-intuitive scenario under this interpretation where an applicant is granted registration under the Act and is then subject to immediate disciplinary action by a regulating body for a matter that existed prior to registration to which the regulating body takes issue, his Honour concluded that such an approach was acceptable. It would leave the applicant free to seek appropriate redress in that state, and the regulating body to administer his or her case under the relevant state legislation as would occur for any other registered person.

Bromberg and Rangiah JJ provided a joint judgement largely in line with the reasoning of Flick J. Their Honours noted that a 'qualification' under the Act may extend to all manner of conditions including, for example, character. Their Honours' concluded that it was parliament's intention that, just as one state's determination that a person's technical skills are appropriate for registration cannot not be second guessed by a different state, the first state's finding of character could also not be challenged.

Their Honours identified that under the Act the power to refuse is distinct from the power to grant registration. This means that where the grounds for registration specified in the Act are established, registration must follow unless one of the grounds of refusal specified by the Act applies.

| back to Contents

New South Wales

Collateral contracts and weak warranties: a timely reminder

ACN 151 368 124 v Pro-Pac Packaging (Aust) Pty Limited [2017] NSWSC 913

Richard Crawford | Stephaine Skevington

Significance

The case is a timely reminder that where parties fail to explicitly state their intentions in an agreement, significant and unintended consequences may result. Parties must take care when using standard warranty clauses, which will be interpreted narrowly and should be carefully considered in order to give effect to the parties' intentions. Practitioners should revise standard warranty provisions and amend them as necessary. Variations by side letters or other collateral contracts should be avoided as a means for parties to amend the terms of their principle agreements.

Facts

In June 2013, ACN 151 368 124 (formerly Eco Food Pac Australia) (**seller**) entered a sale of business contract with Pro-Pac Packaging (**buyer**), in addition to several ancillary agreements including a side letter. The sale agreement provided for three payments totalling $6 million, including a 'deferred payment' of $250,000 (**Deferred Payment**). The sale agreement provided that the seller would license certain premises to the buyer under the agreement. An entire agreement clause was included in the sale agreement to the effect that the sale agreement embodied all obligations relating to the transaction.

A dispute arose between the parties in relation to payment of the Deferred Payment and other outstanding amounts. There were several issues for the court to determine. Relevantly here:

- The first issue was in relation to the side letter. A clause in the side letter provided that the buyer would pay the seller the Deferred Payment in consideration of the seller granting the licence under the sale agreement. The question for the court was whether the side letter was enforceable as a collateral contract or was unenforceable for failure of consideration.
- The second issue related to a warranty in the sale agreement. The warranty stated that all '…copies of documents and information provided by or on behalf of the seller are complete, accurate and true copies'. Prior to entering into the agreement, the seller made a false representation and an issue arose as to whether this breached the warranty.

Decision

In relation to the first issue, McDougall J found that the side letter was invalid. A further promise in the side letter to grant a licence that was already granted in the sale agreement was not accepted as good consideration. The collateral contract could not alter the legal relationships established in the main sale agreement, and as the two were inconsistent, the side letter was unenforceable.

With respect to the second issue, McDougall J found that the warranty was not breached by the misrepresentation during negotiations. The use of the word 'copies' twice was found to mean that the warranty was only concerned with the accuracy of copies. It was found that the warranty gave no guarantee of the accuracy of information, only to copies of information.

| back to Contents

A home builder can only rely on the defence in section 18F of the *Home Building Act 1989* (NSW) to avoid liability for design by others

Brooks v Gannon Constructions Pty Ltd [2017] NSWCATAP 168

Richard Crawford | Michelle Knight | Clare Moran

Significance

The principle that the defence available to a contractor under section 18F of the *Home Building Act 1989* (NSW) (**Act**) is the only defence that can successfully rebut a claim in respect of the breach of a statutory warranty under a contract to which the Act applies remains unaltered.

Facts

Gannon Constructions Pty Ltd (**builder**) appealed a decision of the New South Wales Civil and Administrative Appeal Consumer and Commercial Division (**tribunal**) (which was analysed in our July 2017 edition), by which it was ordered to pay Mr Christopher Brooks (**homeowner**) the sum of $105,836.57 in compensation for defects.

At first instance, the builder sought to rely on clause 2.2 of the contract which in effect provided that the contract 'may limit' the builder's liability where a failure to comply with various requirements, including the Building Code and other relevant codes and standards, where that failure relates solely to a design or specification prepared by or on behalf of the owner.

The tribunal found that, in respect of a claim for a breach of statutory warranty, the only defence available to a contractor is that contained in section 18F of the Act (which the builder had not sought to rely on) and that the builder was unable to rely on its contractual defence.

The builder appealed arguing that the tribunal erred in finding that the defence in section 18F of the Act was the only defence available for breach of statutory warranty and that the builder was unable to rely on the limitation of liability under the contract.

Decision

On appeal, the tribunal dismissed the builder's appeal and the builder was ordered to pay the homeowner's costs.

The tribunal found, as a threshold issue, that there was no other clause of the contract which took up the option under clause 2.2 to limit the builder's liability. The natural and ordinary meaning of the word 'may' in clause 2.2 of the contract, finding the word is, in the context, permissive of the step of making provision in the contract for a limitation of liability.

Having disposed of the appeal on the threshold issue, the tribunal did not deal with the two grounds of appeal and unfortunately did not answer the question whether section 18F of the Act is the only defence to breach of a statutory warranty. Accordingly the tribunal first instance decision on this point remains as good law.

| back to Contents

Guilty homebuilder – only one chance to rectify

Gassman v Peck [2017] NSWCATCD 90

Richard Crawford | Kate Morrison | Sara Mohabbati

Key Point: Information known to the builder at the time of consenting to orders (eg the complexity of defects or access arrangements) must be taken into account when considering whether to consent to a works order and cannot later be held to have caused delay or used as an excuse to avoid liability.

Significance

While section 48MA of the *Home Building Act 1989 (*NSW) applies to renewal proceedings, granting the preferred outcome (rectification of the defective work by the responsible party) is not mandatory.

Facts

Background

The dispute relates to a claim made by Peter Gassman and Beth Roddy, the applicants (**homeowners**), for breach of statutory warranty for defective works. Orders were made by consent on 11 December 2015 which required the respondent, Nathan Peck (**builder**), to finish works which had been deemed to be defective by 24 March 2016. The consent order made provision for renewal of the matter.

Current proceedings

The current proceedings relate to the builder's failure to rectify the defective works on time. The experts for both parties agreed that the works the subject of the order were not complete but disagreed in relation to quantum and liability.

The homeowners sought a money order for the cost of rectifying the defects. However, the builder denied liability for not having complied with the work order as he alleged the homeowners and/or their experts caused the delay (by rescheduling inspections and by going on a three-month holiday thus denying the builder access to the premises in their absence) and sought another work order in accordance with the preference in section 48MA of the *Home Building Act 1989* (NSW).

The builder also claimed that the complexity of rectifying the defective windows contributed to his failure to comply with the work orders.

Decision

The Tribunal rejected the builder's claims and granted the homeowners a costs order for the amount of rectifying the defective works (including builders margin and GST).

In reaching this conclusion, the Tribunal acknowledged that it must have regard to the principle that rectification of the defective work is the preferred outcome under section 48MA of the *Home Building Act 1989* (NSW) however, having considered a number of cases concluded that granting the preferred outcome is not mandatory.

Based on the evidence, the Tribunal found that:

- the homeowners had not caused the delay:
  - the inspection was in fact rescheduled by the builder's expert; and
  - the homeowners' holiday was not until the end of March and the builder had been aware of it at the time of consenting to the order; and
- as the builder had been aware of the homeowners' holiday and the complexity of the defective works at the time of consenting to the previous works order the builder should have considered the impact of these issues on the work schedule before consenting to them.

Accordingly, the Tribunal accepted that the homeowners had lost confidence in the builder's willingness and ability to satisfactorily rectify the defects and were not satisfied that another work order would suffice.

| back to Contents

Surety Bonds: A Sure Thing?

Kawasaki Heavy Industries, Ltd v Laing O'Rourke Australia Construction Pty Ltd [2017] NSWCA 291

Richard Crawford | Esther Lee

Key Point: Make sure your contract expressly sets out when performance bonds can be called. Don't leave it to chance.

Significance

The Supreme Court of New South Wales was prepared to uphold the decision of the primary judge to continue an interlocutory injunction against the calling of certain bonds because a proper construction of relevant contractual provisions confirmed that the appellant (**Kawasaki**) was not permitted to call on the respondent's (**Laing O'Rourke**) surety bonds in the circumstances of this case. The decision confirms that whilst a contract may stipulate the provision of performance bonds by one contractual party to another, the contract must be carefully construed to determine when those bonds can be called on.

Facts and decision at first instance

Laing O'Rourke and Kawasaki entered into a subcontract with head contractor JKC under which they as a consortium agreed to provide project management, engineering and other services to JKC in relation to a project for the construction of four cryogenic tanks at a site near Darwin.

The parties were governed by three contracts:

- the JKC Subcontract;
- the Consortium Agreement; and
- the LORAC Subcontract.

The JKC Subcontract required Laing O'Rourke and Kawasaki to provide performance bonds to JKC.

Under the Consortium Agreement, Kawasaki agreed to take responsibility for providing the performance bonds to JKC, and Laing O'Rourke agreed to provide surety bonds to Kawasaki.

Under the LORAC Subcontract, Laing O'Rourke agreed to perform some of the work allocated to Kawasaki under the Consortium Agreement.

The Consortium Agreement provided that all disputes between Kawasaki and Laing O'Rourke were to be determined by international arbitration in Singapore. The regime also allowed for interlocutory relief to be sought from a court of competent jurisdiction.

There were significant delays in the completion of the project and relationships between the parties deteriorated. JKC asserted an entitlement to damages from Laing O'Rourke and Kawasaki in excess of $102 million. Despite that claim, JKC did not make a call on the performance bonds.

Even though JKC did not make a call on the performance bonds, Kawasaki proceeded to make a call on Laing O'Rourke's surety bonds.

Laing O'Rourke commenced proceedings in the NSW Supreme Court seeking an interlocutory injunction to restrain Kawasaki from calling on the bonds. On 15 March 2017, Ball J granted Laing O'Rourke an ex parte injunction preventing Kawasaki from calling on the surety bonds.

In April 2017, the primary judge, Stevenson J, heard Kawasaki's application to discharge the interlocutory injunction. The principal question for Stevenson J was whether there was a serious question to be tried that the Consortium Agreement and the LORAC Subcontract prevented Kawasaki from calling on the surety bonds provided by Laing O'Rourke unless JKC had called on the corresponding performance bonds provided by Kawasaki.

Stevenson J held that the Consortium Agreement strongly suggested that it was the intention of the parties that Kawasaki could only call on Laing O'Rourke's surety bonds if JKC had made a call on the Kawasaki performance bonds. Thus, Stevenson J declined to discharge the interlocutory injunction. Kawasaki appealed.

Kawasaki advanced numerous grounds for appeal, of which the most significant were:

- First, that the primary judge erred in deciding that there was a serious question to be tried as to whether the parties intended that Kawasaki only be entitled to call on Laing O'Rourke's surety bonds in circumstances where JKC had first called on the corresponding Kawasaki performance bonds.
- Secondly, that the primary judge should have determined the proper construction of the Consortium Agreement and the LORAC Subcontract 'as if on a final basis'.
- Finally, that the primary judge erred by finding that the balance of convenience favoured the continuation of the interlocutory injunction.

Appeal dismissed – the primary judge's decision to continue the interlocutory injunction was not erroneous

- The Court of Appeal carefully construed the provisions of the Consortium Agreement and the LORAC Subcontract and held that there was nothing in either contract that suggested that Kawasaki was permitted to call upon the surety bonds in circumstances where JKC had not made a call on the Kawasaki performance bonds. Accordingly, the court held that the primary judge did not err in deciding that there was a serious question to be tried.
- Addressing the issue of whether the primary judge should have determined the proper construction of the Consortium Agreement and the LORAC Subcontract 'as if on a final basis', the Court of Appeal emphasised that the primary judge was not asked by the parties to determine the case 'as if on a final basis'. Thus, the court held that the primary judge's conclusions were sufficiently probable to support an interlocutory injunction.
- Finally, the Court of Appeal held that the primary judge gave sufficient weight to the various arguments advanced by Kawasaki in opposition to the continuation of the injunction and thus the primary judge did not err in determining that the balance of convenience favoured the continuation of the interlocutory injunction.

| back to Contents

Failed challenge to validity of NCAT work order

Manbead Pty Ltd v The Owners – Strata Plan; No 87635 [2017] NSWSC 1629

Richard Crawford | Andrew Hales | Sara Mohabbati

Key Point: Jurisdictional concerns about the value of a work order sought in respect of a building claim should be raised before the order is made.

Significance

The NSW Civil & Administrative Tribunal (**NCAT**) may only make work orders or award damages for a claim valued at no greater than $500,000. However, a party concerned with the value of the claim should provide evidence of the value before the work order is made.

Facts

The case concerned a building development involving the construction of six townhouses. In January 2015 the Owners Corporation (**Owners Corporation**) lodged a claim in NCAT alleging defects in construction to which Manbead Pty Ltd (**developer**) and Gino D'Amico (**builder**) were the respondents. For reasons that were not explained, the tribunal subsequently advised the Owners Corporation that each lot owner within the strata plan had to lodge an individual claim for defects in each unit in addition to the Owners Corporation's claim for common property defects. Six claims were eventually lodged with NCAT, each claiming $25,000.

In May 2015 all six claims were settled. By consent NCAT ordered the builder to carry out an agreed scope of rectification works (**Work Order**). NCAT noted an agreement between the parties that the developer would cause the builder to carry out the works and, if he failed to do so, the developer would pay the Owners Corporation and the lot owners the reasonable cost of completing the works required by the Work Order. The scope of works referred to in the Work Order did not include costings for the rectification works.

In February 2016 the Owners Corporation applied to renew the proceedings on the basis of non-compliance with the Work Order. The renewal proceedings were supported by a Scott Schedule which claimed that the total cost of the rectification works was $568,000, but the sum was divided up into separate amounts referable to each of the six units. Before the renewal proceedings were heard, the developer brought an internal appeal against the consent orders made in May 2015, despite being well outside the 28 days allowed to bring an appeal.

The Appeal Panel of NCAT refused to extend the time allowed to make the appeal as it concluded that the appeal had very poor prospects of success. The developer sought leave to appeal that decision to the New South Wales Supreme Court on the basis that NCAT had exceeded its jurisdictional limit under section 48K(1) of the *Home Building Act 198*9 (NSW) of $500,000 for building claims. The developer argued that NCAT should have found that notwithstanding the individual applications made by the lot owners, the Owners Corporation was the proper applicant because the defects claimed by the lot owners actually related to common property, not the individual lots, and the award by NCAT for rectification works was not capable of being divided among the Owners Corporation and the lot owners to bring it within jurisdiction.

Decision

The court refused to grant leave to appeal the decision of the Appeal Panel of NCAT.

The developer contended that the claims were all attributable to the Owners Corporation as a single indivisible claim for damage to common property. However, the court did not accept that the Appeal Panel of NCAT should have allowed the developer to seek to identify every element of work relating to common property in the Scott Schedule during the appeal hearing when that evidence had not been adduced before the Work Order was made.

The court found that although the original Work Order was subsequently valued at $568,000 in the Owners Corporation's Scott Schedule and the Owners Corporation might be considered the proper applicant, the other five individual lot owners had filed separate claims and therefore the $500,000 limit applied separately to each lot owner's claim and the Owners Corporation's claim for common property defects.

Further, for the purposes of the application for leave to appeal, the court did not accept that a subsequent valuation of the cost of rectifying the defects under the Work Order in the Scott Schedule could crystallise the quantum of the claim at the earlier point in time when the Work Order was made.

| back to Contents

Can a homeowner be responsible for defective building works?

Steven Miller & Anor v Grosvenor Australia Pty Ltd [2017] NSWCATCD 42

Richard Crawford | Georgie Roest | Caitlin Ford

Key Point: A builder who performs defective work may be in breach of statutory warranties and held liable for any loss or damage caused by that defective work. However, a builder will not be liable for loss arising because of the homeowner's failure or neglect to take reasonable care to mitigate that loss.

Significance

The New South Wales Civil and Administrative Tribunal (**Tribunal**) found that the applicant homeowners were debarred from recovering any costs against the respondent builder because they failed or neglected to take reasonable care to prevent their loss. The decision confirms that while a builder may be in breach of warranties under the Home Building Act 1989 (NSW) (**HBA**), the builder will not be liable for loss arising from this breach if the homeowners failed to mitigate that loss.

Facts

Steven Miller and Gary Ashmoneit (**Homeowners**) engaged Grosvenor Australia (**Builder**) to supply and install frameless screens and a sliding door at their residential property. The sliding door supplied and installed by the Builder was defective as a piece of glass was missing from the bottom of the door.

The Homeowners informed the Builder of the defect via email and the Builder agreed to carry out replacement work. However, the Homeowners lost patience with the Builder and the relationship

deteriorated. The Homeowners refused the Builder access to their property and thereby terminated the contract.

Three months later, the sliding glass door shattered causing physical damage to the Homeowner's bathroom.

The Tribunal's findings – duty to exercise reasonable care to mitigate loss

The Tribunal found that by supplying and installing a defective glass sliding door the Builder was in breach of the warranty in section 18(B)(1)(c) of the HBA (ie that the work will be done in accordance with, and will comply with the HBA or another law).

The Tribunal was then required to determine whether the Homeowners were entitled to recover the loss which occurred as a result of the glass door shattering having regard to the fact that the Homeowners terminated the contract and refused the Builder access to the property to rectify the defective door.

The Homeowners claimed that the Builder was liable to pay $46,127 for the damage caused to their bathroom as a result of the glass door shattering. Conversely, the Builder submitted that the cost and damage suffered by the Homeowners arose by reason of the Homeowners' failure to mitigate their loss. The Builder contended that had the Homeowners permitted the Builder to rectify the defective door as agreed, or alternatively contracted a new tradesperson to replace the door, they could have avoided their loss.

The Tribunal held that on the facts, the Homeowners knew that the glass sliding door was defective and required replacing. The Homeowners also knew that the Builder agreed to replace the defective door. Then, after terminating the contract with the Builder, the Homeowners did not organise for a new tradesperson to replace the door despite withholding $1,652 from the contract price for this purpose. Thus the Tribunal found that the consequential damage caused by the shattering of the glass sliding door arose because of the Homeowners' failure to take reasonable care to replace the door.

The Tribunal held that the Homeowners' failure to take reasonable steps to mitigate their loss debarred them from recovering the costs they claimed. This finding did not prevent the Tribunal from awarding the Homeowners the cost associated with replacing and installing the defective door. However, there was no evidence before the Tribunal to determine the cost of replacing and installing the door. Given the lack of evidence, the only damages ordered by the Tribunal to the Homeowners were nominal damages in the sum of $10 (in addition to the retained $1,652). The Tribunal also ordered a rectification order requiring the Builder to deliver a replacement sliding door to the Homeowners' property at its own expense.

Queensland

It's easier to ask for forgiveness than permission: seeking leave retrospectively to commence proceedings under the *Subcontractors' Charges Act 1974* (Qld) against a company in administration

Casco Civil Construction Pty Ltd v Yeo & Co Pty Ltd (Administrators Appointed) & Ors [2017] QSC 226

Michael Creedon | Laura Berry

Significance

Failing to obtain the leave of the court, or the administrator's written consent, before commencing proceedings against a company in administration (as required by section 440D of the *Corporations Act 2001* (Cth)) may not be fatal to a subcontractor seeking to enforce a claim of charge under the *Subcontractors' Charges Act 1974* (Qld) (**SCA**). This case indicates that courts may be more willing to

grant leave with retrospective effect in these circumstances to avoid curtailing a subcontractor's rights under the SCA.

Facts

Casco Civil Construction Pty Ltd (**Casco**) commenced a proceeding in the District Court against Yeo & Co Pty Ltd (Administrators Appointed) (**Yeo**) in respect of a claim of charge that it had against Yeo under the SCA.

In contravention of section 440D of the *Corporations Act 2001* (Cth), Casco did not seek the consent of the administrator or leave of the court prior to commencing the proceeding.

Casco then made an application to the Supreme Court seeking leave retrospectively to commence and continue the proceeding against Yeo.

The amount in dispute between Casco and Yeo had been paid into the District Court.

Decision

The Supreme Court of Queensland (per Atkinson J) granted Casco leave retrospectively to commence and continue the proceedings against Yeo.

Her Honour confirmed that Casco was a secured creditor by virtue of the SCA and found that denying leave would be contrary to the purpose of the SCA as Casco's claim and status as a secured creditor would be extinguished if it was not permitted to commence proceedings.

Her Honour found it persuasive that a portion of the amount in dispute had been paid into court and, under subsection 11(7) of the SCA, could only be released by order of the court. Her Honour therefore considered that 'the orderly administration' of Yeo required it to be a party to the proceeding so that it could make a case as to why the moneys in court should be paid to it rather than Casco.

| back to Contents

High Court confirms a builder cannot seek a merits review of a QBCC decision to make a payment under the statutory insurance scheme

Turcinovic v Queensland Building and Construction Commission [2017] HCASL 306

David Pearce | Sarah Ferrett | Michael Thomas

Significance

The High Court of Australia confirmed the position of the Queensland Court of Appeal that once the Queensland Building and Construction Commission initiates recovery proceedings for 'payment on a claim under the insurance scheme', it will not be open to a builder to attempt to seek a judicial or merits review of the antecedent decision to make payment under the insurance scheme.

Facts

Harry Turcinovic (**builder**) applied to the High Court of Australia for special leave to appeal the decision of the Queensland Court of Appeal in *Queensland Building and Construction Commission v Turcinovic* [2017] QCA 077, which was analysed in our May 2017 edition. That matter related to residential construction work within the meaning of the *Queensland Building and Construction Commission Act 1991* (Qld) (**Act**). The work was insured under the statutory insurance scheme provided by the Act. In respect of each of the properties the builder had constructed, the owners made claims on the respective insurance policies for defects. The Queensland Building and Construction Commission (**QBCC**) made payments in respect of the claims under the statutory insurance scheme, and sought to recover the amount of these payments from the builder.

The builder contended that the QBCC was not entitled to recover the amounts on the basis that the costs claimed by QBCC were so unreasonable as to make the monies paid out not a '*payment on a claim under the insurance scheme*'. The builder relied on a quantity surveyor's report.

At first instance the trial judge accepted that the evidence relied on by the builder was sufficient to raise a real, not fanciful, prospect of defending the claim.

On appeal the Queensland Court of Appeal made a finding in favour of the QBCC. In doing so, the court noted that section 71(1) of the Act conferred a right on the QBCC to recover as a debt '*any payment on a claim under the insurance scheme*', and that it was sufficient for recovery under section 71(1) that the QBCC had, in fact, made a payment on a claim under the insurance scheme. The scheme of review provided for by the Act only allowed a building contractor to challenge payment decisions before the QBCC made a payment under the relevant policy. Accordingly, a building contractor who did not challenge the payment prior to any payment being made by the QBCC, would be liable under section 71(1) of the Act whether or not one of the anterior decisions to making a payment may have been the subject of a challenge.

Decision

The High Court of Australia dismissed the application for special leave made by the builder. The court noted that the point of statutory construction which the builder sought to argue '*would not enjoy sufficient prospects of success to warrant the grant of special leave*'. The court was of the opinion that this case was not an '*appropriate vehicle*' for the builder's argument.

| back to Contents

Construction Law Update editor

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

Contributing partners/senior lawyers

Email firstname.lastname@minterellison.com

Sydney	Richard Crawford	**T** +61 2 9921 8507
Melbourne	Owen Cooper | Alison Sewell	**T** +61 3 8608 2159 / 2834
Brisbane	David Pearce	**T** +61 7 3119 6386
Canberra	Richard Crawford	**T** +61 2 9921 8507
Adelaide	James Kearney	**T** +61 8 8233 5685
Perth	Tom French	**T** +61 8 6189 7860
Darwin	Lachlan Drew	**T** +61 8 8901 5921
Hong Kong	Steven Yip	**T** +852 2841 6843

ME_145825416