MinterEllison

Construction Law Update

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In the Australian courts

New South Wales

Builder's breach of statutory warranties warrants discipline

Boyd trading as Kalana Homes v Commissioner for Fair Trading [2018] NSWCATOD 46

Richard Crawford | Claire Laverick | Jessie Jagger

Key Point

A licensed residential builder has been found guilty of improper conduct for breaching statutory warranties under the *Home Building Act 1989* (NSW) (**Act**) and failing to comply with rectification orders without reasonable cause. The builder was fined and was required to undertake training courses.

Significance

This decision highlights the importance of adequate supervision as well as proactive communication with NSW Fair Trading when rectifying defects in residential building works. Where findings of improper conduct are made out, NSW Fair Trading has power to impose fines of up to $50,000 for corporations as well as suspending or cancelling licences, or disqualifying a licence holder from holding a residential building licence.

Facts

John William Boyd trading as Kalana Homes (**Builder**), a licensed builder under the Act, undertook residential building work at four properties in NSW, in respect of which the Commissioner for Fair Trading, Department of Finance, Services and Innovation (**Fair Trading**) issued rectification orders for defective works.

Under section 51(1)(c) of the Act a licence holder will be guilty of improper conduct if it breaches a statutory warranty, unless it has a defence under section 51(3). A licence holder will also be guilty of improper conduct under section 51(2)(b) of the Act if it fails to comply with rectification orders without reasonable cause.

Original Decision

In May 2017, Fair Trading determined that the Builder was guilty of improper conduct under both sections 51(1)(c) and 51(2)(b) of the Act and imposed a $4,000 fine pursuant to section 62(c) of the Act.

External Review Application

On 8 June 2017, the Builder applied to the NSW Civil and Administrative Tribunal (**NSWCAT**) for external review of Fair Trading's decision. The Builder argued that:

- the warranty could only be breached if the Builder refused to rectify a defect or compensate the owner for the defect;
- the breach of warranty was due to poor quality of tradesmen and not lack of competence or supervision;
- Fair Trading's decision could not be relied upon because it relied on building reports which contained serious errors and incorrect information; and
- it had 'reasonable cause' for failing to comply with the rectification orders because of an inability to secure good tradesmen and because the scope of work had increased due to discovering further defects

Decision

Breach of statutory warranties

The NSWCAT found that the Builder breached statutory warranties in respect of three properties.

The defence under section 51(3) of the Act was not made out. The defence required the Builder to do all that could reasonably be required to ensure that a nominated supervisor exercised such degree of control over the work necessary to prevent the occurrence of the improper conduct. The NSWCAT was critical of the Builder's inability to demonstrate adequate supervision of tradespersons and found that the level of supervision was minimal. Further, difficulties in hiring and maintaining subcontractors was not a relevant consideration for this defence.

NSWCAT noted the Builder's contention—that the warranties were not breached unless he refused to rectify defects or compensate an owner—was wrong at law. Further, whilst the Builder's assertion regarding Fair Trading's evidence was relevant to breach, it was irrelevant to determining whether the Builder had a valid defence.

Compliance with rectification orders

The NSWCAT found that the Builder had failed to comply with rectification orders in respect of two properties without reasonable cause. NSWCAT's main criteria for assessing reasonable cause appeared to be whether the Builder had made attempts to contact Fair Trading to express difficulties regarding compliance with the order before the timeframe expired. Unsuccessful attempts to obtain access, for example, were not sufficient to satisfy the 'reasonable cause' test if not notified to Fair Trading. However, delays in receiving replacement parts notified to Fair Trading before expiry of the timeframe were sufficient.

Orders

In addition to upholding the $4000 fine, NSWCAT ordered that the Builder undertake training on supervision, statutory warranties and compliance with rectification orders. This was due to a variety of factors, including the systemic contraventions evident in the Builder's work practices, the need for homeowners to pursue NSWCAT proceedings to obtain resolution of the defects, the Builder's failure to supervise adequately and the Builder's fundamental misconception of its obligations under the Act in relation to statutory warranties and rectification orders.

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Construing a contract - when does ambiguity matter?

Cherry v Steele-Park [2017] NSWCA 295

Richard Crawford | Andrew Hales | Kawshi Manisegaran

Key Points

There is no 'ambiguity gateway' before evidence of surrounding circumstances can be considered in construing a contract.

Significance

In disputes over the interpretation of a contract, parties often seek to rely on evidence of the surrounding circumstances known to the parties at the time of entering into the contract in order to identify the context and purpose of the contract. There have been competing views on the correct interpretation of *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24 as to whether it must be shown that a contract is ambiguous before evidence of surrounding circumstances can be considered.

In this decision, the NSW Court of Appeal held that ambiguity in a contract is a conclusion that can only be reached after consideration of evidence of surrounding circumstances, rather than a precondition to the admissibility of evidence of surrounding circumstances.

However, in relation to the weight to be given to surrounding circumstances, it is very rare that surrounding circumstances can be used to detract from the language used in a contract. This is particularly the case if the surrounding circumstances present evidence of the actual subjective intentions of the parties, which may not be used to construe the contract, as opposed to the objective intention of the parties based on the language used in the contract in light of its context and purpose.

Facts

Bathurst Central Pty Ltd (**Bathurst Central**) entered into a contract for the purchase of property from Mr and Mrs Steele-Park (**Vendors**) (**Contract**). The Contract was later varied to extend the completion date.

Prior to a second variation, Mr Cherry and Mr Sharpe (in their capacity as directors of Bathurst Central) (**Guarantors**) signed a guarantee in respect of all amounts (including damages) payable by Bathurst Central '*under or in connection with the Agreement*' to the Vendors.

The sale was never completed, and the Vendors subsequently terminated the Contract and sold the property to a third party. The Contract provided that if the Vendors validly terminated and resold the property for a lower price, they could recover the difference from Bathurst Central.

The issue for the court was whether the guarantee:

- covered damages resulting from Bathurst Central's failure to complete the purchase as agreed in the Contract, being $147,500 (ie the difference between the agreed purchase price and the price for which the Vendors subsequently sold the property to a third party); or
- was limited to the amount promised by Bathurst Central to the Vendors in consideration for the Vendors extending the completion date, being $30,250.

There were various emails exchanged between the parties' lawyers about the extension of the completion date and the guarantee. The Guarantors argued that these were admissible on the question of construction of the guarantee as they demonstrated that Bathurst Central's lawyers had understood that the guarantee would only cover the price of the completion date extension and *not* damages for failing to complete the sale.

The trial judge excluded the emails on the basis that the guarantee was not ambiguous, and decided that the guarantee covered damages arising from Bathurst Central's failure to complete the purchase

Decision

The Court of Appeal found that the emails concerning the guarantee could be used as evidence in considering the construction of the guarantee. However, the Court of Appeal ultimately dismissed the appeal because even when the evidence of surrounding circumstances was considered in determining the context and purpose of the guarantee, that evidence of context and purpose could not override the clear and expansive language used by the parties in the guarantee.

Principles of interpretation

The Court of Appeal identified the following principles:

- the ultimate question is whether the written language of the contract, when considered in light of legitimately relevant surrounding circumstances, permits a constructional choice to be made between two different legal meanings; and
- whether there is in truth a constructional choice available to a written contract cannot be determined without first at least considering evidence of surrounding circumstances; that is there is no 'ambiguity gateway' before evidence of surrounding circumstances can be considered in construing a contract.

Emails could be used to consider the construction of the guarantee

This was because the emails were objective facts known to both parties. The emails represented the communicated negotiating positions of the parties and supported the Guarantors' submission that the commercial purpose of the guarantee was to secure Bathurst Central's obligation to make the additional payments agreed upon as the price of the completion date extension.

Evidence of context and purpose does not override clear and expansive contractual wording

Even when the evidence of surrounding circumstances was considered in determining the context and purpose of the guarantee, the court found that evidence of context and purpose could not override the clear and expansive language used by the parties in the guarantee.

The guarantee clearly indicated that the obligations of the Guarantors included guaranteeing payment of damages for failure to complete. The phrase '*under or in connection with the Agreement*' was broadly expressed and encompassed damages arising from both the original Contract and the second variation.

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Watch what you say if you want to rely on the contract

CPB Contractors Pty Ltd v Rizzani de Eccher Australia Pty Ltd [2017] NSWSC 1798

Richard Crawford | Andrew Hales | Jessie Jagger

Key Points

A member of the joint venture responsible for the WestConnex M4 Widening Project (**Project**), Rizzani de Eccher Australia Pty Ltd (**RdE**) was ordered to sign a board resolution requiring payment of $8.5 million into the joint account it shares with partner CPB Contractors Pty Ltd (**CPB**) to service the Project's debts.

Even though the evidence was uncertain in respect of whether RdE had agreed in a board meeting to inject the sum in the binding manner required by the contract, RdE's representatives had in effect promised that RdE would sign the resolution requiring it to do so. CPB had detrimentally relied on RdE's promise. RdE was therefore estopped from acting inconsistently with its promise.

Significance

Parties to commercial contracts with formal meeting, voting or resolution mechanisms may be held to an agreement that may not have been properly made if their representatives, by words or conduct, suggest that an agreement was made or a particular course will be taken and are silent in the face of the other party's detrimental reliance.

Facts

In December 2014, WestConnex entered into a design and construct contract with CPB and RdE as unincorporated joint venture partners to perform the Project works.

In August 2015, the parties entered into a joint venture deed which set out how the parties would perform the design and construct contract. Among the terms of the joint venture deed were mechanisms for:

- board meetings where binding decisions could be made. The requirements for a binding decision included a quorum of at least one appropriate representative from each party and representation in equal numbers to vote; and

- contributions of equal 'called sums' into a bank account jointly held by the parties to service debts at an amount and time agreed between the parties from time to time to maintain positive cash flow for the Project.

In the latter half of 2017, CPB and RdE became concerned with the debts and liabilities being incurred on the Project.

19 September 2017 meeting

On 19 September 2017, a joint venture board meeting was convened. The agenda read '*Please urgently meet and agree the Called Sums. The project cannot manage the current situation without certainty of funding*'.

CPB asserted that, during the teleconference meeting, the representatives agreed that each party would pay a called sum of $8.5 million. However RdE contended that one of its representatives, Mr Mortoni, left the meeting for another teleconference and was not present for any discussion or vote on called sums. As a result, RdE was only represented by one person, Mr Bagnariol (its General Counsel), who it said did not have authority to bind RdE by the contractual mechanism. Mr Bagnariol denied that he agreed to the payment of the called sum during the meeting. Rather, he testified that his impression was that CPB would send a resolution after the meeting for consideration and signing if RdE agreed.

Shortly after the meeting, Mr Hughes (an attendee on behalf of CPB) sent an email to Mr Mortoni which was copied to various other persons, including Mr Bagnariol. It stated '*Could you please sign the attached and return documenting the JV Board's resolution of today*'. A document attached to the email was called '*JV Board Resolution*' which was signed by CPB's attendees and stated '*This paper confirms that the RdE CPB JV Board resolved in a JV Board Meeting held on 19 September 2017 to the payment of Called Sums to the Project Account in the amount of ($8,500,000 AUD from each Party) paid on or before 6 October 2017*'. Mr Bagnariol replied six minutes later '*Yes, we will do it along with the Minute of Meeting*'.

Relevant conduct after meeting

On 22 September 2017, CPB paid $1,500,000 into the joint venture project account towards the called sum.

On 6 October 2017, CPB paid a further $7,000,000 sum which was fully disbursed to creditors by the end of October 2017. On the same day, Mr Hughes emailed Mr Mortoni confirming the total called sum had been paid by CPB and asked when RdE's payment would be made. Mr Mortoni responded on 9 October 2017 that there were delays in cash contributions but that RdE was '*confident to do it in the next few days*'.

On 12 October 2017, CPB issued a notice of default under the joint venture deed to RdE for failing to pay the called sum. On 19 October 2017, Mr Mortoni responded rejecting the notice on the basis that RdE was not obligated to pay the called sum as the mechanism in the joint venture deed for binding decisions had not been followed in the 19 September 2017 meeting. Mr Mortoni did not suggest to CPB that he was not present in the meeting.

The parties maintained their respective positions. CPB commenced proceedings on 2 November 2017 seeking payment by RdE of the called sum. Other than disputing an obligation to pay, RdE also sought a stay of the proceedings on the basis that the relief was not '*urgent injunctive or declaratory relief*', meaning that the dispute should be referred to arbitration under the terms of the joint venture deed.

Decision

Ward CJ determined that:

- the nature of CPB's application was for urgent declaratory relief, meaning the court had jurisdiction to hear the application notwithstanding the arbitration agreement in the joint venture deed; and

- although CPB could not establish that there had been a binding decision in the 19 September 2017 meeting, CPB had established a promissory estoppel, meaning that RdE could not deny that it stood in the '*postulated legal relationship – namely, that envisioned by the … deed*'.

The injunctive or declaratory relief sought by CPB was urgent because the Project director could not certify, as required by the design and construct contract to secure payment from the principal, that all subcontractors engaged by the joint venture had been paid. There was an urgent need for cash injection.

Ward CJ was not satisfied that CPB had shown that a binding resolution had been passed at the board meeting, noting clear discrepancies in the evidence between the parties as to representation, authority and quorum.

In respect of CPB's alternative claim in relation to promissory estoppel, Ward CJ held that the necessary elements were satisfied because:

- CPB had assumed that the execution of the resolution attached by Mr Hughes to his email of 19 September 2017 would give rise to rights and obligations under the joint venture deed;
- RdE induced CPB to adopt the assumption or expectation due to RdE's conduct after the board meeting. This conduct included the express representations contained within both Mr Bagnariol's and Mr Mortoni's emails and the implied representations, being silence after CPB's made its called sum contributions;
- CPB relied on RdE's conduct to its detriment by paying the called sum which was promptly paid out to creditors or by not taking steps to prevent payments to creditors;
- it would have been plain to RdE that CPB was operating under a mistaken belief that there had been an agreement in the board meeting to pay the called sum;
- CPB's action or inaction referred to above would cause detriment if RdE was not required to sign the resolution because there was a risk on the evidence of completion not being able to occur under the contract with the principal; and
- RdE failed to act to avoid the detriment by signing the resolution or taking other steps such as earlier informing CPB that it considered CPB was mistaken as to the board meeting decision.

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It pays to know who you are contracting with and to firm up payment arrangements before terminating a construction contract

Primelime (NSW) Pty Ltd v B.A.E.C. Contracting Pty Ltd [2017] NSWSC 372

Richard Crawford | Michelle Knight | Emily Miers

Significance

Before commencing an adjudication, be sure to check the party that you are adjudicating against is the party you entered into a contract with. If another arrangement or 'fresh contract' exists, for example where a related entity was invoiced and paid for the works carried out by the party to the contract as in this case, this issue will need to have been put to the adjudicator to be relied on in any challenge subsequently made.

Facts

Primelime (NSW) Pty Ltd (**Primelime**) owned a quarry in Cudal, NSW, and sought assistance from 'B.A.E.C.' (to use a neutral term at this point of our analysis) to perform electrical recommissioning works.

On 9 May 2016, B.A.E.C. emailed Primelime attaching a schedule of rates for the requested works (**May email**). The email was neutral as to which particular B.A.E.C. company (B.A.E.C. Contracting or B.A.E.C. Electrical) was its author, however the attachment to the email specified B.A.E.C. Electrical as the author. On 12 July 2016, B.A.E.C. sent a subsequent email to Primelime, again, neutral as to the particular issuing B.A.E.C. company, adjusting a portion of the rates previously issued (**July email**). The May and July emails together formed the original contract (**Contract**).

B.A.E.C. commenced work on the quarry site on 14 July 2016 under an agreement to issue payment claims every 14 days and that payment was to follow 14 days later. On 22 August 2016, B.A.E.C. Electrical prepared site drawings to assist in the performance of the works. All invoices had been issued by B.A.E.C. Contracting.

On or about 20 January 2017, it was common ground that the Contract was terminated but the parties did not agree on how that occurred. Primelime said B.A.E.C. repudiated the Contract which was accepted by Primelime as a discharge of the Contract. B.A.E.C. Contracting claimed that the termination was by agreement and referred to a letter it had issued to Primelime on 23 January 2017 confirming the termination of the Contract while reinforcing their right to receive payment for works completed prior to the date of demobilisation.

Pursuant to an adjudication determination under the *Building and Construction Security of Payment Act 1999* (NSW) (**Act**), an adjudicator found in favour of B.A.E.C. Contracting.

Primelime challenged the adjudicator's decision, contending that the adjudicator had no jurisdiction as B.A.E.C. Contracting was not a party to the Contract and there was no available reference date following the termination of the Contract.

Decision

The court allowed the appeal finding that the adjudicator did not have jurisdiction as there was no available reference date following the termination of the Contract.

First issue: who are the parties to the contract?

The court held that the better view was that B.A.E.C. Electrical, rather than B.A.E.C. Contracting, was the party to the Contract because the schedule of rates accompanying the May email clearly identified B.A.E.C. Electrical.

The court took this view even though the invoices were issued by B.A.E.C Contracting, and Primeline's director had made a statutory declaration which stated that he entered into a verbal agreement with B.A.E.C Contracting. However, as Primeline was successful on the second issue, McDougall J considered it unnecessary to make an express finding on the first issue.

Second issue: Reference date on and from which the payment claim could be made

The court found that nothing suggested the contractually determined reference date in the Contract survived termination of the Contract and, relying on *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52 (analysed in our Security of Payment Roundup of 2016 cases on page 17), held that there was no statutory right to make a payment claim on or after 20 January 2017.

Further, the court dismissed B.A.E.C. Contracting's argument that a 'fresh' contract was created between Primeline and B.A.E.C. Contracting based on the 23 January 2017 letter under which B.A.E.C. Contracting retained the right to payment as the fresh contract did not specify a reference date. His Honour noted that the 23 January 2017 letter simply conveyed consensual termination and B.A.E.C. Contracting's entitlement to payment for works completed up until the date of demobilisation. The letter did not extend to a suggestion that the work was completed under a contract other than the original contract so as to alter the requirements under section 8(2)(b) of the Act. Further, this was not the way in which the matter was put to the adjudicator.

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Liquidation results in stay of recovery proceedings

Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq); Ostwald Bros Pty Ltd (in liq) v Seymour Whyte Constructions Pty Ltd [2018] NSWSC 412

David Pearce | Petrina Macpherson | Elissa Morcombe

Key Point

The Supreme Court of New South Wales has stayed recovery proceedings under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) in light of the mandatory set off procedure under section 553C of the *Corporations Act 2001* (Cth).

Significance

Where a contractor goes into liquidation after receiving an adjudication decision, but before filing the adjudication certificate for enforcement, they remain a 'claimant' under Part 3 of the Act. The court found that *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 (***Façade***) (analysed in our Security of Payment Roundup of 2016 cases on page 29) was plainly wrong in concluding the contrary on this point. However, recovery proceedings will nonetheless be stayed under the mandatory set off procedure in section 553C of the *Corporations Act 2001* (Cth).

The case also confirmed that the courts are prepared to rectify contractual errors where they are satisfied that they were a common mistake.

Facts

Seymour Whyte Constructions Pty Ltd (**Seymour Whyte**), as contractor, entered into a contract with Ostwald Bros Pty Ltd (**Ostwald**), as subcontractor, to perform road works on the Pacific Highway. The contract, which comprised of three documents, contained inconsistent provisions about the time limit to pay after a payment claim was made. The Subcontract Conditions provided payment was due 'within 30 days of the end of month of claim', while the Special Conditions purported to displace this and provided payment was required within '15 Business Days'.

After Seymour Whyte terminated the contract, Ostwald made a successful adjudication application but was subsequently liquidated after a period of voluntary administration. Seymour White then commenced proceedings, seeking a declaration that the adjudication determination was void and a stay of any judgment arising from the filing of an adjudication certificate. The issues were:

- should the contract be rectified to delete the inconsistent clause in the Special Conditions;
- was Ostwald's adjudication application therefore made in time;
- did Ostwald lose its entitlement as 'claimant' under the Act as a result of being in liquidation, following the Victorian Court of Appeal's decision of *Façade*; and
- whether recovery under the Act should nonetheless be stayed because Ostwald was in liquidation.

Decision

Stevenson J ordered rectification of the contract and for all recovery proceedings to be stayed until the process in section 553C of the *Corporations Act 2001* (Cth) was complied with. In coming to this decision, his Honour made the following findings:

- The contract should be rectified to refer only to 'within 30 days of the end of month of claim', in accordance with the actual and common intention of the parties ascertained by the pre-contractual evidence.
- Accordingly, Ostwald made its adjudication application in time.
- Ostwald remained a 'claimant' under Part 3 of the Act despite being in liquidation. His Honour found the decision of *Façade* was 'plainly wrong' and should not be followed.

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Queensland

Oppressive material can lead to indemnity costs order

John Holland Pty Ltd v Adani Abbot Point Terminal Pty Ltd (No 2) [2018] QSC 48

Petrina Macpherson | Lachlan Pramberg

Key Point

This case highlights the supply of excessive material in court proceedings can be held to be oppressive resulting in indemnity cost orders in certain circumstances.

Significance

Practitioners need to be aware that producing excessive material in court proceedings may be regarded as oppressive by the courts and any material provided must be relevant and presented in a coherent and organised manner.

Facts

This case was an application for costs in the Supreme Court of Queensland before Jackson J relating to an earlier application for leave to appeal under section 38 of the *Commercial Arbitration Act 1990* (Qld) between John Holland Pty Ltd (**applicant**) and Adani Abbot Point Terminal Pty Ltd (**respondent**). The application took two days and involved in excess of 2,000 pages of affidavit material.

The application for costs was commenced by the respondent on the basis that the application for leave to appeal involved three special or unusual features that warranted an order for costs to be awarded on an indemnity basis. Prior to analysing the respondent's submissions, his Honour outlined the grounds on which indemnity costs are assessed.

The recurring theme throughout the case law presented by his Honour is that for costs to be awarded on an indemnity basis there has to be some special or unusual feature to justify a court departing from the ordinary practice.

Decision

Jackson J concluded there was an oppression in the material filed in support of the application and therefore indemnity costs were awarded in favour of the respondent.

In reaching his decision Jackson J addressed the three unusual features of the applicant's case as presented by the respondent.

His Honour agreed that the applicant's leave to appeal was abuse of process

The respondent argued the first unusual feature in the applicant's leave to appeal was abuse of process by oppression.

His Honour held a variety of factors can make litigation oppressive including, unnecessary or unwinnable contentions and unreasonable factual assertions which combine to cause excessive expense and delay for the other party and a disproportionate burden on the court's resources. Jackson J agreed with the respondent and concluded the application was so extensive and wide ranging as to the proposed grounds of appeal that it was not possible on reading it to identify what were the questions of law which would have been the limited subject of the proposed appeal.

His Honour rejected the two grounds of unmeritorious submissions and deficiencies within the application

The additional two grounds raised by the respondent, unmeritorious submissions and deficiencies within the application, were rejected by his Honour.

In respect of the unmeritorious submission it was found that whether a point sought to be advanced on appeal is within the scope of the case, is an everyday question of law in appellate practice. It does not attract a sanction just because it is resolved against an appellant.

In refuting the respondent's submission on the deficiencies within the applicant's submissions Jackson J held that the number of points on which an applicant fails is not, of itself, a basis for awarding indemnity costs.

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Interlocutory injunction successful in stopping enforcement of BCIPA adjudication decision

Low v MCC Pty Ltd & Ors; MCC Pty Ltd v Low [2018] QSC 6

Andrew Orford | Elissa Morcombe

Key Point

The Supreme Court of Queensland granted an interlocutory injunction to an owner challenging the validity of two adjudication decisions made against it for progress payments upon completion of 'Frame Stage' of construction.

Significance

The policy behind the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIPA**) will not prevent the grant of an interlocutory injunction to restrain the enforcement of an adjudication decision where the validity of that decision is being challenged. The decision deviates from the reasoning in *Wiggins Island Coal Export Terminal Pty Ltd v Sun Engineering (Qld) Pty Ltd* [2014] QSC 170 (**WICET**).

Facts

Alvin Low (**Owner**) applied for an interlocutory injunction to restrain enforcement of two adjudication decisions until the validity of those decisions was determined.

The dispute arose after the Owner and MCC Pty Ltd (**Builder**) entered into two construction contracts. Each contract provided for progress payments upon completion of a number of stages, including the 'Frame Stage'. After the progress payments were initially not made upon the alleged completion of the Frame Stage, the Builder served the Owner with payment claims and subsequently obtained two adjudication decisions.

The Owner commenced proceedings seeking declarations that the adjudication decisions were void. He alleged that the reference date for the Frame Stage had not been reached as the Frame Stage was not complete due to the Builder's failure to install:

- light steel framing on external and structural walls;
- floor joists; and
- frames for internal partitions.

The Builder submitted that upon proper construction of the contracts, the Frame Stage was completed and a reference date arose on 4 August 2017. Alternatively, the Builder submitted that it was entitled to a progress payment because the Frame Stage constituted 'Practical Completion'. The contracts defined Practical Completion as including when the owner takes possession of the land when they are not entitled to do so. The Builder argued that Practical Completion occurred on 4 August 2017, as the Owner excluded the Builder from site by changing the temporary fencing and refusing access by security contractors.

In applying for the interlocutory injunction the Owner submitted that the policy of BCIPA does not support the payment of an invalid adjudication decision that is susceptible to be declared void.

In reply, the Builder argued that an injunction would defeat the policy of BCIPA that payment is to be made promptly of an amount established by an adjudication decision.

Decision

Jackson J granted the injunction to restrain the builder from enforcing the adjudication decisions because:

- the Owner's submissions about the progress of the Frame Stage were sufficient to establish there was a serious question to be tried; and
- the balance of convenience favoured granting the injunction.

His Honour considered the following factors in determining the injunction was in the balance of convenience:

- an injunction would not defeat the policy of BCIPA. Despite there being no express policy that there must be a payment in respect of an invalid adjudication decision, the Owner's claim was comparable to the exception provided in section 31(4) of BCIPA for orders to set aside adjudication certificates. The declaration and injunction sought by the Owner had the same effect in substance, and the undertaking by the Owner to lodge a bank guarantee with the register also fulfilled the same purpose as a payment into court as required by section 31(4);
- the policy of BCIPA likewise does not support dismissal of the application on discretionary grounds, as suggested by WICET;
- the Owner's case could not be characterised as weak;
- there was nothing to suggest the proceeding would not be heard promptly; and
- the Builder was not likely to suffer loss or damage beyond the cost of being kept out of the money payable under the adjudication certificates.

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Arbitrator's independent reasoning upheld

Mango Boulevard Pty Ltd v Mio Art Pty Ltd [2018] QCA 39

David Pearce | Sam Rafter

Key Point

Arbitral awards are binding on the parties.

Significance

The decision of an arbitrator, based on considerations outside of the scope of the contract, will be binding provided the parties have the opportunity to address that reasoning during the arbitration.

Facts

Mango Boulevard Pty Ltd (**Mango Boulevard**) and Mio Art Pty Ltd (**Mio Art**) were parties to a joint venture which was formed in 2003 pursuant to a number of agreements, including a share sale agreement (SSA). Under the SSA, Mio Art agreed to sell half of its shares in the joint venture company, Kinsella Heights Developments Pty Ltd (**Kinsella**) to Mango Boulevard. At the date of the SSA, Kinsella was entitled to become the registered proprietor of a parcel of land for $22 million.

The purchase price of those shares was to be calculated in accordance with a prescribed formula in the SSA, which was based on the value of the land and payable at a later date once Kinsella had obtained a preliminary approval for a material change of use of the land.

Specifically, the SSA prescribed that one of the assumptions on which the land was to be valued was that 'the Project would achieve a Profit on Cost Percentage return of 25%'.

The valuation mechanism in the SSA prescribed that disputes as to the value of the shares were to be submitted to arbitration. Despite the prescribed valuation mechanism, it was apparent the arbitrator's decision was based on an assumption that a competent and prudent developer would not buy the land unless they reasonably believed they could make a profit of 30% – 40% (which was not submitted by either party).

Mango Boulevard applied to set aside the arbitrator's award under sections 34(2)(ii) and 34(2)(b)(ii) of the *Commercial Arbitration Act 2013* (Qld) (**Act**), submitting the arbitrator's introduction of his own methodological approach to value involved a fundamental departure from the requirements of procedural fairness, being a consideration under those sections of the Act. Specifically, it was argued that the reasoning was only raised after the evidence had closed and it was not put to witnesses who were said to be affected by the reasoning. The primary judge dismissed Mango Boulevard's argument and Mango Boulevard appealed to the Court of Appeal.

Decision

The Court of Appeal dismissed Mango Boulevard's appeal, finding that there was no departure from procedural fairness and, accordingly, that no ground was established under sections 34(2)(a)(ii) or 34(2)(b)(ii) of the Act.

The Court of Appeal found that:

- the arbitrator clearly raised the possibility of his reasoning during final addresses;
- Mango Boulevard had made oral submissions on the subject in the arbitration after the subject was first raised by the arbitrator; and
- Mango Boulevard did not attempt to lead further evidence or recall any of its witnesses to address the arbitrator's reasoning, despite not being denied the opportunity of doing so.

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Brevity does not constitute a jurisdictional error!

Watkins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd [2018] QSC 65

Andrew Orford | Petrina Macpherson | Sam Rafter

Key Point

The case is a reminder that parties have limited rights to review an adjudicator's decision under the *Building and Construction Industry Payments Act 2004* (Qld) (**Act**).

Significance

Adjudicator decisions won't be set aside for jurisdictional error for brevity if they are sufficient and reveal a foundation and logical basis for the decision.

Facts

Hyatt Ground Engineering Pty Ltd (**Hyatt**) was a subcontractor engaged by Watkins Contracting Pty Ltd (**Watkins**) to carry out grouting works on a large concrete plinth. While performing the works, Hyatt's drill rig slipped while on the concrete plinth and rolled on to its side. As a result of this incident, Watkins contended that the head contract it had entered into with the principal was terminated and that it had terminated the subcontract with Hyatt for breach of contract.

Hyatt served a payment claim on Watkins pursuant to the Act, claiming $479,488.10 for works performed under the subcontract.

Watkins' payment schedule stated that the scheduled amount was 'nil' on the basis that there was no valid reference date for the purpose of sections 12 and 17 of the Act because at the time the payment claim was served on Watkins the subcontract had been terminated by Watkins following the drill rig incident.

Watkins' adjudication submissions contended that Hyatt had breached obligations in the head contract relating to safe work practices, obligations in Hyatt's SHE Work Method Statement (**SHEWMS**), being a document Hyatt was required to prepare under legislation, and certain implied terms relating to carrying out the work in a proper and tradespersonlike manner, safely and without negligence.

Hyatt denied that it had breached the subcontract and that it had been validly terminated.

The adjudicator highlighted that Watkins' submissions did not address why the obligations in the head contract or SHEWMS should be incorporated into the subcontract, nor did they address why the implied terms should be implied into the subcontract as a matter of law. Accordingly, the adjudicator found that they did not form part of the subcontract, the subcontract was not validly terminated and there was a valid reference date for the purposes of the sections 12 and 16 of the Act and determined the adjudicated amount to be the entire amount claimed by Hyatt.

Watkins applied to the Supreme Court for an order that the decision was void on the basis of jurisdictional error because:

- the adjudicator refused to consider Watkins' submission that the subcontract had been terminated, which, if accepted, meant that there was no reference date for the purposes of the Act and the adjudicator had no jurisdiction to adjudicate the payment claim under the Act; or
- the adjudicator ignored its submissions, substantially denying it natural justice.

Decision

Brown J found that the adjudicator did consider, albeit briefly, Watkins' submissions as to jurisdiction and did not make a jurisdictional error nor deny Watkins natural justice. Further, her Honour found that the reasons for rejecting the incorporation into the subcontract of express and implied terms were sufficient and effectively resolved the question of whether the subcontract was terminated and whether there was an available reference date under the Act. Accordingly, there was no jurisdictional error.

Her Honour found that as the adjudicator found that the terms did not form part of the subcontract, the adjudicator was not required to consider the question of breach and whether termination had occurred.

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South Australia

No reference date, no payment claim – the importance of correctly identifying a reference date

The Trustee for Allway Unit Trust trading as Westside Mechanical Contracting Pty Ltd v R&D Airconditioning Pty Ltd & Ors [2018] SASC 46

James Kearney | Rebecca Clafton

Key Points

The Supreme Court has applied recent High Court authority in quashing an adjudication determination on the basis the reference date relied on by a claimant did not arise under the contract. The Supreme Court has also confirmed that the *Building and Construction Industry Security of Payment Act* 2009 (SA) (**Act**) does not allow for the concept of 'premature' payment claims on the basis that the wording of the Act entitles a claimant only to serve a payment claim 'on and from' a reference date, and not prior to that date.

Significance

This case serves a good example of the importance of properly considering and identifying what, if any, reference date is available before making a payment claim under the Act. A failure to do so creates both a risk of jurisdiction arguments being raised as well as creating a risk that the Act's prohibition against more than one payment claim being served in respect of each reference date is offended.

The decision also aligns the position in South Australia with that of New South Wales in rejecting the concept of 'premature' payment claims being valid. This contrasts with the present position in Victoria where, in a number of cases, the Victorian Supreme Court has determined premature claims are to be treated as enlivened on and from the occurrence of the next reference date under the Victorian security of payment legislation.

Facts

On 6 October 2016, Westside Mechanical Contracting Pty Ltd (**respondent**) and R&D Airconditioning Pty Ltd (**claimant**) entered into a subcontract for the claimant to perform mechanical services installation works at the Department of Defence's AIR 7000 Project at the RAAF Base at Edinburgh, South Australia (**Contract**).

The claimant ceased work under the Contract in October 2017, though it maintained that the Contract had not been terminated; rather, the respondent had simply asked the claimant to leave the site, and the claimant had agreed to do so. The respondent contended that the Contract had in fact come to an end as of 31 October 2017, either by the respondent's acceptance of the claimant's repudiation, or alternatively, by the parties' agreeing to terminate the Contract from that date.

On 8 December 2017, the claimant served the respondent with a payment claim, endorsed as a payment claim pursuant to the Act, for the amount of $336,344. The respondent provided a payment schedule denying any liability to pay, noting that the payment claim did not identify a reference date (and in any event, the respondent claimed entitlement to set off amounts).

On 17 January 2018, the claimant brought an application for adjudication of the payment claim. In its adjudication application the claimant nominated a reference date of 23 December 2017, and submitted that whilst the payment claim did not indicate a reference date, the Act did not require that it do so. The Contract specified the time for submission of payment claims as the '23rd day of the month for work done to and including the last day of the month', and allowed for the submission of a final payment claim within 15 days of the works being deemed to be completed. The adjudicator's determination of 2 February 2018 similarly noted a reference date of 23 December 2017, and the adjudicator ultimately determined in the claimant's favour for the amount claimed.

The respondent issued proceedings seeking judicial review, contending that the adjudicator fell into error in concluding that the payment claim had a valid reference date, and that the resultant determination was therefore infected by jurisdictional error.

Decision

The court held that the adjudicator's determination was affected by jurisdictional error and should be quashed.

In doing so, it cited the recent High Court case of *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty* Ltd [2018] HCA 4 (analysed in our Security of Payment Roundup of 2017 cases on page 22) which clarified that judicial review of an adjudicator's determination under the Act is confined to review for jurisdictional error.

The court followed the decision in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52 (analysed in our Security of Payment Roundup of 2016 cases on page 17), where the High Court accepted that the existence of an available reference date was a necessary precondition to the making of a valid payment claim under the Act.

The court found that the Contract had been terminated by the parties in late October 2017 and as a result no reference date of 23 December 2017 could arise pursuant to the Contract. The court found that as consequence the adjudicator's determination, reliant on a reference date of 23 December 2017, was infected by jurisdictional error.

While a reference date of 23 October 2017 was notionally available (and the court considered that despite the claimant making progress claims in respect of that reference date, it had not yet made—for the purposes of the Act—*payment claims* in respect of that reference date), both the claimant's application and the adjudicator's determination were predicated upon a 23 December reference date. Consequently, the court found that the earlier reference date could not provide the adjudicator the requisite jurisdiction to have made the determination in question.

The court also addressed the alternate scenario in which the Contract had remained on foot. Following the decision of the NSW Court of Appeal in *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* [2017] NSWCA 289 (analysed in our Security of Payment Roundup of 2017 cases on page 8), the court found that even if a reference date of 23 December 2017 did arise, the adjudication determination was still infected by jurisdictional error. The court determined that as the payment claim was served on 8 December 2017 it could not be in respect of a reference date of 23 December 2017. The court focused on the wording of section 8 of the Act which entitles a claimant only to serve a payment claim 'on and from' a reference date.

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Victoria

Factors to consider when calculating a quantum meruit for variation works

Mann v Paterson Constructions Pty Ltd [2018] VSC 119

Owen Cooper | Tom Kearney | Bianca Pyers

Significance

This decision confirms that a claim for quantum meruit (a fair and reasonable payment) can be calculated in accordance with the value of the advantage conferred on a benefiting party, and does not have be confined by reference to the contract price or actual costs incurred.

Facts

In 2014, Mr Peter Mann and Ms Angela Mann (**owners**) engaged Paterson Constructions Pty Ltd (**builder**) to construct two units (**contract**). The contract was a major domestic building contracts for the purposes of the *Domestic Building Contracts Act 1995* (Vic) (**Act**).

The owners directed multiple variations throughout the construction of the units. The variations were undocumented yet were carried out by the builder.

A dispute arose between the parties over moneys claimed. The owners purported to terminate the contract and exclude the builder from the site. The parties accused each other of wrongful repudiation of the contract.

The builder initiated proceedings in the Victorian Civil and Administrative Tribunal (**VCAT**). VCAT found that the contract had been wrongfully repudiated by the owners and that the builder was entitled to recover payment for the works on a quantum meruit basis. VCAT ordered the owners to pay the builder $660,526.41 in accordance with expert evidence provided by a quantity surveyor regarding the value of the building works.

The owners appealed, arguing that:

- the proper test for the value of a quantum meruit claim was to assess a fair and reasonable value by taking into account a range of specified matters, including the contract and the actual costs sustained;
- section 38 of the Act restricted the builder's right to claim for quantum meruit for variations.

Decision

The court dismissed the appeal.

Quantum meruit – how best to measure the value?

Cavanough J determined that actual costs incurred and the contract price are not the only relevant considerations available to an assessor. His Honour decided, in accordance with *Sopov v Kane (No 2)* (2009) 24 VR 510, that the measurement of a quantum meruit can be based on the value of the benefit conferred on the receiving party. Cavanough J concluded that VCAT was entitled to adopt the quantity surveyor's expert evidence regarding the value of the benefit conferred by the variation work.

Domestic Building Contracts Act – rights to variations under the Act and at common law

Section 38 of the Act provides that a builder is not entitled to recovery any money for a variation to a contract unless certain specified conditions are met.

Cavanough J confirmed, by reference to *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, that a restitutionary claim for payment of a quantum meruit is not a contractual claim but rather a claim at common law. Given the pro-consumer nature of the Act, parties often consider that such provisions will be interpreted to protect owners. However, taking a strict view on section 38 of the Act, his Honour concluded that section 38 of the Act does not prevent a party from making a restitutionary claim for payment of a quantum meruit.

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Western Australia

Another adjudication determination quashed for jurisdictional error – the continuing trend in WA

Clough Projects Australia Pty Ltd v Floreani [2018] WASC 101

Tom French | Chris Hey

Key points

An adjudicator may adjudicate more than one payment dispute between parties, without the consent of the parties, where the adjudicator is satisfied that doing so will not adversely affect his or her ability to adjudicate the dispute fairly and as quickly, informally and inexpensively as possible.

Making a determination on a basis not argued by either party is a denial of procedural fairness and will result in jurisdictional error.

Making a determination on the basis of an implied contract, and not on the basis of the contract under which the adjudication application is brought, will result in jurisdictional error.

Significance

This case confirms that an adjudicator may adjudicate more than one payment dispute between parties, without the consent of the parties, where the adjudicator is satisfied that doing so will not adversely affect his or her ability to adjudicate the dispute fairly and as quickly, informally and inexpensively as possible.

The case also provides a timely reminder that an adjudicator will deny the parties procedural fairness where the adjudicator makes a decision on a basis not advanced by either of the parties, without inviting further submissions from the parties on that point.

Facts

Clough Projects Australia Pty Ltd (**respondent**) and the Oceanic Offshore Pty Ltd (**claimant**) entered into a lump-sum subcontract under which the claimant was to provide diving services at Mundaring Weir (**Subcontract**). The Subcontract contained a provision that the claimant could not vary the work without a written direction from the respondent. In May and June 2017, the claimant issued fifteen separate invoices, nine of which were disputed by the respondent.

On 17 October 2017, the claimant served an adjudication application on the respondent, seeking payment of $605,963 in relation to the disputed invoices, which the claimant characterised as a single 'payment dispute' under the *Construction Contracts Act 2004* (WA) (**Act**). The adjudicator determined that the invoices constituted fifteen separate payment claims, which had given rise to nine separate payment disputes. Nonetheless, the adjudicator determined that on the proper construction of section 32(3)(c) of the Act he had jurisdiction to determine the nine separate payment disputes simultaneously without first obtaining the consent of the respondent.

Having concluded that he had jurisdiction to determine the payment disputes, the adjudicator was required to consider the respondent's contention that the claimant had no entitlement to payment in respect of certain variation claims because no written directions had been provided. In finding that the claimant had a partial entitlement to payment for seven of the nine payment disputes, the adjudicator found that a separate implied contract arose in relation to certain variations. This was not a submission advanced by either party.

The respondent applied to the Supreme Court of Western Australia to quash the determination.

Decision

Ultimately, Tottle J held that the adjudicator was entitled to adjudicate one or more payment disputes between the same parties without both parties' consent; however, the adjudicator fell into jurisdictional error by:

- denying the respondent procedural fairness by making the determination on a basis that was not advanced by either party; and
- making a determination on the basis of an implied contract that he found to have been formed, and not on the basis of the Subcontract under which the adjudication application was brought.

In finding that section 32(3)(c) of the Act permitted an adjudicator to adjudicate a payment dispute simultaneously with one or more other payment disputes, Tottle J considered that such a construction of the Act was consistent with the plain language of the section, the Act's object to determine payment disputes 'fairly and as quickly, informally and inexpensively as possible' and the extrinsic materials available.

However, the court considered that the adjudicator's finding that one or more implied contracts had been formed between the parties was not readily available on the parties' submissions. The respondent should have been given the opportunity to respond to matters prejudicial to its interests that were known only to the adjudicator and which might have been taken into account in the adjudicator's final determination of the issues. The adjudicator's failure to invite submissions amounted to a denial of procedural fairness.

Further, the adjudicator's jurisdiction was limited to adjudicating payment disputes under the Subcontract. By making the determination on the basis of implied contracts, Tottle J considered that the adjudicator exceeded his jurisdiction.

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