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Construction Law Update

May 2018

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Legislative update

Commonwealth

Brace yourself: a national security of payment regime based on the NSW model may be coming

National review of security of payment laws

Peter Wood | Andrew Orford | Richard Crawford | Tom French | Andrew Hales | Nikki Miller | Laura Berry

On 21 May 2018, the Australian government released John Murray AM's final report on the national Review of Security of Payment Laws. In the report, Murray recommended that the Australian government work closely with all state and territory governments to adopt nationally consistent security of payment laws based on the NSW security of payment legislation.

The review

On 21 December 2016, the federal government announced that Murray was tasked with identifying best legislative practice with a view to improving consistency across all states and territories in terms of the level of protection afforded to contractors.

As part of the review, Murray carried out an extensive process of targeted consultations with key stakeholders across all levels of governments, business, unions and other interested parties. The majority of stakeholders agreed that the construction industry would benefit from a nationally consistent legislative model, however, there were differing views on whether the legislation should be based on the 'east coast' or 'west coast' model.

The recommendations

Murray recommended that security of payment legislation across the nation should be based on the 'east coast' model after determining that it is best able to facilitate the prompt payment of progress claims. He was persuaded by the fact that a failure to respond to a progress claim served on the east coast results in the claimed amount being deemed to be a debt which is capable of being enforced in court proceedings. In comparison, the west coast model does not provide for immediate consequences if a respondent fails to reply to a progress claim.

More particularly, Murray recommended that all states and territories adopt laws based on the New South Wales legislation after determining that:

- all payment claims should be subject to the same process, in contrast to the composite system that currently operates in Queensland;
- the respondent should not be permitted to provide any new or additional reasons in its adjudication response, as both the Queensland and Victorian legislation currently allow (at least in certain circumstances); and
- the legislation should not exclude certain claimed amounts, as is currently the case in Victoria.
- However, Murray recommended that some drastic changes be made to the New South Wales regime, including the addition of:
- a right for the respondent to request additional time to provide its adjudication response; and
- a right for a party that is aggrieved with an adjudication decision to apply for an adjudication review (in certain circumstances and subject to appropriate restraints).

In total, Murray made 86 different recommendations in his complete report Review of Security of Payment Laws.

What's next?

As legislative responsibility for security of payment rests with the states and territories, whether Murray's recommendations are adopted will be determined by the government of each state and territory. In his report, Murray expressed concern that the states and territories would 'cherry pick' from his recommendations.

While the federal government cannot introduce the recommendations itself, it has said that it is *'committed to working closely with all Building Ministers around the country'* to *'harmonise the various state and territory security of payments laws'*.

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In the Australian courts

New South Wales

Because I said so! Adjudicators' obligations to give reasons explored

Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd [2018] NSWCA 107

Richard Crawford | Jessie Jagger

Key Point: The New South Wales Court of Appeal (**NSWCA**) has overturned the Supreme Court's decision that an adjudication determination was void due to allegedly insufficient reasons given by the adjudicator.

Significance

The trend towards confining the circumstances in which an aggrieved person may judicially review an adjudication determination has continued. The NSWCA has confirmed that an adjudicator's obligation under section 22(3) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOPA**) to *'include the reasons for the determination'* does not require the reasons to be adequate or sufficient.

Facts

On 26 February 2018, the respondent (**head contractor)** to the appeal, Fulton Hogan Construction Pty Ltd (**Fulton Hogan**), applied to the Supreme Court seeking a declaration that an adjudication determination in the amount of $8,189,348.54 made in favour of the appellant (**subcontractor**), Cockram Construction Ltd (**Cockram**), should be set aside.

The adjudicator determined that a relevant subcontract clause was not a valid condition precedent to Cockram's entitlement to an extension of time under the subcontract, such that Fulton Hogan's claim for liquidated damages as set-off to the payment claim failed. The condition precedent in question was that Fulton Hogan had *'received an equivalent extension of time'* under its head contract with Transport for NSW and was rejected by the adjudicator on the basis of the *'pay when paid'* prohibition in the SOPA.

At First Instance – adjudicator had fallen into jurisdictional error

At first instance, Fulton Hogan argued that the adjudication determination rejecting the set-off claim was void as the adjudicator had failed to perform her statutory function by allegedly refusing to apply what she considered to be the correct construction of the condition precedent clause because she found that it was not *'legitimate'*.

Ball J agreed with Fulton Hogan that the adjudication determination should be set aside. His Honour noted that Fulton Hogan's argument on the condition precedent ground had developed at hearing into

(at [22]) *'the question whether the Adjudicator gave adequate reasons for refusing to apply that clause of the Subcontract'*.

Cockram contended that the condition precedent clause was void due to section 12 of the SOPA (concerning 'pay when paid' provisions). Ball J disagreed, finding (at [28]) that the adjudicator did not expressly refer to section 12 of the SOPA and her reasons were *'simply a matter for speculation'*. The adjudicator had therefore fallen into jurisdictional error by the failure to comply with section 22(3)(b) of the SOPA.

Contentions put forward to Court of Appeal

Cockram contended that any failure to comply with the requirement for reasons involved jurisdictional error. Fulton Hogan's position was that:

- the adjudicator's reasons for refusal to deny Cockram's extension of time claim indicated a refusal to apply the condition precedent, thereby resulting in failure to comply with section 22(3)(b) of the SOPA; and
- the adjudicator must have had additional and unstated reasons for upholding the extension of time claim and, accordingly, failed to comply with section 22(2)(b) of the SOPA (for not considering the terms of the contract in so far as they were relevant to an issue in dispute and relied on by a party).

On appeal – adjudication determination reinstated

The NSWCA overturned the Supreme Court decision, reinstating the adjudication determination.

Meagher JA, with whom Barrett AJA joined, held:

- section 22(3)(b) does not require reasons to *'be adequate according to any objective criterion'* (at [34]). The adjudicator had visibly based her finding on the premise that the condition precedent depended upon something happening under a different contract and that the clause was not *'legitimate'* and *'workable'*; and
- the descriptions the adjudicator gave the condition precedent were capable of amounting to reasons and constituted consideration of the required matters. The adjudicator had not fallen foul of section 22(2) of the SOPA merely because her conclusion was that a provision of the contract was not to be applied, whether or not that was legally correct.

Basten JA:

- dismissed Fulton Hogan's primary challenge as placing a *'gloss'* on section 22(3) of the SOPA and being *'misconceived'* because it required speculation as to the adjudicator's true reasoning process which is irrelevant to the question of whether the adjudication determination provided constituted written reasons; and
- found that the adjudicator had in fact considered the condition precedent, complying with section 22(2) of the SOPA. Fulton Hogan's submission required an *'illegitimate assumption'* that the adjudication determination was legally incorrect, thereby allowing the conclusion to be made that her reasons were legally inadequate to justify the decision.

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Show me the money! Builders being made to pay under the Home Building Act.

Kurmond Homes Pty Ltd v Marsden [2018] NSWCATAP 23

Richard Crawford | Ashley Murtha

Key Point: The Civil and Administrative Tribunal of New South Wales (**Tribunal**) did not err in making a money order instead of a work order under section 48O of the *Home Building Act 1989* (NSW) (**HB Act**) despite section 48MA of the HB Act stating that the preferred outcome is a work order.

Facts

A builder and homeowners entered into a contract on 25 March 2011 with a contract price of $296,500.00. The builder commenced work on 21 July 2011 and practical completion was achieved around 22 June 2012.

The parties fell into dispute over defects. Complaints were made to the Department of Fair Trading and a rectification order was issued. The dispute was not resolved so proceedings at the Tribunal were commenced.

At the Tribunal hearing the builder conceded that works should be completed in accordance with the method of rectification proposed by the homeowners' expert. The Tribunal acknowledged several factors that supported making a work order, including that the builder wished to return to site and knew the job and would be able to keep costs down.

Despite this, the Tribunal ordered that the builder pay the homeowners the sum of $231,770.71.

The builder appealed the decision arguing that the Tribunal erred by making a money order rather than a work order. The builder argued that:

- there were no factors that would impede a work order being made and the Tribunal should not have considered the builder's prior misconduct in respect of unrelated matters. Therefore the Tribunal failed to weigh the competing factors and evidence appropriately;
- in the alternative, the evidence did not displace the principal in section 48MA of the HB Act that rectification of defective work by the responsible party is the preferred outcome.

Decision

The Appeal Panel of the Tribunal dismissed the builder's appeal and upheld the Tribunal's decision.

The Appeal Panel referred to section 79U(2)(g) of the *Fair Trading Act 1987* (NSW) (**Fair Trading Act**) which specifically states that the Tribunal can consider the conduct of the parties in relation to similar transactions when making orders.

Further, the consumer protection purpose of both the Fair Trading Act and the HB Act means that the repeated failure of a builder to comply with its obligations under consumer contracts may be relevant in determining what form of orders should be made.

The Appeal Panel noted that the conduct identified by the Tribunal arose in relation to the work which was the subject of the present dispute or was conduct in other projects that occurred thereafter. The conduct demonstrated a continuing attitude of the builder not to comply with its obligations under its contract with the homeowners and under the HB Act.

With respect to the *'preferred outcome'* of a work order in section 48MA of the HB Act, the Appeal Panel noted that:

- section 48MA does not mandate that a work order must be made in all cases;
- the usage of 'preferred' is not defined and the HB Act and the Regulations do not specify circumstances in which the preferred outcome is not to be adopted; and
- the Second Reading Speech for the amendment introducing section 48MA by the Minister for Fair Trading made it clear that section 48MA was to operate as a preference, not an absolute right.

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Obligations to use reasonable endeavours – what is reasonable?

Tamanna v Zattere; Thakorlal v Zattere; Rabac Pty Ltd v Zattere [2017] NSWSC 1388

Richard Crawford | Nick King | Stephaine Skevington

Key Point: The Supreme Court of New South Wales considered whether a vendor of land had met its contractual obligations to use reasonable or best endeavours to achieve registration of specified documents by a sunset date, in the context of purported rescissions by the vendor.

Significance

The court found that the vendor's rescissions were invalid as the vendor had not met its reasonable endeavours obligations under the contract and could not rely on its own default. It had failed to undertake a degree of planning and preparation sufficient to identify the steps that would need to be taken (including alternative strategies), and the timing of those steps, in order to achieve registration by the sunset date.

Facts

The court considered three separate proceedings together. The plaintiffs were multiple purchasers under contracts for sale of lots in a proposed 21 lot subdivision at 31 Memorial Avenue, Kellyville.

The contracts for sale:

- were expressed to be conditional upon registration of a plan of sub-division and registration of an instrument under 88B of the *Conveyancing Act 1919* (NSW) (together, the **Documents**);
- contained a provision that if the Documents were not registered by 31 December 2014 (**Sunset Date**), either party had the right to rescind the contract; and
- required that the vendors to use their best endeavours (or in other cases their reasonable endeavours) to have the Documents registered by the Sunset Date.

Development of the property as proposed required access to a downstream property for stormwater and sewer purposes. This involved obtaining the consent of the owners of that property (**Schembri family**) as a precondition to obtaining the construction certificate and registration of the Documents.

The Schembri family were not prepared to give consent. However, a developer (**Pearson**) who had an option to purchase the Schembri family land, was planning to develop it and initially indicated willingness to provide the required consent. Ultimately, consent was not provided by either Pearson or the Schembri family and the Documents were not registered by the Sunset Date.

After the Sunset Date, the vendor purported to rescind the sale contracts as a result of the Documents not being registered by the Sunset Date. The purchasers initially sued for specific performance on the basis that the rescissions were wrongful and that the contracts were still on foot. However, specific performance became impossible once the property was sold by a receiver. The purchasers then accepted that the contracts were repudiated by the vendor and claimed damages for loss of bargain.

Decision

The court held that the vendor's rescissions were invalid as the vendors had breached their reasonable endeavour or best endeavour obligations.

It was common ground between the parties that if the reasonable endeavours obligation was breached, the best endeavours obligation would also be breached. It was therefore not necessary for the purposes of this case to distinguish between 'best' and 'reasonable' endeavours.

The court found that the vendor was required to undertake a degree of planning and preparation sufficient to identify steps to be taken and times by which they would need to be taken in order to achieve registration of the Documents by the Sunset Date. There was no evidence the vendor did any such planning, but had it done so it should have been clear to the vendor that the most reasonable

alternative available in order to ensure registration was achieved by the Sunset Date, was to make an early application under section 88K of the *Conveyancing Act 1919* (NSW). This would have allowed easements to be imposed by the court in a timely way. Instead, the vendor pursued a strategy of negotiations with Pearson, which was attended by a degree of uncertainty that fell short of compliance with the vendor's obligations to use its reasonable endeavours to achieve registration by the Sunset Date.

As the purchasers were found to be ready, willing and able to perform their obligations at all relevant times, they were entitled to damages (which were considerable, given rising land values in the area).

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Make sure you have a reference date before you go to adjudication

Trinco (NSW) Pty Ltd v Alpha A Group Pty Ltd [2018] NSWSC 239

Richard Crawford | David Bell

Key Point: After terminating a contract which had no provision for reference dates to accrue after termination, a subcontractor was left with no available reference date to claim for work performed prior to that termination. As earlier payment claims had already utilised the final available reference dates under the contract, the disputed payment claim including the relevant work was found to be invalid.

Significance

Contractors/Subcontractors should insist on including a specific reference date that accrues on, or continues to accrue following, the termination of a contract (including termination for convenience).

Facts

Trinco (NSW) Pty Ltd (**Trinco**) and Alpha A Group Pty Ltd (**Alpha**) were in dispute as to a determination made by an adjudicator pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOPA**). The central issue was whether a payment claim issued by Alpha was made *'on or from a reference date'*, as required by the SOPA.

On 6 March 2017, Trinco (**head contractor**) and Alpha (**subcontractor**) entered into a written subcontract for Alpha to perform tiling and silicone work on a project at Mascot (**Written Subcontract**). The Written Subcontract was a 'construction contract' for the purposes of the SOPA. It provided for progress claims to be made on the 25th day of each month but made no provision for reference dates to accrue after termination.

From 6 June to 8 June 2017, after Alpha had carried out some of the work, the parties exchanged a series of emails relating to certain disputed work and the continuation of the Written Subcontract. It is unnecessary to go into the detail of these emails other than to note that, in a confusing exchange, the parties seemingly agreed, on 7 June 2017, to terminate the Written Subcontract, only for Trinco to purportedly 'reject' that termination on 8 June 2017 and insist that Alpha continue on the same terms but with an altered scope of works. Alpha then returned to the site on a number of days between 8 June and 11 August 2017 and performed the work.

The progress claims

Alpha served three progress claims during the course of their engagement with Trinco. The first, dated 25 May 2017, claimed $12,350. The second progress claim, dated 26 June 2017, was not in evidence and the amount claimed was unknown. Progress claim 3, dated 7 September 2017, was the payment claim the subject of the adjudication. While giving evidence, Mr Alizada of Alpha agreed that the disputed sum of $65,875 in progress claim 3 was the total amount claimed by Alpha *'for work under the Written Subcontract'*. The two remaining amounts claimed by progress claim 3 were $120,697.50 for lost profit (later withdrawn during adjudication) and $27,511 for *'extra work'*, which Mr Alizada explained was for work *'performed by Alpha after 7 June 2017'*.

The adjudication

The adjudicator determined that, despite the purported termination on 7 June 2017, the work valued at $65,875 claimed in progress claim 3 was done pursuant to the Written Subcontract. He upheld this claim but found that the claim for extra work was not made out.

Decision

McDougall J overturned the adjudicator's decision and found no available reference date existed for the amount of $65,875 in progress claim 3. Consequently, this aspect of progress claim 3 was not valid and the adjudicator lacked jurisdiction to determine the adjudication application. The analysis is broken down as follows.

Identification of the 'construction contract'

McDougall J found that, despite Trinco's attempted 'rejection' of the termination, the legal effect of the email exchange constituted, on 7 June 2017, a mutually agreed termination of the Written Subcontract and, on 8 June 2017, an offer by Trinco to engage Alpha to perform the work specified in the relevant email on the same terms.

On that basis, Alpha's conduct in returning to the site and performing the works specified in the email amounted to an acceptance of the offer. At that point, a fresh subcontract for the performance of those works came into existence (**New Subcontract**), in circumstances where Alpha's existing obligation to perform them had been discharged by termination of the Written Subcontract. McDougall J found, on that analysis, that work done prior to 7 June 2017 was performed under the Written Subcontract and work done from 8 June 2017 onwards was performed under the New Subcontract that came into existence on that day.

Was there a reference date?

As noted above, the Written Subcontract made no provision for reference dates to accrue after its termination. Therefore, the termination on 7 June 2017 had the effect of discharging both parties from further performance and, relevantly, limiting Alpha's rights under the Written Subcontract to those accrued at the date of termination. McDougall J noted that these points follow directly from the High Court's decision in *Southern Han Breakfast Point Pty Ltd (In Liq) v Lewence Construction Pty Ltd* [2016] HCA 52 (**Southern Han**) (analysed in our Roundup of 2016 Security of Payment cases), where the form of contract considered by the High Court was not materially distinguishable from the Written Subcontract.

According to McDougall J's analysis, the New Subcontract did make provision for reference dates. As Alpha continued to perform work up until 11 August 2017, reference dates arose on 25 June, 25 July and 25 August 2017. The first of those could have been used to support the second progress claim, dated 26 June 2017. Relevantly, the third date was an available reference date for progress claim 3, dated 7 September 2017, but only in respect of its work performed under the New Subcontract.

Under what contract was the third progress claim made?

Trinco argued that, leaving aside the claims for extra work and loss of profit, the work that was the subject of progress claim 3 was all done under the Written Subcontract, which had been terminated. Alpha did not dispute that the Written Subcontract was terminated on 7 June 2017. Rather, Alpha's case was that the work in question had been done under the New Subcontract.

McDougall J held that the work that was the subject of progress claim 3 comprised two elements (ignoring the withdrawn claim for loss of profit). The first element was work done under the Written Subcontract prior to 7 June 2017, which comprised the work claimed at $65,875. This claim had been allowed by the adjudicator. The second element was work done under the New Subcontract after 7 June 2017, which comprised the 'extra work' valued at $25,711. That claim was not allowed by the adjudicator.

McDougall J cited *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 as authority for the principle that service of a valid payment claim is one of the basic and essential requirements for the existence of an adjudicator's determination. That is, if there were no valid payment claim here, the adjudicator lacked jurisdiction to entertain and determine the adjudication application (in relation to the $65,875 claim).

To the extent that progress claim 3 was made under the Written Subcontract, there was no available reference date to support it, because the contractual provision for reference dates did not survive termination. As the Written Subcontract was terminated on 7 June, the final reference date under that contract was 25 June 2017, which had already been used for the second progress claim dated 26 June 2017. Alternatively, to the extent that progress claim 3 was made under the New Subcontract, there would have been an available reference date, but the work in question – which, according to Mr Alizada, was performed on or prior to 7 June 2017 – was not performed under the New Subcontract. The absence of a reference date under the Written Subcontract was therefore fatal to the validity of progress claim 3 considered as a payment claim.

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Queensland

Utmost good faith requirement – a reminder that contractual context is important

Clarence Property Corporation Limited v Sentinel Robina Office Pty Ltd [2018] QSC 95

Michael Creedon | Mark Wheelahan | Sam Rafter

Key Point: Obligations of 'utmost good faith' in contracts are still limited by the scope of the obligations under the contract and the interpretation of the contract as a whole.

Significance

An obligation to act in the utmost good faith in co-owners dealings with each other was not breached by conduct outside the course of the relationship governed by the contract.

Facts

On 25 September 2015, Sentinel Robina Office Pty Ltd as trustee for the Sentinel Robina Office Trust (**Sentinel**) and Clarence Property Corporation Limited in its capacity as responsible entity of the Westlawn Property Trust (**Clarence**), together the **Co-Owners**, agreed to purchase as tenants in common a 16-storey commercial office building in Robina known as the 'The Rocket' from Robina Projects Australia Pty Ltd (**RBA**) for a sum of $70,050,000. At contractual close, Sentinel and Clarence entered into a Co-Owners Deed which stipulated the terms on which the parties would acquire The Rocket and hold it once acquired. The purchase was completed on 16 October 2015.

Simon Kennedy was the national manager of the commercial and industrial portfolio of the Sentinel group and became the manager of The Rocket in June 2016. At that time, a dispute arose between the Co-Owners and RBA as to the value of a post completion rental guarantee contained in the contract of sale. Mr Kennedy and a representative of RBA were able to reach a settlement that was accepted by both parties regarding the value of the rental guarantee payment.

In February 2017, impressed by Mr Kennedy's work in relation to the settlement of rental guarantee dispute, a director of Clarence, Mr Fahey advanced the possibility of Mr Kennedy being employed as head of property management of the Clarence group of companies. After some further discussions, Mr Kennedy resigned from the Sentinel group and commenced his employment with Clarence.

Sentinel commenced proceedings alleging amongst other things that Clarence had breached clause 16.9(a) of the Co-Owners Deed which provided that *'the parties agree that in the performance of their respective powers under this deed and in their respective dealings with each other, they shall act in*

the utmost good faith' by employing Mr Kennedy because Clarence had 'enticed' or 'poached' Mr Kennedy secretly, without disclosing its intention to do so to Sentinel.

If Clarence had breached the Co-Owners Deed, a contractual buy-out mechanism would be engaged and Clarence would be required to transfer a half-interest in The Rocket to Sentinel.

Decision

Jackson J found that the employment of Mr Kennedy by Clarence had not been a breach of the obligation to *'act in the utmost good faith'* contained in the Co-Owners Deed. His Honour found that Clarence's offer of employment to Mr Kennedy did not occur in the course of the Co-Owners' respective dealings with each other within the meaning of clause 16.9(a) of the Co-Owners Deed.

Additionally, in noting that the Co-Owners Deed expressly provided that the Co-Owners were not partners, the court highlighted that the extension of the concept of *'utmost good faith'* into areas outside the course of the relationship under the Co-Owners Deed would potentially curtail the autonomy each Co-Owner would otherwise enjoy.

Importantly, his Honour also found that Mr Kennedy's involvement with The Rocket was limited and only part of his national role managing various properties and his role within the Sentinel group.

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Tasmania

Adjudication of payment claims – is there a valid claim?

Forico Pty Limited v Sive [2018] TASSC 21

Alison Sewell | Chris Hey | Jess Dallimore

Significance

An adjudicator does not have jurisdiction to determine a claim under the *Building and Construction Industry Security of Payment Act 2009* (Tas) (**Act**) where there is no building and construction contract.

Where the works under a building and construction contract have been completed and the parties' respective obligations are at an end, a claimant has no further right to issue a payment claim under section 12 of the Act because there is no building and construction contract.

Facts

In November 2014, Forico Pty Ltd (**respondent**) entered into a contract with SEMF Pty Ltd (**applicant**) for the design, project management and construction supervision (**Contract**) of a new infeed deck, log yard and seal at the respondent's premises. Practical completion of the project was achieved on 22 July 2015; however, the applicant continued to undertake project management services and civil design services relating to defects until June 2017. Despite the applicant's requests, the respondent did not agree that the existing Contract would be extended for works post July 2015.

In August 2017, the applicant sent the respondent a payment claim claiming payment for professional services from August 2015 to May 2017 for the amount $98,430.66. The respondent issued a payment schedule stating that it would not make payment. The applicant lodged an adjudication application under section 21 of the Act. The adjudicator determined that there was a valid payment claim made under the Contract and the respondent was required to pay the applicant the sum of $98,430.66.

The respondent's primary ground for relief was that the adjudicator did not have jurisdiction to make the determination because the payment claim issued in August 2017 was not a payment claim within

the meaning of the Act, in that the applicant did not undertake to supply building or construction related services under a building or construction contract as claimed.

Decision

Marshall AJ held that the adjudicator did not have jurisdiction to make the determination and ordered that the determination be quashed and that the judgment in favour of the applicant be set aside.

His Honour held that the service of a valid payment claim is a jurisdictional pre-condition to the conduct of a valid adjudication and that the claim must be in relation to work carried out pursuant to a building and construction contract. His Honour agreed with the respondent's submissions that the evidence did not support a finding that the parties had entered into a building or construction contract pursuant to which the applicant undertook to supply the services set out in its payment claim.

His Honour considered that an email sent in August 2015 which attached a tax invoice titled *'Final Project Management invoice as agreed'* brought to an end the parties' obligations under the Contract. The payment claim issued in August 2017, which formed the basis of the adjudication determination, was therefore not a payment claim of the requisite character under section 12 of the Act because the work referred to in the accompanying tax invoice was not the subject of agreement between the parties.

Notably, in concluding that there was no agreement between the parties for the work claimed in the payment claim, his Honour did not provide any comments on the effect of the words *'or other arrangement'* in the definition of *'building or construction contract'* under section 4 of the Act.

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Victoria

The court has the final say on jurisdiction of arbitral tribunals

Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd [2018] VSC 221

Alison Sewell | Tom Kearney | James Webster

Significance

Section 16(9) of the *Commercial Arbitration Act 2011* (Vic) requires the court to conduct a full rehearing de novo (ie as if being heard for the first time) to decide the proper jurisdiction of the dispute and not simply judicial review of the arbitral tribunal's decision.

Legislation

Section 16(9) of the *Commercial Arbitration Act 2011* (Vic) (**CAA**) provides:

> *If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the Court to decide the matter.*

Facts

The respondent Platinum Construction (Vic) Pty Ltd (**builder**) subcontracted the applicant Lin Tiger Plastering Pty Ltd (**subcontractor**) to undertake building works on two Melbourne properties (**subcontracts**).

The subcontracts contained dispute resolution clauses which provided that:

- all disputes between the builder carrying out domestic building work and the subcontractor on that work, are 'domestic building disputes' pursuant to the *Domestic Building Contracts Act 1995* (Vic) (**DBCA**) and therefore to be determined by VCAT (clause 41.2); and
- any other disputes were to be submitted to arbitration (clause 41.4).

A dispute arose between the parties regarding the subcontracts and the builder commenced arbitration to resolve the dispute.

The subcontractor contended that the arbitrator did not have jurisdiction to determine the matter and that the dispute should be determined by VCAT. The arbitrator determined that he had jurisdiction to resolve the dispute.

The subcontractor appealed the question to the Supreme Court under section 16(9) of the CAA.

Decision

Croft J determined that section 16(9) of the CAA requires the court to conduct a full rehearing de novo (ie as if being heard for the first time) to decide the proper jurisdiction of the dispute, as opposed to a judicial review verifying that there were no errors of law in the arbitrator's decision.

His Honour found that the arbitrator had jurisdiction to determine the dispute.

Croft J decided:

- The DBCA did not apply to the subcontractor's works because the works were of a single type. Regulation 7 of the *Domestic Building Contracts Regulations 2017* (Vic) provides that the DBCA does not apply to building works carried out under a contract for one type of work only. The scope of works in the subcontracts was for installation of a variety of items such as wall systems, insulation, frames and ceilings. Croft J determined these works were all properly categorised as plastering works and therefore the DBCA did not apply and VCAT did not have jurisdiction for the dispute.
- Clause 41.2 did not affect the arbitrator's jurisdiction because the parties could not by agreement refer a matter to VCAT which was not already in VCAT's jurisdiction. If the subcontracts had been domestic building contracts, then arbitration clauses would be prohibited under section 14 of the DBCA, and therefore clause 41.2 was redundant.

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