MinterEllison

Construction Law Update

June 2018

Contents

- **Making an application to strike out or for summary judgment? Know the rules! A UCPR refresher**
  Ockendon & Anor v Ryan & Ors [2018] QDC 94
- **Strict compliance with performance security instrument essential for payment**
  Santos Limited v BNP Paribas [2018] QSC 105

Tasmania

- **Statutory construction – importance of purpose of objects of the statute and the legislative history and context**
  Webster v Leighton [2018] TASSC 22

Victoria

- **Contractual clauses unable to limit statutory periods for misleading and deceptive claims**
  Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd [2018] VSC 246
- **A right to have recourse to security turns on the particular facts in each case**
  Orange Building Solutions Pty Ltd v Inkerman Property Group Pty Ltd (Building and Property) [2018] VCAT 696
- **Minor defects and non-compliances will not necessarily prevent a stage of construction being achieved so as to disentitle a builder to a progress payment**
  Sightway Construction Pty Ltd v Jayasinghe (Building and Property) [2018] VCAT 676
- **Multiple payment claims under one reference date – new or replacement claim?**
  Valeo Construction v Pentas [2018] VSC 243

Western Australia

- **WA courts have the power to sever parts of adjudication determinations affected by jurisdictional error**
  Duro Felguera Australia Pty Ltd v Samsung C&T Corporation [2018] WASCA 28
- **Adjudicator's power to make determinations over 'hybrid' contracts**
  Samsung C&T Corporation v Duro Felguera Australia Pty Ltd [2018] WASCA 27
- **Implied provisions in the CCA can only be implied into construction contracts to the extent that specific provisions are absent from the contract**
  Total Eden Pty Ltd v Charteris [2018] WASC 60

Legislative update

Commonwealth

Changing Driving Laws to Support Automated Vehicles

National Transport Commission Policy Paper

David Pearce | Amy Dunphy | Michael Thomas

On 29 May 2018 the National Transport Commission (**NTC**) published the Changing Driving Laws to Support Automated Vehicles Policy Paper (**Policy Paper**), which outlines recommendations for the implementation of a purpose-built national law for the regulation of Automated Vehicles (**AVs**).

The recommendations made by the NTC were approved by the Transport and Infrastructure Council (**Council**) on 18 May 2018. This represents the latest step in the NTC's broad national reform program, which is designed to put end-to-end regulation in place by 2020 to support the safe commercial deployment and operation of AVs at all levels of automation (see our alerts of 4 August 2017, 25 October 2017 and 26 October 2017).

What has been recommended?

The NTC proposes that a uniform approach is taken to driving laws to regulate AVs through the development of a purpose-built national law that will:

1 allow an Automated Driving System (**ADS**) which is compliant with the safety assurance system to perform the dynamic driving task when it is engaged;

2. ensure there is a legal entity responsible for the dynamic driving task when the ADS is engaged - the Automated Driving System Entity (**ADSE**);

3. clarify who the responsible entity is at each level of automation when the ADS is engaged;

4. provide obligations for relevant entities including the ADSE and the user of the AV; and

5. provide a regulatory framework with flexible compliance and enforcement options.

Obligations on the ADSE

The NTC proposes that when the ADS is engaged in the dynamic driving task at conditional, high or full automation (being levels 3 to 5 respectively in the Society of Automotive Engineers (**SAE**) International Standard J3016, '*Taxonomy and Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles*), the ADSE should be responsible for compliance with obligations associated with the dynamic driving task. The new laws will also identify any additional duties and obligations that an ADSE will be responsible for that do not form part of the dynamic driving task.

The NTC has chosen this approach because the ADSE identified under its safety assurance scheme will be the entity with the most control over the ADS.

The ADSE will only be responsible for tasks within its control and will not (except for narrow exceptions) be responsible for 'non-dynamic driving' task obligations which have been placed on a driver. The limited 'non-dynamic driving task' obligations for which the ADSE will be responsible could, for example, include a requirement to comply with directions of a police officer directing traffic.

Readiness to drive obligations on users at conditional automation

New readiness-to-drive obligations are proposed to apply for human 'fall-back ready users' in AVs engaged at conditional automation (SAE level 3). This is consistent with the NTC's view that the ADS is in control when it is engaged at conditional automation.

The NTC's concern is that if fall back users are engaged in secondary activities they may not be able to sufficiently resume the dynamic driving task if required.

The NTC recommended that at conditional automation human users (even if not driving at all times) must nevertheless:

1. remain sufficiently vigilant to respond to ADS requests, mechanical failure, or emergency vehicles and regain control of the vehicle without undue delay when required;
2. hold the required driver's licence; and
3. comply with drug, alcohol and fatigue obligations.

The NTC will, however, continue to monitor technological developments and international approaches to secondary activities being performed by a fall back user.

No readiness to drive obligations on passengers in dedicated automated vehicles

The NTC recommended that in a Dedicated Automated Vehicle (**DAV**), there will be no obligation on any user of the vehicle to be ready to drive or take control of the vehicle at any time. This is because, for example, even if there is a driver's seat, it may not be occupied.

The NTC defines a DAV as a vehicle with no manual controls enabling it to be driven by a human driver so that the ADS is always performing the dynamic driving task.

Next Steps in Law Reform

To facilitate the implementation of a purpose-built national law, the NTC will be conducting a legislative analysis of the model Australian Road Rules and the Heavy Vehicle National Law to identify which driver duties fall within the dynamic driving task and which of these duties should be the responsibility of the ADS when it is engaged.

The NTC is to coordinate a national working group with membership from the states, territories and the Commonwealth to agree to a nationally consistent approach to the analysis of state, territory and Commonwealth legislation. This analysis is to be completed by the end of November 2018 ahead of the May 2019 meeting of the Transport and Infrastructure Council.

Further recommendations of compliance and enforcement options as well as potential offences, penalties and sanctions for driving laws are also to be made to the Transport and Infrastructure Council at its May 2019 meeting.

| back to Contents

Queensland

Queensland's new security of payment regime delayed until December 2018

Building Industry Fairness (Security of Payment) Bill 2017 (Qld)

Andrew Orford | Petrina Macpherson

On 10 November 2017, the Queensland Government passed the *Building Industry Fairness (Security of Payment) Bill 2017* (Qld) (**BIFSOP Act**).

The provisions in the BIFSOP Act introducing Project Bank Accounts commenced operation on 1 March 2018 for government contracts for the construction of fixed structures where the contract sum is between $1million and $10million.

A number of provisions of the BIFSOP Act, including the repeal and replacement of the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIPA**), the *Subcontractors' Charges Act 1974* (Qld) (**SCA**) and amendment of other related legislation were expected to commence on 1 July 2018.

However, by a media release on 12 June 2018, the Minister for Housing and Public Works, Mick de Brenni MP, advised that these amendments will not come into effect until at least December 2018.

Minister de Brenni said:

> '*In the interests of business confidence, we will commence these reforms in tranches, and following industry consultation of the next tranches, I will introduce BIF Act amendments into the House to progress the next stages of reform.*
>
> *I intend for these provisions to commence on 17 December 2018.*'

The media release did not provide any further information as to the 'tranches' in which the legislation will commence operation. However, it did state that a further discussion paper would be released for industry consultation in the coming weeks and that an approved regulation for Minimum Financial Requirements in the Queensland building industry will be in operation from 1 January 2019.

| back to Contents

Victoria

Changes to the Victorian Building Act and new Building Regulations

Building Amendment (Enforcement and Other Measures) Act 2017 (Vic) and *Building Regulations 2018* (Vic)

Owen Cooper | Tom Kearney | Frank Aloe

Summary

Recent legislative changes have resulted in a number of amendments to the *Building Act 1993* (Vic) (**Act**) as well as the introduction of the new *Building Regulations 2018* (Vic) (**Regulations**).

Key changes in the amended Act

The *Building Amendment (Enforcement and Other Measures) Act 2017* (Vic) makes a number of changes to the Act. These amendments come into force on **1 July 2018**.

New offence provisions

The new provisions prohibit:

- representing or implying that a person is registered or able to carry out certain work unless appropriately registered as a building practitioner (sections 169 to169C of the amended Act);
- carrying out certain work unless appropriately registered as a building practitioner (sections 169D to 169F of the amended Act); and
- a body corporate carrying out or undertaking to carry out work as a registered building practitioner unless it has a nominee director who is appropriately registered as a building practitioner (section 169G of the amended Act).

The registration of corporations as building practitioners

Amendments to the Act also introduce a new Division 1A of Part 11, dealing exclusively with the registration of building practitioners, allowing for:

- the registration of body corporates as building practitioners (section 170(b) of the amended Act); and
- the appointment of 'nominee directors', required for the registration of body corporates and where a body corporate carries out or undertakes to carry out building work (section 171B of the amended Act).

Key changes in the new Regulations

The Regulations came into force on 2 June 2018, repealing the *Building Regulations 2006* (Vic) and the *Building (Interim) Regulations 2017* (Vic). Updates include:

- new forms and further requirements relating to permits, orders and notices;
- changes to allow for electronic use of documents for permits;
- updated requirements for the chief officer, building surveyors and building practitioners in relation to documenting performance solutions;
- new building permit reporting requirements commencing on 1 July 2019;
- new obligations for building surveyors to provide notice 30 days prior to a building permit lapsing to minimise lapsed permits;
- obligations on building surveyors and the owner to inform the adjoining owner about protection work;
- introducing a new mandatory notification stage and inspections if the building work includes fire and smoke resistant building elements; and
- formalising the process for granting a determination to treat two or more allotments as a single allotment for the purpose of a building permit application.

| back to Contents

In the Australian courts

Australian Capital Territory

ACT builder still liable for substandard work over a decade after building completed

Koundouris v The Owners - Units Plan No 1917 [2017] ACTCA 36

Richard Crawford | Claire Laverick | Jessie Jagger

Key Point: Rectification of defects in residential buildings in the ACT constitutes residential building work and must be carried out in accordance with the Building Act statutory warranties. Contracts of sale allow a subsequent purchaser to succeed to the accrued rights of the previous owner and action those rights for up to 6 years after accrual.

Significance – up to 10 years of liability

ACT builders subject to statutory warranties should be aware that, depending on the circumstances, they could be liable under the statutory warranties for defective building work for up to 10 years (under the *Building Act 2004* (ACT) (**2004 Act**) after the works are completed.

Background to the claim

Mr Koundouris was employed by Koundouris Projects as the licensed builder to construct a residential 10-unit complex called 'Lagani' in Canberra. A certificate of occupancy was issued on 20 December 2000 and the units were sold to individual owners during the period that the *Building Act 1972* (ACT) (**1972 Act**) was in force.

The unit owners encountered various defects, including water ingress and cracking to masonry, brickwork and facades. Between 2001 and 2008, Mr Koundouris unsuccessfully attempted to rectify these defects.

Between 2010 and 2013, the owners corporation rectified the building at its cost. The owners corporation commenced proceedings in order to recover damages for breach of the statutory warranties under the 1972 Act and the 2004 Act (together the **Acts**). Under the 1972 Act, there is a 5-year statutory warranty period for defective building works that have been, or will be, carried out

from the date of the certificate of occupancy, compared to 6 years under the 2004 Act (for structural elements).

At first instance, the ACT Supreme Court determined that statutory warranties had been implied into all contracts of sale entered into by unit owners during the applicable statutory warranty period, with those warranties having been breached by the builder on the date of completion of the contract (thus restarting the applicable limitation periods). Accordingly, Mr Koundouris was found to be liable in respect of two units whose claims were found to have been brought within time. The remaining unit owners required an extension of time to the general limitation period which the trial judge denied.

Mr Koundouris appealed and the owners corporation cross-appealed, each on various grounds.

ACT Court of Appeal dismisses builder's appeal

In finding in favour of the owners corporation, the ACT Court of Appeal confirmed the following points.

- The builder is not required to be a party to the contract of sale for a subsequent purchaser to gain implied warranties
- The Acts do not require a builder to be a party to the contracts of sale for the statutory warranties to apply. This would be inconsistent with the purpose of the legislation as a whole. Section 58C of the 1972 Act and section 88 of the 2004 Act each creates a legal relationship between the builder and other persons, whether or not the legal relationship already exists. The court ruled that the warranties are implied into all contracts of sale entered into during the applicable statutory warranty period, even if the builder is not a party to such contracts.
- There was a contract to do residential building work.

Mr Koundouris argued that the relevant gateway to section 58C(1) of the 1972 Act applying against him was not fulfilled because he was not party to a 'contract to carry out residential building work' for the owners corporation. However, the court held that the oral employment contract between Mr Koundouris and Koundouris Projects was such a contract within the meaning of section 58C(1) of the 1972 Act (even though it was not specific to the construction of Lagani) as (amongst other things):

- the contract required him to carry out building work as directed by his employer;
- he was employed as a construction and project manager under the contract; and
- he held a building licence which his employer used for the project.

It was not necessary for there to be a contract between Mr Koundouris and Koundouris Projects specific to the construction of the Lagani project to satisfy section 58C(1) of the 1972 Act, with the conclusion that the statutory warranties were therefore actionable against Mr Koundouris in his personal capacity.

Scope of statutory warranties

The court held that an actionable right based on the statutory warranties in the Acts may arise in two ways after the expiry of the original statutory warranty period applicable to the works:

- the builder performs rectification work during the statutory warranty period which does not comply with the warranties (ie is defective or fails to fix the issue); or
- the relevant property is on-sold during the relevant warranty period, meaning the subsequent purchaser gains the benefit of the statutory warranties implied into their sale contract.

As to the first point, the Court of Appeal held that, if rectification works are undertaken during the prescribed warranty period which do not comply with the statutory warranties, there will be a separate breach of the warranties (in addition to the initial breach in respect of the defective building works). The Court of Appeal found that there had been a final breach of the statutory warranties when the defects remained unremedied in 2008 at the expiry of the applicable statutory warranty periods. Therefore, the claims of the owners corporation and those of the unit owners were found to have been brought within time.

As to the second point, the Court of Appeal held that subsequent purchasers gain implied warranties based on their contract of sale. In this case, the court found that these warranties were breached by the builder on the date of completion of the contract of sale, thus restarting the applicable limitation periods. Accordingly, if a defective residential building is the subject of a contract for sale entered into during the statutory warranty period, as the statutory warranties will be implied into this contract of sale, the defects will give rise to a fresh breach and the commencement of a new limitation period. They do not rely on the subsequent purchaser having a contract with the builder.

However, notwithstanding the above (which could operate to leave builders liable for up to 12 years after completion of the original building work under the 2004 Act), the longstop date for bringing an action against a builder is 10 years after a certificate of occupancy is issued (by virtue of section 142 of the 2004 Act).

The High Court has recently dismissed Mr Koundouris' application for special leave to appeal.

| back to Contents

New South Wales

Residential building contractors: Be certain who you are contracting with

AJ Gouros Investments Pty Ltd trading as Adelaide Concrete Polishing & Grinding Pty Ltd v Pongraz [2018] NSWCATAP 129

Richard Crawford | Claire Laverick | Richard Cornwell

Key Point: The interesting factual scenario in this case demonstrates that contractors for residential building work may be directly exposed to home owners and their successors in title for breach of the warranties under section 18B of the *Home Building Act 1989* (NSW) (**Act**) where those owners are not party to any contract for the relevant building work.

Facts

The respondents, Ms Pongraz and Mr McAlpine (**Owners**) are the owners of a residence that was built by Simonds Industries Pty Ltd (**Simonds**). The appellant, AJ Gouros Investments Pty Ltd trading as Adelaide Concrete Polishing & Grinding (**AJG**), was engaged to polish an exposed concrete floor in the residence to a 'mirror finish' (**Polishing Works**). Relevantly, Ms Pongraz was employed by Simonds as a sales assistant and used a Simonds email server with a Simonds logo and email signature to request a quotation for the Polishing Works from AJG. AJG responded to Ms Pongraz's email with a quotation addressed to 'Simonds Homes'. Ms Pongraz personally signed this quotation and returned it. AJG subsequently issued its terms and conditions for the supply of goods and services to Simonds (which did not identify the relevant goods and services), which were signed by Mr Simonds on behalf of the company (**Trade Agreement**). The Polishing Works were paid for by the Owners.

The Owners subsequently commenced proceedings in the NSW Civil and Administrative Tribunal (**Tribunal**) claiming that the Polishing Works were poorly finished and featured pitting. The Owners claimed that they had a contract with AJG for the Polishing Works and that AJG breached the statutory warranties in section 18B of the Act pursuant to which, inter alia, the contractor warrants that the residential building work will be carried out with due care and skill.

AJG disputed the Owners' claim on the following grounds:

- the Polishing Works were carried out properly, but substandard slab construction by others resulted in a poor quality finish and pitting; and
- there was no contract between AJG and the Owners in respect of the Polishing Works, as the contract was between AJG and Simonds. Accordingly, AJG claimed the Owners lacked standing.

At first instance

The Tribunal found that the Owners had the benefit of the warranties under section 18B of the Act by way of section 18D(1A) of the Act, which extends the warranties to a 'non-contracting owner', being an owner of the relevant land (and its successors in title) who is not a party to the contract. The Tribunal considered it unnecessary to make any specific finding as to the identity of the parties to the contract for the Polishing Works and found that AJG had breached the implied warranties.

Before the Appeal Panel

AJG sought review of the Tribunal's interpretation of the Owners as 'non-contracting owners' and challenged whether section 18D(1A) enabled a home owner to recover against a subcontractor. The Owners argued that they had contracted directly with AJG, as Ms Pongraz had dealt with AJG in her personal capacity on behalf of the Owners. At issue was the identity of the counterparty (or counterparties) to the agreement for the provision of the Polishing Works.

Decision

No contract between the Owners and AJG

The Appeal Panel held that there was no contract between AJG and the Owners for the Polishing Work, but there was a contract between AJG and Simonds. Whilst the Trade Agreement did not specify the work, the accompanying documents indicated that the parties understood the works comprised the Polishing Works. This fact, and Mr Simonds's execution of the Trade Agreement, led the Appeal Panel to conclude that there was a contract between AJG and Simonds.

It reasoned that Ms Pongraz's signing and returning of the quotation not addressed to her was, at best, an offer to engage AJG on the same terms as those offered to Simonds. Notwithstanding that payments were made by the Owners directly to AJG, there was no evidence to demonstrate that AJG had made a general offer capable of acceptance by the Owners or that AJG accepted the change of the contracting party to the Owners or Ms Pongraz. Therefore, no concluded contract came into effect when Ms Pongraz returned the signed quotation.

Were the Owners non-contracting parties for the purposes of section 18D(1A)?

Yes. The Appeal Panel considered that the Owners fell within the definition non-contracting owners. Accordingly, the Owners could enforce the section 18B warranties against AJG.

In coming to this decision, the Appeal Panel considered whether the Polishing Works had been sub-contracted by Simonds to AJG, which would have prevented the Owners from being non-contracting owners (per the decision in *The Owners – Strata Plan 74602 v Brookfield Australia Investments Ltd* [2015] NSWSC 1916, analysed in our December 2015 – June 2016 edition). Whilst the Appeal Tribunal accepted this was an unusual case as the Owners had specifically excluded the Polishing Work from their contract with Simonds, there was no contract between Simonds and the Owners to perform the works. Therefore the Polishing Works could not be said to have been subcontracted by Simonds to AJG. The only contract to perform the Polishing Works was between Simonds and AJG, to which the Owners were not a party.

What if the Appeal Panel was wrong?

The Appeal Panel expressly noted that, if its analysis was wrong, there were three other interpretations, each of which would have led it to dismiss the appeal:

- there was a contract for the Polishing Works:
  - between AJG and the Owners;
  - between AJG and Simonds, but Simonds was the undisclosed principal of the Owners,

  and in each case the Owners would be entitled to enforce the statutory warranties; or
- there was no relevant contract for the performance of the Polishing Works, in which case it was arguable that AJG was liable for breach of the consumer guarantees under the Australian Consumer Law.

| back to Contents

Costs of applying to set aside an adjudication determination - competent junior counsel would have sufficed

Brefni Pty Ltd v Specific Industries Pty Ltd [2018] NSWSC 578

Richard Crawford | Andrew Hales | Kawshi Manisegaran

Key Point: Even though costs were awarded on an indemnity basis, the successful party was denied the costs of retaining both senior and junior counsel.

Significance

If the issues to be determined in an application to set aside an adjudication application do not warrant the retention of senior and junior counsel, it is unlikely that the successful party will be awarded costs of senior counsel.

Facts

Brefni Pty Ltd (**Contractor**) entered into a subcontract with Specific Industries Pty Ltd (**Subcontractor**) for the supply and installation of material for a construction project. The Contractor served two payment schedules in response to a payment claim made by the Subcontractor. In a subsequent adjudication, the Contractor failed to lodge a response to the adjudication application served by the Subcontractor within the time allowed by the *Building and Construction Industry Security of Payment Act 1999* (NSW). Consequently, the adjudicator was not entitled to consider the submissions set out in the adjudication response.

The Contractor commenced proceedings seeking to set aside the adjudicator's determination on the basis that the adjudicator had erred by considering the revised payment schedule instead of the first payment schedule served on the Subcontractor. The Contractor also pleaded that it had somehow been misled, by a representation attributable to the Subcontractor, into thinking that the adjudication application had not been served until four days after the stated date of service.

Following the commencement of proceedings, the Subcontractor served two Calderbank letters offering to settle the proceedings on the basis that the adjudicated amount be paid in full within seven days, and that the proceedings thereafter be dismissed with no order as to costs. An important point to note in relation to the question of costs was that the Subcontractor had retained senior counsel and junior counsel in relation to the proceedings.

Decision

The court found that there was no evidence to support the Contractor's explanation for its delayed adjudication response and that the Contractor's complaint about the adjudicator considering the revised payment schedule was unfounded. Additionally, the court found that the Contractor ought to have reconsidered its position as a result of the Calderbank letters.

Cost of two counsel

In principle, the court found that costs should be payable on an indemnity basis from the date the second Calderbank offer expired. However, the court stated that '*this is not, and never was, a case for senior counsel, or for two counsel. It was a case that could and should have been conducted by competent junior counsel*'.

Therefore in relation to costs, the court ordered that subject to any view to the contrary taken by a costs assessor, the indemnity costs awarded were not to include the costs of senior counsel nor the costs of two counsel. What was allowed were '*the reasonable costs of briefing competent junior counsel, to be assessed so far as possible on the indemnity basis*'.

| back to Contents

Supporting statements – when is service of a payment claim rendered invalid?

Central Projects Pty Ltd v Davidson [2018] NSWSC 523

Richard Crawford | Andrew Hales | Lachlan Williams

Key Point: Service of a payment claim is valid even if the accompanying head contractor supporting statement contains errors and inaccuracies.

Significance

Principals will not be able to rely on technical arguments regarding deficiencies in a head contractor supporting statement to impugn the validity of a payment claim. Ball J also provides an interesting insight into his Honour's position on supporting statements by stating (in obiter) that a payment claim may be capable of being validly served even where it is not accompanied by a supporting statement, contrary to previous authority on the issue.

Facts

Mr Stephen Davidson (**Developer**) entered into a contract with Central Projects Pty Ltd (**Contractor**) for the construction of a mixed-use development on Curlewis Street in Bondi (**Contract**). On 5 January 2018 (whilst the works were suspended by the Developer), the Contractor served 'progress claim 24' together with supporting documents which included a 'supporting statement by head contractor' (**Payment Claim**). The supporting statement accompanying the Payment Claim (**Supporting Statement**) contained certain errors and deficiencies, including by:

- inserting the name of the Developer instead of a subcontractor at item 1 of the supporting statement, which is intended to identify the contract with a relevant subcontractor (if only one subcontractor performed work covered by the Payment Claim); and
- failing to list, in the accompanying subcontractors schedule, several subcontractors who had supplied goods to the Contractor during the period covered by the Payment Claim.

The Developer failed to serve a payment schedule in response to the Payment Claim, and the Contractor subsequently commenced proceedings against the Developer on 26 February 2018 seeking judgment under section 15 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOPA**).

Decision

Ball J held that the Developer was liable to pay the full amount of the Payment Claim, together with interest and costs, on the basis that the Supporting Statement was a supporting statement within the meaning of section 13(9) of the SOPA.

Arguments

In reaching its decision, Ball J addressed two issues:

- Was the Supporting Statement a supporting statement within the meaning of section 13(9) of the SOPA (**Valid Supporting Statement**)?
- If it was not, is the consequence that the Payment Claim was not validly served on the Developer?

In addressing the first issue, the court accepted the Contractor's submissions that:

- for a supporting statement to be valid, it must meet two requirements:
  - it must be in the prescribed form; and
  - it must contain a declaration required by section 13(9) of the SOPA;
- if it is implicit in section 13(7) of the SOPA that a supporting statement must be accurate and complete, section 13(8) of the SOPA (which imposes a penalty for knowing the statement is false or misleading in a material particular) would have no work to do, or at the very least make little sense; and

- as there is nothing in section 13(9) of the SOPA that requires a supporting statement to list all of the subcontractors, the Supporting Statement was a Valid Supporting Statement.

Ball J rejected the Developer's argument that, for the purpose of section 80 of the *Interpretation Act 1987* (NSW) (**Interpretation Act**), the Supporting Statement was not in the prescribed form because it did not contain all the information that was required. This was rejected on the basis that section 80 of the Interpretation Act concerns itself with the form of a prescribed form and not the accuracy of the contents.

Judicial commentary

In developing reasons for the decision in this case, Ball J expressed an opinion on the interpretation of sections 13(7), 13(8) and 13(9) of the SOPA. The following comments may be useful in considering the future judicial interpretation of these clauses:

- **False or misleading in a material particular**:
  - a supporting statement will be false or misleading in a material particular if it omits one or more subcontractors from the list of subcontractors and that omission is material;
  - a supporting statement will be false or misleading in a material particular if, contrary to the declaration, not all subcontractors have been paid and the amount owed to an unpaid subcontractor is material; and
  - in either case, if a head contractor knows that the supporting statement is false or misleading, the head contractor will commit an offence by serving the statement.
- **Valid service of a progress claim**

  Whilst the court was not required to answer the question of validity of service, his Honour nonetheless provided some commentary on the issue. Notably:

  - his Honour stated that had there been no authority on the consequences of a supporting statement not being a Valid Supporting Statement, the court would have concluded that the failure to serve a supporting statement did not render the Payment Claim invalid;
  - this opinion is in opposition to the current judicial position that a payment claim will not be validly served if is not accompanied by a supporting statement (as concluded by McDougall J in *Kitchen Xchange v Formacon Building Services* [2014] NSWSC 1602 (analysed in our Roundup of 2014 Security of Payment cases) and affirmed in later judgments); and
  - whilst his Honour is of this opinion, it was not necessary to decide this issue given the conclusion that the Supporting Statement was a Valid Supporting Statement.

| back to Contents

'Businesslike and sensible' – How termination clauses are likely to be interpreted

D.R. Design (NSW) Pty Limited v Grand City International Development Pty Ltd [2017] NSWSC 1778

Richard Crawford | Claire Tait | Sophie Wallwork

Key Points: The New South Wales Supreme Court will favour a 'businesslike and sensible' approach to the interpretation of termination clauses and is likely to accept the plain meaning of the text in order to give effect to the clear intention behind a right to terminate. Where the language of a contract is clear as to the intention of the parties, it is unlikely that the courts will imply any rights or obligations into the terms of that contract, including an obligation on the parties to act in good faith.

Significance

The decision serves as a reminder to drafters of contracts that clear and concise wording is required to ensure that the provisions of the contract capture the intention of the parties. It reiterates the

principle that the role of the court is to discover what the parties meant from what they have said. It is not for the court to imply meaning to words or provisions if that meaning was not clearly intended.

Facts

On 8 October 2014 the plaintiff D.R. Design (NSW) Pty Limited trading as Dickson Rothschild (**DR**) entered into a contract with the defendant Grand City International Pty Ltd (**GCI**) for $650,000, plus incentives, to provide GCI with project management and architectural planning services for a mixed use development in Wolli Creek (**Contract**).

The standard terms of the Contract were contained in an appointment letter issued by DR on the same date, including a termination clause which provided that GCI could terminate prior to completion by:

- providing DR with 48 hours' notice, in writing, of termination of the Contract; and
- paying DR the value of the work completed to date including, amongst other things, any outstanding invoices, the value of all work undertaken or disbursements incurred since the last invoice was issued.

On 24 February 2016, GCI issued a letter to DR, under that clause, terminating the Contract. The termination letter stated: '*We hereby give notice that your appointment in accordance with the Appointment Letter is hereby terminated effective immediately*'.

DR raised a number of issues with the termination letter, including that:

- the letter did not give 48 hours' notice of termination;
- GCI was not entitled to exercise a right of termination in bad faith, which it says the exercise of the right was in this case; and
- GCI failed to pay the amounts required under the termination clause.

DR claimed that the notice of termination was ineffective and amount to repudiation of the Contract, which DR accepted. DR claimed it was entitled to recover the value of the work and issued a final invoice on 8 June 2016 for the amount of $942,258 plus interest.

In the alternative, DR claimed that, even if GCI was entitled to terminate the Contract, GCI was still required to pay all outstanding invoices, totalling $82,550, together with amounts said to be due in respect of six variations.

GCI maintained that it had validly exercised the right to terminate under the Contract. GCI disputed the variations, which it asserted were for work that fell within the project scope. In any event, GCI claimed that DR had failed to prove the amounts claimed.

Decision

The court held that:

- GCI's notice of termination was effective and the question of repudiation did not arise;
- three of the six variations were variations for which DR was entitled to recover amounts; and
- DR was only entitled to recover some of the amounts claimed.

Interpretation of the Termination Clause

The court accepted GCI's submissions that the termination clause must be given a sensible, commercial or businesslike interpretation and held that GCI clearly intended for the letter to be given under the termination clause of the Contract.

By adopting that principle, Ball J held the termination clause should be interpreted as requiring notice in writing and as stating that the notice is effective after 48 hours. It made no sense to interpret the clause as requiring the notice to specify the notice period as a condition to its validity. What was important was that the notice was in writing and, whatever it said, took effect 48 hours after it was given.

In relation to DR's claim that the Contract could not be terminated until GCI had paid the amounts set out in clause 2 of the termination clause, the court held that it seemed natural to interpret the payment obligation as a consequence of termination rather than a precondition to the right to terminate and that to interpret it any other way would have odd results.

In relation to DR's claim that GCI was not entitled to exercise a right of termination in bad faith, the court stated that there is no reason to read the right of termination as being qualified by a requirement that it must be exercised reasonably or in good faith, particularly when it is clear from the language of the contract in question that such a requirement was not intended to be imposed on either party.

His Honour explained that, where the effect of a contract depends on the exercise of a discretion given to one of the parties, the courts often take the view that a contract requires that discretion to be exercised reasonably or in good faith. However, that view is not applicable in this case as the Contract clearly expressed a simple right of termination, which was not dependent on the exercise of discretion.

Entitlement to unpaid invoices and variations

In relation to how the amounts payable under the Contract were to be calculated, Ball J held that it was not necessary to determine the precise point that each stage of the work had reached. Under the termination clause, DR was entitled to be paid all unpaid invoices that were due for payment under the Contract and had not been paid at the time of termination, and for the value of the work that had been done since the last invoice on a time basis. The court held that DR was entitled to recover for the time spent since the last invoice on the basis of the electronic database that recorded the persons working on the project and the time recorded against the project.

Ball J did not accept DR's submission that all variation work fell within the project scope. His Honour did not accept that DR had proved an entitlement to the whole of the amounts claimed. The court held that DR bears the onus of proving what work related to which variation. The electronic database did not do this as the description of work was insufficiently clear for the court to be satisfied that the work related to a particular variation. Ball J held that, '*without a complete understanding of all the work that was done on the project at particular times, which was not provided by the evidence, it was not possible to draw any inferences from when the work was done*'. His Honour also rejected evidence from DR personnel as simply seeking to interpret the time entries of others and to express an opinion on whether the entries related to a variation without any personal knowledge of the work done.

| back to Contents

'Based on the above' is only a valid basis for awarding claim if there is a proper evaluation above

Laing O'Rourke Australia Construction Pty Ltd v Monford Group Pty Ltd [2018] NSWSC 491

Richard Crawford | Michelle Knight | Stephaine Skevington

Key Point: In any adjudication under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**), an adjudicator must properly consider the merits of the claimant's claim, even if the adjudicator rejects the respondent's contentions (or those contentions were not put forward in a payment schedule).

Significance

When making an adjudication application, a party must ensure they provide sufficient evidence of the validity of the claim including work carried out, value of the work carried out and the right to payment under the contract.

Facts

The plaintiff, Laing O'Rourke Australia Construction Pty Ltd (**respondent**), engaged the defendant, Monford Group Pty Ltd (**claimant**), as a subcontractor in relation to the Transport Interchange Facility Project at Wickham.

On 22 September 2017, the claimant served a payment claim on the respondent for $3,476,977.33 (**Payment Claim**).

On 6 October 2017, the respondent served a payment schedule under which it did not propose to pay the claimant any amount pursuant to the Payment Claim.

On 20 October 2017, the claimant made an adjudication application in relation to the Payment Claim for $2,724,675.05 for contract works and variations.

On 28 November 2017, the adjudicator found that the claimant was entitled to a progress payment of $1,173,056.24.

The respondent challenged the adjudicator's determination on the basis that the adjudicator had not performed their statutory function and the determination must be set aside. The dispute before the court related to the amount awarded by the adjudicator to the claimant relating to variations, being $590,288.97. The respondent argued that the adjudicator allowed the claimant's claim in relation to 12 claimed variations without considering the merits of the claimant's claims.

Decision

Stevenson J held that the adjudication determination was void. His Honour found that the adjudication determination was made without jurisdiction as, in failing to address the merits of the claimant's claim the adjudicator had not performed his statutory function.

His Honour referred to the relevant authorities which provide that an adjudicator making a determination under the Act has a '*duty…to come to a view as to what is properly payable*' on the '*true merits of the claim*'. The adjudicator cannot simply award the amount of the claim without addressing its merits.

In this case, the adjudicator expressed his conclusions in relation to each of the claimed variations to be *'based on the above'* in the adjudication determination. Stevenson J noted that:

> 'the *'words "based on the above" should be taken to mean, in relation to each variation considered by the adjudicator, the reasons set forth in the immediately preceding paragraphs concerning that particular variation.*'

However, nowhere in the earlier parts of the adjudicator's determination did the adjudicator demonstrate that he had come to a view as to whether the claimant had carried out the work, the value of that work or, for 6 of the 12 challenged variations, whether the work constituted a variation to the contract.

| back to Contents

Owner builders can fix defects too

Leung v Alexakis [2018] NSWCATAP 11

Richard Crawford | Misha Chaplya

Significance

In resolving a claim for a breach of the statutory warranties in section 18B of the *Home Building Act 1989* (NSW) (**HBA**) by a successor in title against an owner builder, section 48MA of the HBA permits a court or a tribunal to make work orders in respect of owner builders, even where those owner builders are no longer licensed to carry out residential building works.

Facts

Leung, the appellant in these proceedings (**Leung**), was the successor in title to residential premises located in Concord (**property**). Alexakis, the respondent in these proceedings (**Alexakis**), was the previous owner of the property. Alexakis held an owner builder permit issued under the HBA, pursuant to which she had carried out residential building work at the property from October 2011. Alexakis sold the property to Leung in about September 2014. At the time of the hearing, Alexakis was no longer licensed to carry out residential building work.

The residential building work which Alexakis had carried out contained a defective stormwater system resulting in a water leak in the basement and surrounding areas (**Defects**) the rectification of which was valued at $100,000. Leung, pursuant to section 18C of the HBA, sought to enforce the section 18B statutory warranties applicable to the residential building work carried out by Alexakis.

At first instance, the New South Wales Civil and Administrative Tribunal (**Tribunal**) ordered, among other things, Alexakis to rectify the Defects by engaging qualified personnel. Leung appealed. On appeal, Leung said that the work order made by the Tribunal should be substituted by an order for Alexakis to pay Leung the sum of $180,600.97. In support of his position, Leung submitted that the Tribunal at first instance erred in law in finding that section 48MA of the HBA applied to owner builders, including those owner builders who were no longer licensed under the HBA.

Accordingly, the primary issue on appeal was whether the principle in section 48MA of the HBA was limited in application to where the person against whom the claim is made will personally do the rectification work.

Section 48MA of the HBA, which does not expressly say whether it applies to owner builders, provides as follows:

> "***48MA Rectification of defective work is preferred outcome in proceedings***
>
> A court or tribunal determining a building claim involving an allegation of defective residential building work or specialist work by a party to the proceedings (the "responsible party") is to have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome [emphasis added]."

Leung argued that:

- Parliament did not intend for section 48MA to apply to owner builders as owner builders are ineligible to obtain home warranty insurance and because inspectors are not permitted to issue work orders to owner builders;
- the work order was inappropriate in that it required third parties to carry out the rectification work, where section 48MA says that the rectification work is to be done by the 'responsible party', and therefore cannot apply to anyone other than a party to the relevant proceedings;
- the language used in section 48MA excluded an order that rectification work be performed by a third party 'on behalf of' the responsible party;
- an order could not be made for some person other than Alexakis to carry out the work because such an order would mean that the works were not carried out 'by the responsible party'; and
- an order could not be made in respect of Alexakis as she was no longer suitably qualified or licensed to carry out the rectification works.

Decision

The Tribunal rejected Leung's arguments.

To determine whether the principle in section 48MA of the HBA was limited in application to where the person against whom the claim is made will personally do the rectification work, the Tribunal asked two questions:

- first, does the word 'party' used in section 48MA include the holder of an owner builder permit; and
- second, to what 'work' in the expression 'work by a party to the proceedings' does section 48MA apply?

No limit to 'party' in section 48MA

In respect of the first question, the Tribunal held that there is no basis to limit the expression 'party' and/or the application of the principle in section 48MA to building claims against person who holds a contractor licence or might otherwise be a person carrying on a business as a builder. Rather it includes the holder of an owner builder permit against whom a building claim is made.

Both work personally done by a party and on its behalf by others fall within 'work by a party to the proceedings' in section 48MA

In respect of the second question, the Tribunal considered that there are two possible interpretations as to what work is included in the expression 'work by a party to the proceedings'. This was either both work done personally or for which the person was responsible, or only work done personally by the party. The Tribunal held that section 48MA applies to building claims involving both work done personally by a party to the proceedings and work done on their behalf. To hold otherwise would mean that an owner builder could simply have others physically do the work on their behalf and thereby avoid any liability of the owner builder to a successor in title and defeat the purpose of section 18C of the HBA.

| back to Contents

Queensland

Implied term that bank guarantee will not expire prior to the defects liability period

Bose v Muggeridge Constructions Pty Ltd [2018] QDC 75

Julie Whitehead | Amy Dunphy | Elissa Morcombe

Key Point: The District Court of Queensland has found a contract contained an implied term that a bank guarantee would not expire prior to the defects liability period.

Significance

Where a bank guarantee is provided on the understanding that its expiry date will occur before the end of the defects liability period (that is, that period extends beyond the expiry of the bank guarantee), the courts may imply a term that the contractor must provide a new bank guarantee to cover the extended period of time.

Facts

The contract

Dipjit Bose and Sujata Bose (**owners**) engaged Muggeridge Constructions Pty Ltd (**contractor**) to construct an apartment building on the owners' land. A written contract was entered into that provided the following material dates for construction:

- date for commencement: 1 August 2016;
- date for practical completion: 11 months after commencement;
- defects liability period: 6 months starting from the date of practical completion.

The contract also provided for security by retention of 5% of the contract sum or, alternatively, by one or more bank guarantees for the same value. The owners were to release 2.5% of the security upon the date of practical completion and the remaining 2.5% on the expiration of the defects liability period.

Timeline of events

The dispute arose after the following series of events:

- 3-7 February 2017: the contractor obtained and provided copies of two bank guarantees for the benefit of the owners, each for 2.5% of the contract sum;
- 29 September 2017: one bank guarantee expired;

- 14 December 2017: practical completion occurred;
- 5-24 March 2018: the owners provided the contractor with a list of defective and incomplete building works and a trade summary and detail, and informed the contractor that they intended to use the remaining bank guarantee to rectify the defects;
- 27 March 2018: the owners attempted to cash the bank guarantee, but the bank refused to honour the copy;
- 29 March 2018: the remaining bank guarantee expired; and
- 16 April 2018: the owners brought an application seeking the contractor to provide a bank guarantee of 2.5% of the contract sum.

Decision

The District Court of Queensland held it was an implied term of the contract that any bank guarantee must remain effective until the end of the defects liability period. Such an interpretation was reasonable and equitable, necessary to give business efficacy to the dealing, so obvious it went without saying and did not contradict any express term of the contract. As the contractor was in breach of this implied term, the contractor was ordered to provide a new bank guarantee of 2.5% of the contract sum.

In arriving at this decision, Farr SC DCJ noted that the parties could not have intended that the owners would be entitled to have security in the form of 2.5% of the contract sum in cash for the defects liability period but not in the form of a bank guarantee. The contract would be illogical and unworkable if the owners were left without security merely because the contractor chose one form of security over another.

| back to Contents

Fail to reveal information about a company in financial difficulty? Beware of non-party costs

Murphy v Mackay Labour Hire Pty Ltd [2018] QCA 90

Michael Creedon | Sarah Ferrett | Lachlan Pramberg

Key Point and Significance

This case highlights the responsibility on non-parties (eg directors) for transparency if a party is in financial difficulty. As the Queensland Court of Appeal outlined in this case, if a company is in financial difficulty, failing to disclose that fact during litigation can result in an adverse non-party costs order being awarded.

Facts

Mr Murphy (**Murphy**) appealed against a non-party costs order made against him in relation to proceedings against Collhart Investments Pty Ltd (formerly known as JM Kelly (Project Builders) Pty Ltd) (**Company**). Murphy was the sole director of the Company and the nominee for the Company's building licence.

The Company and Mackay Labour Hire Pty Ltd (**MLH**) had been involved in a payment dispute commenced by MLH, as plaintiff, for $288,242.54 for labour hire provided under various contracts. After the dispute was heard in the Mackay District Court before Clare DCJ between 13 June 2016 and 15 June 2016, it was adjourned for submissions.

On 15 July 2016, prior to the delivery of the judgment in the Mackay District Court, MLH brought an application against Murphy seeking non-party costs. An affidavit filed with the application deposed that liquidators had been appointed to the Company on 20 June 2016 (five days after the close of evidence). On 9 August 2016, the liquidator consented to an order dismissing the Company's counterclaim against MLH, with costs in favour of MLH, with her Honour reserving judgment on the non-party costs application.

On 2 May 2017, her Honour determined the application for non-party costs and ordered Murphy pay MLH's costs incurred from 17 March 2016. The primary judge observed that although the Company ceased business on 17 June 2016, there was evidence that allowed her Honour to draw the inference that the Company must have been insolvent for at least three months prior to the day it ceased trading. Without disclosure of this fact, MLH had been permitted to expend further legal costs on a claim which would be unenforceable and in defence of the Company's counterclaim. Her Honour considered that this case fell within the category of case contemplated by the High Court in *Knight v FP Special Assets* (1992) 174 CLU 178 (***Knight***) in that where the party to a litigation is an insolvent person or *'a man of straw'*, where a non-party has played an active part in the conduct of the litigation or has an interest in the litigation, an order for costs should be made against the non-party if the interests of justice require it ((1992) 174 CLR 178 at 192-193 per Mason CJ and Deane J with whom Gaudron J agreed at 205).

Murphy appealed to the Court of Appeal on the grounds that the primary judge committed various errors in making the costs order.

Decision

The appeal was dismissed and the non-party costs order was upheld.

Philippides JA held that there was no error in the approach taken by the primary judge in adopting the conventional category set out in *Knight* and that there was sufficient evidence to support a finding of insolvency from 20 June 2016 and for a period of three months before the Company ceased trading.

As there had been no disclosure as to the Company's financial position, MLH was deprived of the opportunity to bring a security for costs application in respect of the counterclaim brought by the Company, as it could have done had it been alerted to matters which could have put it on inquiry pertaining to the Company's position.

In the circumstances, it was open for the primary judge to exercise her discretion to award non-party costs against Murphy.

| back to Contents

Making an application to strike out or for summary judgment? Know the rules! A UCPR refresher

Ockendon & Anor v Ryan & Ors [2018] QDC 94

Andrew Orford | Allie Flack | Lachlan Pramberg

Key Point: This case highlights the importance of effectively establishing the requirements under the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) when bringing an application to strike out or an application for summary judgment. It also serves as an important reminder for legal practitioners to take care when giving advice in relation to the termination of a building contract.

Facts

This matter, heard before the District Court at Brisbane, arises out of allegedly negligent advice provided by barrister Barry Ryan and solicitors Leonard McKeering and Gregory Down (**Solicitors**) in relation to a building dispute between William and Mary Ockendon (**Clients**) and Kamada Constructions Pty Ltd (**Kamada**).

The Clients claim that they were given negligent advice by Mr Ryan and the Solicitors with respect to the building dispute and had they been provided with the correct advice, they could have properly terminated the building contract and made a successful claim under the Queensland Building and Construction Commission (**QBCC**) Home Warranty Insurance Scheme (**HWIS**). It is alleged that due to

the failure to lawfully terminate the building contract, the Clients lost the opportunity to claim under the HWIS for non-completion and defective works by Kamada.

This application, brought by the Solicitors, sought orders for judgment against the Clients or alternatively, that the then current amended statement of claim (number eight) be struck out. After the application was filed, the Clients filed their ninth amended statement of claim. At the hearing, the Solicitors sought, and Devereaux SC DCJ granted, an amendment to the application so it addressed the ninth amended statement of claim. The relevant orders sought by the Solicitors were:

1. The eighth amended statement of claim be struck out as against the Solicitors pursuant to rule 171(1)(a) or rule 371(2) of the UCPR;
2. Pursuant to rule 293 of the UCPR, that the Solicitors be given judgment against the Clients on the Clients' claim; and
3. Alternatively to paragraph two, the ninth statement of claim be struck out as against the Solicitors pursuant to rule 171(1)(a) or rule 371(2) of the UCPR.

Decision

The application for orders one, two and three was dismissed.

In dismissing the first order, Devereaux SC DCJ concluded the ninth amended statement of claim was not to be struck out as it did not fail to allege factual material based on the right to claim on the HWIS. His Honour concluded there was no requirement to make an order about the eighth statement of claim.

In dismissing orders two and three, his Honour addressed rule 293 (summary judgment for a defendant) and rule 171 (striking out pleadings) of the UCPR.

His Honour held under rule 293 of the UCPR the Solicitors must show the Clients have no real prospect of succeeding on all or part of the claim and there is no need for a trial. His Honour concluded the Clients had successfully made out their claim in the ninth amended statement of claim.

In rejecting the Solicitors' claim under rule 171(1)(a) of the UCPR, his Honour held that the Solicitors had failed to show the facts pleaded are incapable in law of giving rise to the relief sought and therefore his Honour could not strike out the application.

| back to Contents

Strict compliance with performance security instrument essential for payment

Santos Limited v BNP Paribas [2018] QSC 105

Andrew Orford | Laura Berry | Elissa Morcombe

Key Point: The Queensland Supreme Court has found there was no obligation to pay the security amount where the wording of a demand on security differed from the instrument.

Significance

To ensure payment of a demand on security, the demand must strictly comply with the requirements and wording of the instrument.

Facts

Santos Limited (**Santos**) brought a claim for payment of $55,000,000 as due and owing under a performance security. The proceeding arose after Santos made a demand upon BNP Paribus (**BNP**) to call upon security, which BNP refused to pay. Santos and BNP cross-applied for summary judgement, each on the ground that the other party had no real prospects of success.

The performance security, which was misleadingly headed 'Bank Guarantee', was in the nature of an unconditional bond to pay money on demand up to a stated maximum amount. An instrument

annexed to the performance security required the demand to be signed by an authorised representative of Santos. However, the demand was stated to be signed by the 'General Manager Development' rather than the 'authorised signatory of Santos Limited'. There was no question that the signatory had actual authority to sign the demand. The issue was that the demand did not expressly state that he was the authorised representative of Santos.

Decision

Jackson J held Santos had no reasonable prospects of success and ordered summary judgment in favour of BNP. The signature of the general manager coupled with the description of his position did not amount to a representation that he was the authorised representative or authorised signatory of Santos. Therefore, BNP was not obliged to pay the security amount as the demand did not comply with the requirements of the instrument.

In arriving at his decision, his Honour noted that it was important to have regard to the commercial context in which an instrument is issued and the purposes for which it is being used. In the case of a performance security it is to operate as a bond by a financial institution that it will unconditionally pay the amount promised to a named beneficiary when presented with a complying demand. It is usual that payment is to be made immediately upon demand and in that sense a bond is said to be 'as good as cash' for the beneficiary. Accordingly, it is of critical importance that a financial institution only pay upon a complying demand and a complying demand must strictly comply with the requirements of the instrument for payment.

| back to Contents

Tasmania

Statutory construction – importance of purpose of objects of the statute and the legislative history and context

Webster v Leighton [2018] TASSC 22

Alison Sewell | Chris Hey | Lucy Wang

Significance

The decision confirms that in construing statutory powers regard must be had to the purposes or objects of the relevant legislation and the legislative history and context.

In this case, the Supreme Court of Tasmania was required to consider whether an order under section 40(3)(da) of the now repealed *Building Act 2000* (Tas) (**Act**) could be directed at a person who had ceased to be a building practitioner and therefore could not directly carry out the work ordered.

Facts

Ricky Alan Leighton (**builder**) was an accredited building practitioner who owned and operated a company constructing homes. The builder's company was engaged to build a house. However, before it could complete construction, it went into liquidation. Although the builder ceased to be an accredited building practitioner on 30 November 2015, he was one at the time the work was performed. Accordingly, he was an accredited building practitioner for the purposes of section 40 of the Act. The owner made a complaint to Dale Webster, the Director of Building Control (**Director**) regarding the company's failure to complete the house.

After an investigation, the Director issued a building order pursuant to section 40(3)(da) of the Act. That section authorises an order *'as if the Director were exercising the powers of a general manager or a building surveyor under section 170(2)(b)(ii)'*. Section 170 of the Act authorises the issue of a building order in circumstances where a building notice has been issued to an owner or builder and has not been revoked.

The Director ordered the builder to *'carry out building work or cause building work to be carried out, at the expense of'* the builder. The builder failed to comply with the building order.

In the Magistrates' Court of Tasmania, the builder submitted that an order under section 40(3)(da) of the Act may only be directed at a building practitioner that is accredited when the order was issued. This is because, where an order is made pursuant to section 40(3)(da) of the Act to perform work that would cost more than $5,000, that work must be carried out by an accredited building practitioner. As the builder had ceased to be accredited at the date of the order, the builder submitted that the order was invalid because of impossibility of performance.

Magistrate Webster accepted the builder's argument and dismissed the complaint. The Director applied to the Supreme Court of Tasmania for a review of that decision.

Decision

Brett J allowed the appeal and set aside the magistrate's decision. His Honour held that if the builder could not legally perform the work, then he was obliged to engage an accredited building practitioner to carry out the work. In reaching his decision, Brett J relied on section 8A of the *Acts Interpretation Act 1931* (Tas) and the legislative history and context of the Act.

Section 8A of the *Acts Interpretation Act 1931* (Tas) provides that *'an interpretation that promotes the purpose or object of the Act is to be preferred to an interpretation that does not promote the purpose or object'*. His Honour considered that a broad construction of section 40(3)(da) of the Act was consistent with the purposes of the Act including the control of the quality of building work and the resolution of disputes.

Further, his Honour noted that the *Building Amendment Act 2012* (Tas) (**amending bill**), under which section 40(3) of the Act had been inserted, extended the definition of *'accredited building practitioner'* to include those who were accredited at the relevant time, but were no longer. The clause notes in the amending bill clearly evinced an intention for the complaint regime under the Act to extend to persons who were formerly accredited building practitioners.

Finally, Brett J noted that his interpretation was consistent with sections 163 and 170 of the Act, which allow a building notice and a building order to be served on a building owner. Clearly, the owner does not need to be an accredited building practitioner.

| back to Contents

Victoria

Contractual clauses unable to limit statutory periods for misleading and deceptive claims

Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd [2018] VSC 246

Owen Cooper | Tom Kearney | Frank Aloe

Significance

Private subcontracts cannot limit timeframes within which parties can make claims for misleading and deceptive conduct because such drafting is contrary to public policy and the purposes of the Australian Consumer Law (**ACL**).

Facts

On 5 March 2012, Multiplex Constructions Pty Ltd (**contractor**) contracted with Brighton Australia Pty Ltd (**subcontractor**) for plastering works as a part of the construction of the new headquarters of the National Australia Bank in Docklands, Melbourne (**subcontracts**).

The subcontractor claimed that the contractor made representations, by implication from its tender documents, (**representations**) which were misleading or deceptive, which it relied upon and which caused it loss.

Section 236 of the ACL provides a six-year period within which misleading and deceptive conduct claims under section 18 can be brought. However, clause 46.1 of the subcontracts provided that the subcontractor was required to give the contractor notice of all claims within seven days of when it was or could reasonably have been aware of the relevant conduct or claim. Clause 46.3 of the subcontracts provided that any claim not complying with clause 46.1 was absolutely barred.

A special referee was initially appointed to assess the subcontractor's claims. The special referee found the time bar within clauses 46.1 and 46.3 of the subcontracts was valid but concluded that the subcontractor's claim failed for other reasons.

The court reviewed the special referee's opinion and made a final determination.

Decision

The court held that, despite the unenforceability of the time bar within clauses 46.1 and 46.3 of the subcontracts, the subcontractor was unsuccessful in its claim.

Contrary to public policy to deny statutory remedy under ACL

Riordan J determined that the ACL contemplated that the statutory norm would be enforced through the remedy provided by section 236 of the ACL. His Honour determined that denying such a statutory remedy on the basis of a contractual term would be contrary to public policy.

Riordan J concluded:

> *'Extreme provisions, of which the one under consideration is an example, could effectively preclude any claim under s 18 of the ACL except by the most punctilious of claimants. However, in my opinion, any attempt to restrict the remedy by limiting the time in which an action can be brought is an unacceptable interference with the public policy underpinning the provisions.'*

Further, his Honour noted the outcome proposed by such restrictions under a contract left uncertainty as to whether courts would find such limits unenforceable, and that such uncertainty was also inconsistent with public purpose of the ACL.

In addition to the purpose and policy behind the ACL, his Honour also looked at the ACL's predecessor, the *Trade Practices Act 1974* (Cth) and the reasoning for certain amendments to that Act such as the extension of the statutory period (now provided by section 236 of the ACL) from three to six years. In doing so Riordan J relied on comments from a range of Australian decisions as to the strong role of this public policy perspective in interpreting the ACL.

Why the subcontractor's claim failed

The court found that although the subcontractor was not restricted by the subcontracts from bringing such a claim, the basis of the claim had not been proven as the contractor had not made the representations and nor had it engaged in misleading or deceptive conduct, and, further, the representations had not been relied upon by the subcontractor.

| back to Contents

A right to have recourse to security turns on the particular facts in each case

Orange Building Solutions Pty Ltd v Inkerman Property Group Pty Ltd (Building and Property) [2018] VCAT 696

Alison Sewell | Chris Hey | James Webster

Significance

The case provides a timely reminder that a party's right to have recourse to security will turn on the particular facts and circumstances of that case and the precise wording of the contractual right.

A party may be restrained from having recourse to security where it seeks to claim an amount in excess of the amount assessed by the superintendent under the contract.

Facts

Inkerman Property Group Pty Ltd (**developer**) engaged Orange Building Solutions Pty Ltd (**builder**) to design and construct a development in St Kilda for a price of $11,400,650 (**contract**). As security under the contract, the builder provided four bank guarantees totalling $570,000.

During the project, the builder applied for a number of extensions of time and the superintendent allowed an adjustment of 94 days in the builder's favour. Nonetheless, the superintendent determined that the builder was still liable to pay the developer liquidated damages for 69 days totalling $276,000. Both parties disputed this assessment; however, the builder paid the developer $276,000 in exchange for the return of two of the four guarantees.

Subsequently, on 11 April 2018, the developer notified the builder that unless it paid it an amount of $272,000 for additional liquidated damages (over and above the amount determined by the superintendent), it would have recourse to the remaining two bank guarantees. The builder applied for an injunction in the Victorian Civil and Administrative Tribunal (**VCAT**) to restrain the developer from having recourse to the bank guarantees.

The security clause

Relevantly, the security clause under the contract (**Security Clause**) provided:

> '*The principal may have recourse to security… where the principal has become entitled to use the proceeds or the security in accordance with the terms of the contract.*
>
> *The principal may use the proceeds of the security … in connection with any costs, expenses, losses or damages of any kind which the principal has incurred or claims that it has incurred or might in the future incur in connection with what the principal contends constitutes any act, default or omission of the contractor.*'

Decision

Ultimately, VCAT granted an injunction restraining the principal from accessing the builder's bank guarantees.

Senior Member Walker helpfully summarised the various authorities which have considered a party's entitlement to have recourse to security under a contract. It was noted that each case turns upon its own facts and the wording of the particular contract.

In this context, Senior Member Walker held that under the Security Clause the developer needed a present entitlement to payment under the terms of the contract before it could have recourse to the security. The developer did not have such an entitlement because the builder had already paid it $276,000 pursuant to the original determination of the superintendent. The developer had no entitlement unless and until a further determination or adjudication was made which altered the original determination of the superintendent.

Senior Member Walker considered that it was unnecessary to consider the question of the balance of convenience as the determination regarding the interpretation of the Security Clause was final for the purposes of the proceeding. All the same, on the basis of the evidence put forward by the builder that it would suffer reputational harm if the developer called on the security and that there were serious concerns about the developer's future capacity to repay any overpayment, Senior Member Walker considered that the balance of convenience favoured the granting of an injunction.

| back to Contents

Minor defects and non-compliances will not necessarily prevent a stage of construction being achieved so as to disentitle a builder to a progress payment

Sightway Construction Pty Ltd v Jayasinghe (Building and Property) [2018] VCAT 676

Alison Sewell | Chris Hey | Bianca Pyers

Significance

The decision highlights the fact that minor defects and non-compliances in building work will not necessarily mean that a particular stage in construction has not been reached. It is a matter of contractual construction to determine when the parties intended that a stage of the works would be completed.

Facts

Kosala and Jeanne Jayasinghe (**owners**) entered into a contract with Sightway Constructions Pty Ltd (**builder**) to construct three two-storey units in Lower Plenty for a contract sum of $687,000 (**contract**). Construction issues arose during the base stage of the works due to the steep slope of the land. The builder claimed that the slab could not be built according to the original contractual specifications. The design was amended in consultation with designers and engineers, and the builder proceeded on the basis of the amended design.

The builder served a payment claim on the owners for the base stage works and a substantial variation for the slab (**payment claim**) and purported to suspend the works when the payment claim was not paid. Subsequently, the owners alleged various breaches of contract by the builder, including suspension of the works without due cause, and purported to terminate the contract. The builder's solicitors then also purported to terminate the contract.

The builder commenced proceedings in the Victorian Civil and Administrative Tribunal (**VCAT**) seeking payment of the payment claim under section 40 of the *Domestic Building Contracts Act 1995* (Vic) (**Act**).

Decision

Senior Member Walker held that the builder was entitled to payment for the base stage works but had failed to prove that it had incurred additional costs entitling it to payment for the slab variation.

Had the builder achieved base stage?

In VCAT, the owners contended that satisfactory completion had not been reached due to multiple defects and errors in the construction of the slab/footing.

However, Senior Member Walker held that '*n error in construction will not necessarily prevent a particular stage of construction from being reached for the purpose of entitling a builder to a progress payment*'. In this case, Senior Member Walker considered that that the non-compliance with the design did not prevent construction proceeding on the slabs as poured and was trivial in terms of determining the stage of construction that had been reached. On this basis, the builder was entitled to the progress payment for the base stage works as they had reached a stage of satisfactory completion.

Variation claim for the slab

Senior Member Walker found that the amendments to the slab design amounted to a variation to the scope of the works. However, the builder failed to prove that it had in fact incurred additional costs as a result of the variation and so was not entitled to payment in respect of that claim.

Which party rightfully terminated the contract?

On the basis of VCAT's finding above, the builder was entitled to suspend the works for the owner's failure to pay the payment claim and the owners' purported termination of the contract due to this suspension was not permitted. In contrast, Senior Member Walker held that the contract was duly terminated by the builder.

| back to Contents

Multiple payment claims under one reference date – new or replacement claim?

Valeo Construction v Pentas [2018] VSC 243

Owen Cooper | Tom Kearney | Jess Dallimore

Significance

The restriction on issuing multiple payment claims in respect of one reference date under section 14(8) the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) will be construed strictly.

Legislation

Section 14(8) of the Act provides that *'a claimant cannot serve more than one payment claim in respect of each reference date under the construction contract'*.

Facts

In March 2014 Pentas Property Investments Pty Limited (**respondent**) contracted Valeo Construction Pty Ltd (**claimant**) to construct a five-storey residential apartment building (**contract**). Under the contract, as amended, the claimant was entitled to make claims for payment on the thirtieth day of each month.

On 28 February 2018 the claimant served a payment claim titled '*Progress Payment claim #45*' for the sum of $2,215,160.03 (**first payment claim**).

On 1 March 2018 the claimant served a revised payment claim, with the same title, in the sum of $2,240,160.13 (**second payment claim)**. The second payment claim was served under cover of an email stating that the '*PC sum for the pool has been updated*' and that this claim was a '*Rev 1*'.

On 6 March 2018 the claimant's contracts administrator sent a further email to the respondent stating that the claimant had withdrawn the first payment claim and that it relied on the second payment claim. The email did not attach a further payment claim, but it did expressly state that '*Valeo has withdrawn the payment claim dated 28 February 2018 … and relies on the amended payment claim dated 1 March 2018*'.

On 22 March 2018 the respondent served a payment schedule on the plaintiff (**payment schedule**).

The claimant asserted that because the payment schedule was served more than 10 business days after the second payment claim was served the respondent was liable for the full amount claimed (section 16 of the Act).

The respondent disputed the validity of the second payment claim under section 14(8) of the Act.

Decision

Digby J held that the second progress payment claim was invalid as it breached section 14(8) of the Act.

In *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd & Anor* [2015] VSC 233 (analysed in our Roundup of 2015 Security of Payment cases) service of a payment claim on 7 October 2014 accompanied by three tax invoices was supplemented by re-sending the same payment claim on 9 October 2014 with additional trade invoices. In that case Vickery J determined that the two series of correspondence constituted the one payment claim.

His Honour determined that:

- the communication attached to the second payment claim did not clearly and unequivocally convey to the respondent that the first payment claim was withdrawn or abandoned by the claimant and replaced with the second payment claim;
- the 6 March 2018 email did withdraw the first payment claim, but it did not serve any new payment claim; and

- because the second payment claim was for a different amount, it rectified what appeared to be an omission from the first payment claim; accordingly, the claimant had served two payment claims in respect of the same reference date, contrary to section 14(8) of the Act.

His Honour noted, as a practical observation, that it could be problematic for respondents if payment claims could be amended after service unless the earlier payment claim is '*clearly abandoned or withdrawn*'.

| back to Contents

Western Australia

WA courts have the power to sever parts of adjudication determinations affected by jurisdictional error

Duro Felguera Australia Pty Ltd v Samsung C&T Corporation [2018] WASCA 28

Tom French | Sharon Milton

Significance

Adjudication determinations under the *Construction Contracts Act 2004* (WA) (**CCA**) are capable of severance as the court has the power to quash parts of an adjudication determination that are invalid due to jurisdictional error.

Facts

Samsung C&T Corporation (**Samsung**), the head contractor, entered into a subcontract with Duro Felguera Australia Pty Ltd (**Duro**) for the Roy Hill Iron Ore Project (**Project**). The Project involved the development of an open cut mine for the extraction of iron ore, with associated processing, rail and port facilities in the Pilbara region of Western Australia.

Duro referred five disputes between the parties to adjudication, which were adjudicated by different adjudicators. Each adjudicator determined in favour of Duro and determined the amounts due to Duro from Samsung.

Duro brought proceedings to enforce the five determinations (**enforcement applications**), the validity of which Samsung challenged in judicial review proceedings (**judicial review proceedings**). Both proceedings were heard simultaneously before the trial judge who handed down a single set of reasons.

The trial judge:

- in respect of the first, fourth and fifth adjudication determinations, dismissed Samsung's judicial review proceedings and found in favour of Duro; and
- in respect of the second and third adjudication determinations, dismissed Duro's enforcement applications and found in favour of Samsung.

The parties appealed to the Court of Appeal. The Court of Appeal referred to its decision in these proceedings as the Duro Appeal and the related proceedings as the Samsung Appeal.

The court described the issues in Duro's appeal in respect of the second and third adjudication determinations as the 'set-off' issue and the 'severance' issue.

Set-off issue

The trial judge found that the adjudicator had exceeded his jurisdiction with respect to part of the determination which awarded an amount of approximately $34.2 million said to have been certified as payable, but which Samsung claimed to have 'set off'. On appeal, Duro submitted that it should be open to the adjudicator to consider the set-off issue in exercising the jurisdiction conferred by the CCA, which requires it to determine *'whether any party to the payment dispute is liable to make a payment'*.

Severance issue

In the context of the set-off issue, Duro submitted that the trial judge could and should have severed the invalid portion of the adjudicator's determination and allowed the valid portions of the determination to be enforced.

Decision

Duro's appeal in respect of the set-off issue was upheld. The Court of Appeal held that the adjudicator correctly limited his determination to the question of whether Samsung was entitled to set off the amount which it claimed in partial answer to Duro's payment claim, evident from the fact that the adjudicator did not include in his determination any amount reflecting the difference between the $6.66 million which Samsung claimed to set off and the $13.1 million which the adjudicator found Samsung had wrongly withheld.

Further, the Court of Appeal held that courts do have the power to sever part of an adjudication determination which is invalid because of jurisdictional error. Therefore, the Court of Appeal severed the invalid part of the determination and held that the parts of the determination that had not been affected by jurisdictional should remain enforceable.

| back to Contents

Adjudicator's power to make determinations over 'hybrid' contracts

Samsung C&T Corporation v Duro Felguera Australia Pty Ltd [2018] WASCA 27

Tom French | Sharon Milton

Key points: Hybrid construction contracts in Western Australia can still be adjudicated. An adjudicator can determine payment claims in respect of work which includes both construction work and work excluded from the definition of construction work as 'obligations' in relation to work under the contract.

Significance

This decision was based on the provisions of the *Construction Contracts Act 2004* (WA) (**CCA**) before the 2016 amendments to the CCA. Had this case been assessed under the legislation as amended, instead of considering whether or not the work is intrinsically linked to a mining process, the test could well be whether or not the work was the construction of an 'item' of plant.

Facts

The facts are set out in our analysis of *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2018] WASCA 28 above.

The trial judge dismissed Samsung's judicial review proceedings and allowed Duro's applications for enforcement of the relevant determinations. The trial judge found that the adjudicator had erred in his determinations that some of the works were not within the meaning of 'construction contract' for the purposes of the CCA (construction work interpretation error). However, the trial judge concluded that these errors did not invalidate both determinations as the adjudicators had made those errors in the course of exercising jurisdiction conferred on them by the CCA.

Samsung appealed to the Court of Appeal on the basis that the work being undertaken by Duro was not 'construction work' within the meaning of the CCA and therefore the adjudicator was bound under section 31(2)(a) of the CCA to dismiss the adjudication application and, in the alternative, the adjudicator had no jurisdiction to determine amounts relating to work which was not of a kind described in the definition of construction contract under the CCA.

The Court of Appeal considered whether an adjudicator has jurisdiction to determine a payment dispute where some of the work falls outside the definition of 'construction contract' under the CCA.

Decision

By a majority (Buss P and Murphy JA, Martin CJ dissenting), the court allowed Samsung's appeal.

The Court of Appeal held that:

- it is within an adjudicator's jurisdiction to determine payment claims in respect of work which included within, and excluded from, the meaning of 'construction contract' as obligations in relation to work under the contract are still obligations under 'construction contracts' for the purposes of the CCA;
- a determination in relation to anything other than a 'payment dispute' (for the purposes of the CCA) will fall into jurisdictional error because adjudicators do not have the power to determine the merits of a dispute that does not involve a 'payment claim' under the CCA; and
- invalid components of an adjudicator's determination can be severed under section 31(2)(b) of the CCA.

| back to Contents

Implied provisions in the CCA can only be implied into construction contracts to the extent that specific provisions are absent from the contract

Total Eden Pty Ltd v Charteris [2018] WASC 60

Tom French | Amy Ryan

Significance

The court quashes an adjudication determination for jurisdictional error where the adjudicator fails to consider a set-off argument, and also holds that the implied provisions in the *Construction Contracts Act 2004* (WA) (**CCA**) should only be implied to the extent that those provisions are expressly absent from the contract in question.

Facts

Total Eden Pty Ltd (**Total Eden**) was contracted on the Woodie Agriculture Project (**Project**) to supply and install irrigation equipment. Total Eden subcontracted ECA Systems Pty Ltd (**ECA**) to supply and install the electrical and process control works. In May 2014, ECA provided an initial quotation for works being performed in connection with the Project, and the parties subsequently agreed to a price of $169,852 (plus GST). On 11 August 2016, ECA submitted an invoice to Total Eden for $80,640 (plus GST) for part of the works (**Invoice**). Total Eden did not pay the Invoice on time, and on 6 October 2016, ECA made an application for adjudication under the CCA (**Application**).

On 18 October 2016, Total Eden advised ECA that its Principal had refused payment of Total Eden's invoices, in the sum of $134,730.64, because of alleged loss and damage the Principal had suffered due to ECA's failures. Total Eden sought payment of that sum from ECA.

Mr Michael Charteris (**Adjudicator**) was appointed as the adjudicator on the Application. The Adjudicator's determination of the Application required Total Eden to pay ECA a total of $92,853.74, comprised of the amount for which Total Eden was liable to pay under the Invoice, interest on that

amount, GST, $1,681.82 for ECA's costs of preparing the Application, and $1,500 for ECA's share of the Adjudicator's fee (**Determination**).

Total Eden sought judicial review of the Determination on the basis that the Adjudicator:

1. failed to make a determination of Total Eden's liability as at the date of the Determination;
2. failed to have regard to Total Eden's entitlement to set off $134,730.64 for faulty or defective works;
3. failed to consider matters which he was obliged to consider, namely Total Eden's entitlement to set off $134,730.64 for faulty or defective works;
4. failed to make the Determination on the basis of the law of Western Australia;
5. required Total Eden to make a payment of ECA's costs of preparing the Application, which did not form part of the 'costs of the adjudication'; and
6. misconstrued section 34(2) of the CCA and acted unreasonably by ordering Total Eden to pay ECA's preparation costs and ECA's portion of the Adjudicator's fee.

Decision

The court upheld grounds 2, 3 and 6 of the appeal and held that the Determination should be quashed.

Under section 31(2)(b) of the CCA, adjudicators are required to determine on the balance of probabilities whether a party to a payment dispute is liable to make a payment. The court found that in performing this role, the Adjudicator failed to assess Total Eden's liability by reference to the terms of the contract and applicable legal principles. The Adjudicator did not take into account Total Eden's set-off claim under the indemnity given in clause 5.3 of the contract on the basis that it was not open to Total Eden to rely on the set-off claim in the adjudication because under section 17 of the CCA all of the terms of division 5 of schedule 1 to the CCA were implied into the contract.

Pritchard J found that the Adjudicator had erred in concluding that all of the terms of division 5 of schedule 1 to the CCA were implied into the contract and that, in any event, section 32 of the CCA required the Adjudicator to take into account both matters raised in ECA's claim and matters raised in Total Eden's response. Therefore, the Adjudicator's failure to take in to account Total Eden's set off claim meant that the Adjudicator had failed to determine Total Eden's liability according to the contract, and failed to take into account a matter which the CCA required the Adjudicator to take in to account. Pritchard J was satisfied that these failures amounted to jurisdictional error sufficient to uphold grounds 2 and 3.

Pritchard J held that, under section 34(2) of the Act, an adjudicator may order a party to pay the costs of the adjudication if the adjudicator is satisfied that a party incurred costs because of frivolous or vexatious conduct by another party. Pritchard J found that the Adjudicator's only basis to conclude that Total Eden's conduct was frivolous or vexatious was Total Eden's alleged late defence for not making payment (ie the set-off claim) which did not comply with the implied provisions of the Act and was therefore bound to fail. Pritchard J concluded that the Adjudicator's basis to require Total Eden to pay ECA's costs was an unreasonable exercise of the discretion he had under section 34(2) of the CCA and was therefore a jurisdictional error.

| back to Contents

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