MinterEllison

Construction Law Update

July 2018

Contents

Legislative update

Queensland

New combustible cladding regulation to tackle privately owned buildings in Queensland

Building and Other Legislation (Cladding) Amendment Regulation 2018 (Qld) (**Cladding Regulation**)

Andrew Orford | Petrina Macpherson

Regulation to compel private building owners to assess cladding risk

On **27 July 2018** new cladding regulations were introduced in Queensland which will potentially affect up to 12,000 privately owned buildings.

The new Cladding Regulation will compel owners of private buildings to complete an online checklist to assist the Queensland Building and Construction Commission (**QBCC**) to identify which buildings are affected by combustible cladding. Owners will only have 6 months to do this.

Cladding Regulation to commence on 1 October 2018

The Cladding Regulation, which amends the *Building Regulation 2006* (Qld), is scheduled to commence on **1 October 2018**.

It requires owners of private buildings to register using an online system and complete an online checklist for the building. The checklist will need to be provided to the QBCC before **29 March 2019**.

This affects many buildings in Queensland including residential and commercial buildings retail outlets, car parks, storage buildings, laboratories, industrial warehouses, trade workshops, health care buildings, schools, aged-care homes and places of assembly.

What is a privately owned building?

A private building for the purpose of the Cladding Regulation is defined as:

- a class 2, 3, 4, 5, 6, 7, 8 or 9 building of either Type A or Type B Construction;
- for which a building development approval was given after 1 January 1994 but before 1 October 2008, for building work to:
  - building the building; or
  - alter the cladding on the building; and
- is owned by one or more private entities or if a private entity jointly holds more than a 50% interest in the building.

If the online checklist indicates that a private building may be affected by combustible cladding, the owner will be required to complete a Part 2 Checklist and provide the QBCC with a statement about whether or not the building may be an affected private building. This statement is known as Building Industry Professional Statement and must be prepared by a building industry professional.

If a building is considered to be an affected private building, the private building owner will be required to complete a Part 3 checklist and obtain a Building Fire Safety Risk Assessment and a Fire Engineer Statement by **3 May 2021**.

The Cladding Regulation will also impose other obligations on owners affected private buildings including:

- the requirement to display a notice that the building is an affected private building;
- lot owner and tenants are to be provided with a copy of the Building Fire Safety Risk Assessment;

- on the sale of buildings, the original owners are to provide the new owners with notice of compliance with the Cladding Regulation.

Private building owners must act early

It is recommended that all private building owners familiarise themselves with the requirements of the Cladding Regulation and take steps to complete the online registration and Part 1 checklist as soon as possible.

| back to Contents

Commonwealth

New obligations on owners and operators of critical infrastructure assets

Security of Critical Infrastructure Act 2018 (Cth)

Alison Sewell | Chris Hey | Domenic Mollica

Key takeaway

In light of the introduction of the Act, investors in and operators of critical infrastructure assets should:

- consider whether they are required to provide the information prescribed under the Act for inclusion on the Register; and
- be aware of the Minister's new power to impose security requirements on reporting entities.

Background

As of 11 July 2018, investors in, and operators of, Australian critical infrastructure assets are subject to a new regulatory framework established under the *Security of Critical Infrastructure Act 2018* (Cth) (**Act**). Broadly, the framework seeks to manage the national security risks of espionage, sabotage and coercion arising from foreign investment in, and control of, Australia's critical infrastructure.

Entities that are obliged to provide information for inclusion on the new 'Register of Critical Infrastructure Assets' (**Register**) must do so by 11 January 2019 and within 30 days of such information becoming incomplete or incorrect. The Act imposes penalties for non-compliance with its requirements.

High level summary of the Act

The Act:

- establishes the Register which is kept by the Secretary of the Department of Home Affairs (Secretary) and contains information obtained from and relating to certain 'reporting entities' (being either direct interest holders or responsible entities) and the critical infrastructure assets they own or operate;
- sets out the Secretary's powers in relation to the Register, including the power to obtain more detailed information where necessary; and
- empowers the Minister of the Department of Home Affairs to direct reporting entities to do, or refrain from doing, an act or thing to mitigate against a national security risk.

Central to the operation of the Act is the maintenance of the Register and potential imposition of new security requirements on reporting entities.

What is a critical infrastructure asset?

The Act primarily classifies critical infrastructure assets, with threshold requirements for each class as being either:

- critical gas assets;

- critical electricity assets;
- critical water assets; or
- critical ports.

In addition to these classes, an asset will be a critical infrastructure asset where:

- the Minister, being satisfied that the asset is critical infrastructure that affects national security and that there would be a risk to national security if it were publicly known to be so, declares it to be a critical infrastructure asset; or
- the rules under the Act prescribe it to be a critical infrastructure asset.

Reporting entities – being responsible entities and direct interest holders

The obligation to provide information for inclusion on the Register in relation to critical infrastructure extends to certain '**reporting entities**', being '**responsible entities**' and '**direct interest holders**'.

For the purposes of the Act:

- **responsible entities** are entities that hold a licence, approval or authorisation to provide services in the electricity, gas or water industries; and
- **direct interest holders** are entities that hold an interest of at least 10% in a critical infrastructure asset, or are otherwise in a position to exercise influence or control over that asset.

Responsible entities are required to provide operational information in relation to their relevant assets. In this context, operational information includes information regarding how the assets are operated and the way data relating to the assets are maintained.

Direct interest holders are required to provide information relating to the interest and control of the relevant entity and assets. Such information includes the extent of the direct interest holder's control of or influence in the assets

New Ministerial power to impose security requirements

The Act grants to the Minister a new broad power to direct reporting entities to do or refrain from doing a specified act where the Minister is satisfied that there is a risk that such act or omission would be prejudicial to security.

| back to Contents

Ipso facto reforms have commenced – are you ready?

Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017 (Cth)

Richard Crawford | Mark Wheelahan | Max Cameron | Julie Purbrick | Nicholas Anson | Michael Hughes

From 1 July 2018 the ipso facto insolvency reforms apply to new contracts, agreements and other arrangements.

The reforms, which are part of government's safe harbour and insolvency law reforms, prevent a party from exercising a right under a contract, agreement or arrangement which arises solely on the basis of one of the following types of formal restructuring processes:

- the appointment of a voluntary administrator;
- the appointment of a receiver or managing controller over all or substantially all of a company's property;
- a company undertaking a scheme of arrangement for the purposes of avoiding being wound up in insolvency; or

- an event or circumstance relating to the affected party's financial position if an appointment or scheme of arrangement referred to in an earlier paragraph has been made or undertaken.

Rights which may be affected include the right to terminate, suspend performance, step-in, novate and, in some cases, call on security. A party retains its entitlement to enforce a contractual right for any other reason i.e. where the right does not arise solely as a result of one of the events described above. For example, if the counterparty is in breach of its payment or performance obligations, the other party will be able to exercise its rights under the contract in respect of those breaches.

Key points to consider

The stay only applies to contracts made after 1 July 2018. This means that any insolvency-related terminations in existing contracts, including existing contracts which are amended after 1 July 2018, are still enforceable.

If a party obtains the written consent of the administrator, receiver or scheme administrator, or an order of the court, it will be permitted to enforce its right under a clause that circumvents the stay on enforcement of an ipso facto right. Case law from overseas suggests these court orders will not be made lightly.

Contract managers and contract administration teams need to be educated on the impacts of the ipso facto amendments on their contracts. Contract managers who do not properly understand the reforms may, for example, put a company at risk of wrongfully repudiating the contract.

The ipso facto reforms potentially amplify the risks associated with the insolvency of a counterparty, and in that context, they provide a useful prompt for parties to review the processes and contractual remedies in place to mitigate the insolvency risks.

Exemptions to the stay relevant to the construction and property industry

There is a long list of exemptions to the statutory stay in the *Corporations Amendment (Stay on Enforcing Certain Rights) Regulations 2018* (Cth) (**Regulations**). The Regulations provide for the types of contracts, agreements or arrangements that the stay does not apply to. For the construction and property industry, the key exemptions to arrangements to consider are those:

- involving a special purpose vehicle (**SPV**) that provides for a public-private partnership (**PPP**) or project finance
- for defined building work, where the total payments are a minimum of $1 billion
- involving Australia's national security, border protection or defence capability
- for the supply of essential or critical goods or services, or for the carrying out of essential or critical works, to or for government, or to or for the public on behalf of government
- for the supply of goods or services to, or on behalf of, a public hospital or public health service
- relating to government licences, permits or approvals.

The *Corporations (Stay on Enforcing Certain Rights) Declaration 2018* (Cth) (**Declaration**) sets out the types of rights that the statutory stay does not apply to. Key exemptions under the Declaration include step-in rights (ie the right to perform obligations of the counterparty under the contract) and the right to assign or otherwise transfer (one's own) rights or obligations under the contract.

Some impacts for the construction industry

From a builder's perspective, it is important to note that the statutory stay applies to contractual rights. The ipso facto reforms will not affect statutory rights, for example rights accruing under the security of payment legislation or through statutory liens.

For principals, certain (temporary) step-in rights are also protected from the statutory stay. However, the permanent replacement of an affected person, e.g. by procuring a novation of their rights and obligations under a contract, will not be protected and will be subject to the stay.

The language of the exceptions is open to interpretation and, as they are new, there is no judicial direction to rely on. Accordingly, the detailed wording of each exemption needs careful consideration to ensure that clients take advantage of the exemption.

For example, while a 'PPP' and 'project finance' exemption may exist, not all contracts or counterparties within the complex suite of contractual arrangements comprising those transactions will necessarily have the benefit of those exemptions.

Depending on the circumstances, a builder, subcontractor or a principal may be a key creditor in the insolvency of a person involved in a construction project. The broad protections given to financiers and financing arrangements and the project proponent (in the case of a PPP) means that some creditors to a project (eg suppliers and builders being paid in arrears) may be disadvantaged, in relative terms, to other creditors (eg project financiers, lenders under syndicated loans). That is, some creditors to a project will be unfettered in the exercise of their rights, while other creditors and counterparties will be unable to exercise their insolvency-event triggered rights (at least until other payment or performance defaults arise).

Some impacts for the property industry

There will be impacts for the property industry, for example, leases, which are not covered by the exemption. However, the situation largely remains unchanged. Already landlords usually take into consideration a number other overriding rights or restrictions not specifically addressed in a lease before terminating it. Going forward, a landlord will not be able to terminate for an insolvency event alone. While specific changes to the termination clauses in leases are not mandatory, we recommend that termination rights for insolvency be made subject to Chapter 5 of the *Corporations Act 2001* (Cth) which will draw to the parties' attention that the new laws have been taken into account and must be complied with.

How to mitigate your risk

- Review contracts and consider whether amendments are required to ensure that any rights currently activated by an insolvency event or the financial position of the counterparty remain available in a default situation. Amendments may include:
  - bolstering performance based triggers (e.g. to include specific performance based defaults based on how an insolvency event might manifest itself in terms of time, quality and performance and payments) - noting of course that these might be difficult to identify in advance and also that it may only be viable to explore this option for high value / high risk contracts;
  - shortening the timeframes for remedying defaults;
  - including additional drafting to make use of the statutory exemptions e.g. including warranties as to a party's status as an SPV;
  - including a contractual requirement that, if an external controller is appointed, the non-defaulting party may terminate the contract if the external controller does not confirm in writing, within a prescribed period of time, that the insolvent party will continue to perform its obligations under the contract. This amendment is not a 'fail-safe' termination option, but it may at least trigger dialogue between the parties;
  - adding drafting to the provision dealing with the right to terminate for an 'Insolvency Event' (or similar) which makes it expressly subject to the statutory stay provisions in the *Corporations Act 2001* (Cth), so that contract administrators are at least prompted to consider the effect of any potential stay before exercising the termination right; and
  - reviewing security arrangements to determine whether additional performance security is required.
- Consider whether existing processes in respect of pre-qualification and financial due diligence of counterparties are adequate. Financial due diligence may extend to key subcontractors and the counterparty's broader group of companies.

- Educate and train contract managers and project teams on the ipso facto reforms to ensure the risks are properly managed, for example so that contracts are not wrongfully terminated (repudiated).
- Consider the implication of varying, restating, novating, or replacing a contract after 1 July 2018 in light of the 'application of amendments' provision of the schedule to the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017* (Cth).
- Where a contract has a connection with a foreign jurisdiction, consider the implications of the reform when selecting the governing law of the contract.
- Consider the need to qualify advices to stakeholders concerning the operation and enforceability of contractual terms on insolvency in light of the ipso facto reforms.

| back to Contents

In the Australian courts

New South Wales

A non-existent appointing body may not defeat an arbitration agreement

Broken Hill City Council v Unique Urban Built Pty Ltd [2018] NSWSC 825

Andrew Hales | Stella Luo

Key Point: An arbitration agreement will not necessarily be rendered inoperative solely due to the non-existence of the person prescribed to nominate an arbitrator. A contractual clause that governs the procedure for appointing an arbitrator may merely constitute a machinery provision. Thus, if it fails, the clause may potentially be severed from the arbitration agreement.

Significance

Although the arbitration agreement was upheld in this case, it highlights that issues of obsoleteness often arise from the use of standard form contracts. The present dispute arose from a contractual reference to the defunct Australasian Dispute Centre (**ADC**) as the default appointing body. Similar arbitration clauses in other contracts refer to bodies such as the Institute of Arbitrators & Mediators Australia (**IAMA**). However, IAMA and LEADR merged to form the Resolution Institute on 1 January 2015, so standard form contracts may need to be updated to reflect this or similar changes.

Facts

Broken Hill City Council (**Council**) contracted Unique Urban Built Pty Ltd (**Urban**) to upgrade the Broken Hill Civic Centre under an AS4000-1997 contract . A dispute arose between the parties which, under the contract, was a matter the subject of an arbitration agreement. The Council commenced proceedings in the Supreme Court of New South Wales. Urban sought an order for the parties to be referred to arbitration.

Under section 8(1) of the *Commercial Arbitration Act 2010* (NSW) (**Act**), a court must, upon a party's request, refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

Choice of arbitrator under the contract

Clause 42.3 of the contract provided that, *'If within a further 14 days [after a dispute is referred to arbitration] the parties have not agreed upon an arbitrator, the arbitrator shall be nominated by the person in Item 32(a). The arbitration shall be conducted in accordance with the rules in Item 32(b).'*

Item 32(a) provided that, if no-one is stated, the person to nominate an arbitrator is the President of the ADC. No President of the ADC existed; the ADC was defunct at the time of the contract.

Item 32(b) provided that, if no rules for arbitration were stated, rules 5-18 of the Rules of The Institute of Arbitrators, Australia for the Conduct of Commercial Arbitrations (**Rules**) would form the rules for arbitration.

Article 8(2) of the Rules relevantly stated:

> '*If within 14 days after receipt by a party of a proposal made in accordance with Article 8, paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the arbitrator shall be nominated by IAMA*.'

The parties' respective arguments

The Council argued that the arbitration agreement was inoperative as the appointor described in Item 32(a) of the contract did not exist. Further, the Council contended that the Rules could not affect the appointment of an initial arbitrator as they governed arbitration procedure only.

Urban argued that the arbitration agreement was not inoperative as Article 8 of the Rules contained a mechanism for appointing an arbitrator. Alternatively, Urban argued that even if clause 42.3 of the contract was ineffective, it did not render the entire arbitration agreement inoperative as the clause was only a machinery provision.

Decision

The court upheld the arbitration agreement and referred the parties to arbitration.

Hammerschlag J noted that clause 42.3 of the contract did not ultimately allow for the operation of Article 8 of the Rules. That is, the failure of the parties' method of appointment pursuant to Item 32(a) did not necessarily mean recourse could be had to the method of appointment provided by Article 8 of the Rules.

His Honour noted that Article 8 commenced with the words *'if one arbitrator is to be appointed'*. Therefore, given the first part of clause 42.3 (Item 32(a)) would have already operated prior to the second part of the clause (Item 32(b)), Article 8 had no field of operation except where there had been a successful challenge to a single arbitrator. That was not the case here.

Nonetheless, the arbitration agreement itself was effective. Clause 42.2 of the contract contained the agreement to arbitrate, whereas clause 42.3 was merely an agreement on a procedure and could be severed. Whether an arbitration agreement is inoperative is assessed within the context of provisions of the Act. In this case, section 11(3) of the Act empowered the court to appoint an arbitrator because the parties had identified a non-existent appointor.

Ultimately, his Honour found that reasonable persons in the parties' positions would not have intended that the arbitration agreement fail because of the non-existence of the President of the ADC.

| back to Contents

Losing your equipment - when your assignment doesn't 'stack' up

Exotic Retirement Living v Construct by Design Commercial [2018] NSWSC 860

Andrew Hales | Stephaine Skevington

Key Point: If a deed of assignment is expressed in the present tense and not as an assignment of future property, in circumstances where the assignor has no existing right, title or interest in the property, the purported assignment will be ineffective.

Significance

When engaging contractors to procure equipment from third parties, developers must ensure they have appropriate contractual protections in place to enforce their rights over such equipment in the event of a dispute with the contractor.

Facts

Exotic Retirement Living (**developer**) engaged Construct by Design Commercial (**builder**) to construct residential apartments. The builder entered into a separate contract with Car Stackers International Pty Ltd (**supplier**) for the delivery, installation and commissioning of a car stacker at the apartments.

The terms of the supply contract provided that the supplier retained title to the car stacker until settlement of all outstanding claims deriving from the business relationship between the supplier and the builder. The final payment instalment for the car stacker remained unpaid by the builder.

The developer and builder entered into a separate 'assignment and benefit deed' (**Assignment Deed**) whereby the developer was to be responsible for the payment of the invoices issued by the supplier for the car stacker (as valuable consideration) and the builder assigned all its rights, title and interest in the car stacker to the developer.

The builder failed to deliver the car stacker to the apartments (and the supplier only delivered the car stacker to the builder after the construction contract between the developer and builder had come to an end).

The developer brought a claim in the Supreme Court of New South Wales for a declaration that it was entitled, as between it and the builder, to possession of the car stacker and an order for delivery up of the car stacker.

Decision

The court dismissed the developer's claim.

McDougall J interpreted the builder's assignment under the Assignment Deed as an assignment of present property, rather than future property. As the builder did not have any right, title and interest in the car stacker when it entered into the Assignment Deed (due to the retention of title by the supplier under the supply contract), the assignment was not effective.

His Honour determined that the Assignment Deed assigned the builder's purported right, title and interest in the car stacker, rather than assigning the builder's right, title and interest in the supply contract. The court noted that even if the assignment was construed as an assignment of future property, it would only be enforceable in equity where consideration was paid. However here, the consideration had not been paid in full.

| back to Contents

Owner-builder defects: which version of the Home Building Act applies?

Gregorio v Cheadle [2018] NSWCATAP 118

Andrew Hales | Jessie Jagger

Key point: If building work was completed before February 2012, the limitation period for bringing an action for breach of statutory warranties is likely to be 7 years, not 6 years.

Significance

A subsequent purchaser from an owner-builder of a home with defective building work deemed completed in 2009 had 7 years to bring an action for breach of statutory warranties under the *Home Building Act 1989* (NSW) (**HBA**), even though the limitation period was substantially altered to 6 years in 2014 by amendment.

Facts

The matter concerned an action for damages by current owners in respect of their home against the former owners in relation to allegedly defective building work performed by one of the former owners as owner-builder.

On 2 April 2008, one of the former owners was granted an owner-builder permit by the Department of Fair Trading and subsequently built a house. On 20 December 2014, the former owners sold the house to the current owners. In August 2015, following a rain event which caused flooding to the home, the current owners' investigation uncovered what they alleged was defective building work.

On 31 March 2016, the current owners filed an application in the NSW Civil and Administrative Tribunal (**NCAT**) against the former owners, claiming that the defects were breaches of the statutory warranties in the HBA.

Prior to the hearing at first instance, the parties were at odds regarding what version of the HBA applied, as the HBA was amended twice - in 2011 and in 2014 (**2011 Amendments** and **2014 Amendments** respectively) - during the period between the commencement of the building work and the commencement of proceedings in NCAT. The building work was in fact completed *before* the commencement of the 2011 Amendments (being 1 February 2012), but the NCAT proceedings were issued *after* the commencement of the 2014 Amendments.

The issue was therefore whether the 2014 Amendments operated retrospectively and altered the limitation period in section 18E of the HBA for building contracts entered into before the 2011 Amendments came into effect.

Before applying the 2011 Amendments

- A successor in title had 7 years from the date of completion of building works to enforce the statutory warranties in the HBA.

After applying the 2011 Amendments

- For a *structural* defect, the limitation period decreased to 6 years. For any other defect, it became 2 years.

After applying the 2014 Amendments

For a *major* defect, the limitation period was 6 years. For any other defect, it was 2 years.

At first instance

NCAT determined that the 2014 Amendments applied and the limitation period was 6 years for a major defect and 2 years for other defects. NCAT dismissed the majority of the current owners' complaints as the defects alleged were not major defects.

On Appeal

The current owners appealed to the Appeal Panel of NCAT, arguing that:

- the sole purpose of the 2014 Amendments was to change the reference in section 18E of the HBA (as it was changed by the 2011 Amendments) from a 'structural defect' to a 'major defect';
- the 2014 Amendments only applied retrospectively to contracts to which the 2011 Amendments applied, regardless of when practical completion was deemed to occur; and
- as the 2011 Amendments did not apply to the building work in question, it remained regulated by the pre-2011 HBA, that is the limitation period for actions on statutory warranties was 7 years.

Decision

The Appeal Panel found in favour of the current owners by deciding that before the 2014 Amendments came into effect, there were in fact two forms of section 18E of HBA in operation:

- first, a limitation period of 7 years in respect of all claims brought for breach of the statutory warranties involving works carried out under a contract entered into prior to the commencement of the 2011 Amendments; and
- second, a limitation period of 6 years in respect of structural defects and 2 years in any other case.

The 2014 Amendments did not amend the 7-year limitation period as that would have led to the 'anomalous result' that a person who acquired property as a successor in title prior to the commencement of the 2011 Amendments would have different rights than one who acquired the property after that time.

| back to Contents

NCAT says you should specifically include costs in your *Calderbank* offer

Grace v Pepe [2018] NSWCATAP 19

Andrew Hales | Kawshi Manisegaran

Key Point: Any offer in relation to costs in a *Calderbank* offer in the NSW Civil and Administrative Tribunal (**NCAT** or **Tribunal**) must be made explicitly, and will not be inferred as forming part of the offer amount.

Facts

The matter involves a dispute between the builder, Mr Grace (**builder**) and the homeowners Mr & Mrs Pepe (**homeowners**). There had been five hearings prior to the hearing before the Appeal Panel of NCAT in relation to:

- an application filed by the builder claiming payment of two unpaid invoices (**HB10**); and
- an application filed by homeowners seeking relief from payment to the builder and amounts to cover completion of the work, and to rectify defects (**HB11**).

Homeowners reject the builder's two *Calderbank* offers

The first *Calderbank* offer was made by the builder, and was not accepted by the homeowners.

The second *Calderbank* offer was for an amount which exceeded the homeowners' ultimate entitlement, however the offer was silent in relation to costs. The Appeal Panel considered that the amount of the offer might be seen as including a component for costs in HB11 when the ultimate entitlement of the homeowners was determined. However this was not expressly stated. The homeowners also rejected this offer.

The issue on appeal – costs

In the third NCAT decision, an order was made against the builder to pay the costs of the homeowners in relation to both matters HB10 and HB11 for the following reasons:

- the homeowners were successful on a number of issues including their entitlement to rectification costs;
- the homeowners' failure to accept the builder's *Calderbank* offer was not unreasonable at the time of the offer; and
- *'the monetary outcome is not a reasonable measure of the [homeowners'] success'*.

The third point in the reasoning above addresses the fact that the final amount awarded to the homeowners was less than that offered in a *Calderbank* offer made by the builder prior to the third decision.

The issue on appeal was whether the Tribunal had made an error of law in considering the weight and relevance given to the builder's *Calderbank* offer.

Decision

The Appeal Panel found that although the Tribunal's reasons for discounting the second *Calderbank* letter were inadequate, the result was correct, because:

- the builder did not make a reasonable offer towards the home owner's costs in HB10 which he had commenced against them in circumstances which did not do him credit; and
- the builder made no offer as to the costs of the home owners in HB11 even though he conceded that rectification and miscellaneous costs were recoverable (but were subject to quantification).

Ultimately, even though the amount offered by the builder in the second *Calderbank* letter exceeded the homeowners' ultimate entitlement, the issue of costs needed to be addressed specifically and could not be inferred as forming part of the amount offered.

| back to Contents

Acceptance is key to quantum meruit

Ingate v Andrews [2018] NSWCATAP 99

Andrew Hales | Ashley Murtha

Key Point: When resolving a claim in quantum meruit - being a fair and reasonable sum for work performed outside of an agreement - 'acceptance' of the work is the critical issue to consider.

Significance

If a builder undertakes work that is outside the contractual scope of work there will often be a dispute as to whether the work is a variation for which the builder is entitled to be paid. If a claim is made in quantum meruit, the recipient of disputed work is likely to be held to have accepted the work in circumstances where the recipient:

- is aware that the work is being carried out;
- is aware that the work is outside the scope of the contract; and
- fails to prevent the work from being carried out.

Facts

The Ingates (**owners**) and Mr Andrews (**builder**) entered into a joint venture agreement under which the owners agreed to subdivide a parcel of land and transfer one of the blocks to the builder in return for the demolition of the owners' existing house and the building of a new house.

Shortly after completing the construction of the house for the owners, the builder presented them with an account for variations. The owners disputed the amounts sought for some of those variations. The builder then presented the owners with a claim for payment of a further set of variations. The owners refused to pay because they had not agreed to those works. The owners viewed the second set of variations as items done at the discretion of the builder without consultation or prior approval.

The builder successfully pursued a claim in quantum meruit for the disputed variations in the NSW Civil and Administrative Tribunal (**NCAT** or **Tribunal**).

The owners sought to have the order set aside on the basis that the Tribunal's characterisation of the work as being outside the scope of works and the Tribunal's understanding of the principles of quantum meruit was incorrect. The owners submitted that the Tribunal failed to address the question of whether the builder had proved that the owners knew that the builder expected to be paid for the work as a variation to the contract.

Appeal Panel dismisses the appeal

In dismissing the appeal, the Appeal Panel found that the Tribunal had properly addressed the relevant matters regarding the variations and the claim in quantum meruit.

The Appeal Panel relied on *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5 as the leading authority on quantum meruit and concluded that the court in that case emphasised 'acceptance' as the ultimate critical issue.

The Appeal Panel found that the owners had accepted the variations because:

- Mr Ingate of the owners had an active involvement in the project and the works undertaken;
- he was aware of the works being done as they unfolded and did not intervene in them; and
- he acknowledged that he did not regard all of the variations as being within the scope of the original contract.

| back to Contents

Building claims relating to building goods or services: beware the limitation period

Tom v Jenkins [2018] NSWCATCD 7

Andrew Hales | Stella Luo

Key Point: Under section 48K(3) of the *Home Building Act 1989* (NSW) (**HBA**), the NSW Civil and Administrative Tribunal (**NCAT** or **Tribunal**) does not have jurisdiction in respect of building claims lodged more than 3 years after the supply of building goods or services.

Significance

The 3-year limitation period in the HBA for certain building claims runs from the time when the building goods or services were supplied, not when a defect becomes manifest or known. It will be difficult for parties to seek recourse for defects relating to building goods or services, particularly where they are not discovered within 3 years from the date of supply.

Facts

In 2009, Mr Tom (**builder**) constructed a residential property located at Townsend (**residence**). Prior to construction, the owners had engaged Mr Jenkins (**engineer**) to prepare a geotechnical report and a footings and slab plan for the residence. The engineer prepared the report and plan in May 2009. The builder followed the footings and slab plan in constructing the residence.

Structural defects in the residence became known or manifest in August 2014. In August 2016, the builder brought an action against the engineer seeking indemnification for any liability in respect of the owners' separate proceedings against the builder for the cost of demolishing and rebuilding the residence.

The engineer argued that the builder was statute barred from bringing an action against the engineer as more than 6 years had passed since the report and plan were prepared. The builder argued that the 6-year limitation period did not start to run until the defects became known or manifest. As the defects only became known in August 2014, the builder contended that the cause of action did not accrue until August 2014.

Decision

The Tribunal dismissed the builder's claim on the basis that it had no jurisdiction pursuant to the application of section 48K(3) of the HBA. Even though none of the parties' submissions referred to that section of the HBA, the Tribunal considered it inappropriate to ignore a relevant provision of the HBA that dealt with the Tribunal's jurisdiction.

The Tribunal held that both parties had erroneously referred to a 6-year limitation period pursuant to the *Limitation Act 1969* (NSW) and the *Fair Trading Act 1987* (NSW) in their submissions.

Rather, under section 48K(3) of the HBA, the Tribunal has no jurisdiction in respect of any building claim relating to building goods or services if the claim is lodged more than 3 years after the date of supply.

Provision by the engineer of a geotechnical report and a footings and slab plan for the construction of a residential building satisfied the statutory definition of 'building goods or services'. It was irrelevant that the builder did not personally contract with the engineer for these services.

As the engineer's services were supplied in May 2009, no claim in respect of such works could be brought before the Tribunal after May 2012. Since the builder's claim was brought in 2 August 2016, it was time barred notwithstanding that the relevant defects only became known in August 2014.

| back to Contents

Queensland

Design certification – a timely reminder of professional obligations

Actron Investments Queensland Pty Limited v DEQ Consulting Pty Ltd [2018] QCA 147

Michael Creedon | Clare Turner | Sam Rafter

Significance

Structural engineers certifying design documentation as complying with relevant building regulations must remember that the regulatory regime is designed for the protection of the public and cannot allow clients to dictate the structural integrity of the design if fully informed clients wish to pursue a 'low cost' option.

Facts

Actron Investments Queensland Pty Limited (**Actron**) purchased from Efstathis Property Developments Pty Ltd (**Efstathis**) a new commercial warehouse that contained a floating concrete slab as a floor. After the purchase was completed, Actron installed pallet racking in the building in or around June 2007 and thereafter used the building for storing air conditioning units and parts pending sale or installation.

Over time the slab subsided and upon expert investigation it was found the measured floor slab settlement was 160mm. This settlement affected Actron's ability to use forklifts in the warehouse and Actron subsequently incurred $1,067,203.50 in costs to make the warehouse fit for purpose.

Actron brought proceedings against a number of defendants. The proceedings with the builder under the D&C contract and the building certifier were ultimately settled before trial.

The proceedings that went to trial were with:

- DEQ Consulting Pty Ltd (**DEQ**), who was the civil, structural and geotechnical engineering company engaged by the builder to prepare preliminary drawings for the warehouse, incorporating the concrete slab, and to perform other civil engineering works and inspections during construction; and
- Mr Henry, who was a director of DEQ and a civil engineer.

At trial, Actron claimed that DEQ had engaged in misleading and deceptive conduct in contravention of the *Trade Practices Act 1974* (Cth) (**TPA**) (now the Australian Consumer Law) by issuing a 'Form 15 Compliance Certificate – Design' (**Form 15**) certifying that the floating slab as evidenced by the structural drawings *'if installed and carried out in accordance with the information contained in the certificate, including any referenced documentation, will comply with the Standard Building Regulation'*. Of relevance was a 'Basis of Certification' AS3600 – Concrete Structures Code (**AS3600**) which requires that the slab be able to resist sustained and intermittent service loads without undue differential or uniform settlement.

Actron argued that issuing the Form 15 was misleading and deceptive because, contrary to the certification in that Form 15, the construction of the floating slab in accordance with the drawings would not comply with the *Standard Building Regulation 1993* (Qld) (**Building Regulations**) as, by virtue of the contraction or expansion in the underlying marine clay, the floating slab would settle by an amount that was 'undue' under AS3600.

According to Actron, the evidence demonstrated that DEQ was aware that the design of the slab as per the certified drawings would lead to excessive settlement, having advised the builder that 'settlement figures between 150 – 200mm could be expected' with the anticipated loading and use as a warehouse. However, DEQ argued that despite this opinion, the Form 15 was issued on the basis that this was the 'low cost' design approved by the builder and the expected settlement of 150 – 200mm was within the client's expectations and therefore could not be 'undue' for the purposes of AS3600 and the Building Regulations.

The trial judge rejected Actron's claim under the TPA and Actron appealed to the Court of Appeal.

Decision

The court allowed the appeal and found that DEQ's issue of the Form 15 was misleading for the purposes of section 52 of the TPA because the anticipated settlement would be 'undue' as contemplated by AS3600. This decision was reached on the basis that:

- the regulatory regime under which a Form 15 is issued is designed for the protection of the public and was irreconcilable with Mr Henry's thesis that the client's expectations were entitled to inform whether the anticipated settlement was 'undue' in terms of AS3600; and
- AS3600 requires the probability of structural failure of the slab to be 'acceptably low throughout its intended life' and the evidence, including DEQ's engineering reports, expected that there would be settlement causing structural failure early in the design life.

In reaching this decision, the court held that the building certifier was entitled to rely on the Form 15 at face value and it was irrelevant that the Form 15 was accompanied by a report, which if reviewed in detail by the certifier, might lead to the discovery that the anticipated settlement would be 'undue'.

The court also found that Mr Henry, being the engineer who signed the Form 15 and also a director of DEQ, was a person involved in the contravention under section 82(1) of the TPA and therefore also liable for the misleading and deceptive conduct.

| back to Contents

No right to appeal QCAT decision refusing an interlocutory application to lead fresh evidence

Alderton & Anor v Wide Bay Constructions Pty Ltd trading as Dixon Homes Hervey Bay [2018] QCA 149

Andrew Orford | Amy Dunphy | Elissa Morcombe

Key point: When leave is granted to discontinue proceedings, the presumption is that the discontinuing party will pay the other party's costs unless they can show good reason to the contrary.

Facts

The Aldertons (**Owners**) entered into a contract with Wide Bay Constructions Pty Ltd trading as Dixon Homes Hervey Bay (**Contractor**) to build a home on their property.

Six years after construction was completed, the Owners complained to the Queensland Building and Construction Commission (**QBCC**) about six defects.

The QBCC issued the Contractor with a 'Notice to Rectify or Complete' for two of the defects, but found one defect had been rectified and there was insufficient evidence for the remaining three defects. The QBCC subsequently advised the Owners that the Contractor had rectified the two defects subject to the notice.

The Owners commenced proceedings in the Queensland Civil and Administrative Tribunal (**QCAT**) seeking rectification of defective work and a review of the decision of the QBCC. After their claim was dismissed, the Owners sought leave to appeal. In the course of the appeal the Owners made an interlocutory application to the Appeal Panel of QCAT to rely on fresh evidence, which was refused.

The Owners then applied to the court for an extension of time within which to seek leave to appeal the refusal to rely of fresh evidence.

Decision

The Queensland Court of Appeal refused the Owners' application on the basis that the Owners had no right of appeal.

Under section 150 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), appeals from QCAT are limited to appeals against cost-amount decisions and final decisions. The decision to refuse leave to lead further evidence did not fall into either of these categories as it did not:

- concern costs; and
- finally decide the matter that was the subject of the proceeding, being the claim for compensation for rectification of defective work.

| back to Contents

Court of Appeal reaffirms position in respect of costs against non-parties

Arawak Holdings Pty Ltd v King Tide Company Pty Ltd [2018] QCA 148

David Pearce | Simon Smith | Lachlan Pramberg

Significance

If a director actively participates in legal proceedings on behalf of a company, beyond what would ordinarily be expected of the director in that capacity, and particularly in circumstances where the director may stand to gain personally from the litigation, it may result in a non-party costs order being made against them.

Facts

This application was heard before the Court of Appeal and arose out of a costs order made against King Tide Company Pty Ltd (**King Tide**) in favour of Arawak Holdings Pty Ltd (**Arawak**).

After a trial between the parties, King Tide was ordered to pay costs. King Tide appealed and the trial judge reserved judgment on an application by Arawak for a non-party costs order against Mr Hartnett, the sole director of King Tide.

On 15 September 2017 the trial judge ordered King Tide and Mr Harnett to pay Arawak's costs of the trial. On 18 September 2017 King Tide's appeal was heard. On 27 October 2017 the appeal was dismissed and costs were ordered against King Tide.

In the present application, filed on 4 December 2017, Arawak sought a non-party costs order against Mr Harnett in relation to the costs of the appeal.

Decision

Morrison JA made a non-party costs order against Mr Harnett.

His Honour found that the conduct of Mr Harnett satisfied the principles established in the leading authority on non-party costs orders, *King v FP Special Assets Ltd* (1992) 174 CLR 178.

As the trial judge had originally identified, Mr Harnett:

- had played an active part in the conduct of the litigation - as sole director of King Tide and as a director of the firm of solicitors that acted for King Tide during much of the litigation;
- was responsible for a majority of King Tide's correspondence during the litigation;
- had an interest in the subject of the litigation as he was a beneficiary of the Hartnett Discretionary Trust, of which King Tide was the trustee; and
- admitted he was the sole person 'behind' King Tide.

Morrison JA also concluded:

- the fact that new counsel was engaged and a new firm of solicitors were employed for the appeal did not detract from the findings at trial;
- despite having the opportunity to do so, King Tide failed on appeal to show through evidence that it had any assets or income, which led to the inference that Mr Hartnett was funding the litigation.

| back to Contents

Take care to ensure restrictive covenants comply with the sustainable housing provisions under the *Building Act 1975* (Qld)

Bettson Properties Pty Ltd & Anor v Tyler [2018] QSC 153

Michael Creedon | Bede Lipman | Lachlan Pramberg

Significance

This case highlights the importance for property developers to take care when drafting restrictive covenants in their contracts to ensure that they comply with the *Building Act 1975* (Qld).

Facts

Bettson Properties Pty Ltd and Tobsta Pty Ltd (**Developers**), trading under the name of Oxmar Properties, were developers of a staged residential and commercial development known as 'Griffin Crest' in the northern suburbs of Brisbane.

By a contract of sale dated 21 July 2014, the Developers sold a proposed lot in the estate to Pauline Taylor (**Buyer**). One of the special conditions (**Clause 1.26**) in the contract of sale was a requirement for the Buyer to comply with certain conditions relating to installation of solar panels. Relevantly, Clause 1.26 provided:

> '*The Buyer shall submit to the Seller, plans for covenant approval indicating the size, number and location of any solar panels. Any panels that are considered by the Seller to cause visual impact or are not aesthetically pleasing, will not be approved.*
>
> *The Buyer shall not proceed with affixing solar panels to any roof or structure until it has received the consent in writing for the same from the Seller and then only in accordance with the terms of the Seller's consent.*'

On 27 December 2016, the Buyer entered into an agreement with a contractor for the installation of solar panels without consulting the Developer. The Buyer was advised that the best location for the panels to maximise efficiency would be the north-eastern quadrant of the roof and, on 24 January 2017, the panels were installed in that position.

When the installation of the solar panels came to the attention of the Developers, the Developers demanded that the solar panels be relocated to the lower southern side of the roof. The Buyer refused.

The Developers brought an originating application before the Supreme Court seeking a declaration that the solar panels were installed in breach of Clause 1.26 and a mandatory injunction requiring the Buyer to relocate them to the south-eastern quadrant of the roof.

Decision

Burns J dismissed the application and ordered the Developers to pay the Buyer's costs.

In reaching his decision his Honour considered Part 2 of Chapter 8A of the *Building Act 1975* (Qld) (**Act**) which contains the provisions to support sustainable housing, including solar panels. His Honour identified sections 246O, 246Q and 246S of the Act as the relevant provisions.

His Honour noted that, under section 246O(3) a covenant will be of no force or effect to the extent that the prohibition applies merely to enhance or preserve the external appearance of the building. His Honour held that Clause 1.26 provided a mechanism for the Developers as sellers to exercise control over the size, number and location of solar panels on a roof and did not prohibit the installation of the solar panels.

Under section 246Q(2) a restriction will be of no force or effect to the extent that it applies to enhance or preserve the external appearance of the building and it prevents a person from installing, solar panels on the roof or other external surface of the building.

The Developers argued a person will only be prevented from installing solar panels within the meaning of section 246Q(2)(b) where he or she is forbidden from doing so. The Developers further contended that where approval has been given to a purchaser to install solar panels in a different location to that which was the subject of the purchaser's application, the purchaser has not been prevented from installing solar panels.

In rejecting the Developer's submissions his Honour relied on the principles of statutory interpretation to conclude the word 'prevent' to mean impede or hinder under section 246Q(2)(b). His Honour concluded the effect of Clause 1.26 was to restrict the location on the roof where solar panels could be installed in any case where the panels were considered by the Developers to cause a visual impact or are not aesthetically pleasing. Further, his Honour held Clause 1.26, by its very terms, hindered or impeded the Buyer from installing solar panels. Therefore, by reason of section 246Q, Clause 1.26 was held to be of no force or effect.

Finally, under section 246S an entity cannot withhold consent for an installation of solar panels to merely enhance or preserve the external appearance of the building, if withholding the consent prevents the person from installing the solar panels on the roof. Similar to section 246Q, his Honour concluded Clause 1.26 also had no effect under section 246S(2) as by refusing their consent on the basis of preserving the external appearance of the building the Developers prevented the Buyer from installing the solar panels in their desired location.

| back to Contents

Back-to-basics review of contractual principles

Hilchrist Pty Ltd v Visual Integrity Pty Ltd and ors [2018] QDC 97

David Pearce | Luke Trimarchi | Bethany Allen

Key Point: Do not neglect fundamental principles of contractual formation. In particular, be clear about the parties to your contract and their respective rights and obligations, and the relationship between multiple agreements which relate to the same subject matter.

Significance

The case provides a useful summary of several contractual principles, and is a reminder of the importance of properly documenting contracts and seeking legal advice.

Facts

Mr Jones, as its operations director, and Mr Butcher, as its managing director, ran Sign Site Pty Ltd (**Sign Site**) from 2012 to 2015. During this time, Sign Site falsified accounts to appear profitable. Mr Butcher was aware of this.

In 2015, Mr Jones was removed from his position as Sign Site's chief operating officer and excluded from the management of Sign Site. It is relevant that Mr Jones was also associated with a company - Hilchrist Pty Ltd (**Hilchrist**) and Mr Butcher was associated with another company - Visual Integrity Pty Ltd (**Visual Integrity**).

Mr Jones subsequently brought an unfair dismissal claim against Sign Site on the basis that Sign Site had not regularised his termination, and he was owed money for unpaid wages, unpaid dividends and on a director's loan account.

On 27 March 2015, Mr Butcher made Mr Jones a financial offer on the condition he withdraw his unfair dismissal claim and transfer any shares and units he held, which Mr Jones accepted.

Both Mr Butcher and Mr Jones signed a document to the effect of their agreement which listed the parties as 'Seller: HILCHRIST, Alan Jones, Robin Jones' and 'Buyer: VISUAL INTEGRITY, Andrew Butcher, Zoe Butcher' (**earlier agreement**). It contemplated the entry of a more formal agreement and also used the term 'without prejudice'.

A later agreement was subsequently prepared by solicitors which listed the parties as Hilchrist, Visual Integrity, and Sign Site and was signed by both Mr Jones and Mr Butcher (**later agreement**). The later agreement detailed Hilchrist's entitlement to receive from Visual Integrity a fixed amount under a payment schedule. Under the later agreement Hilchrist was also entitled to receive goodwill payments, subject to Sign Site continuing to trade and Hilchrist not breaching conditions of sale.

Visual Integrity defaulted on its payments and Hilchrist claimed the balance as immediately payable and recoverable under the agreement.

Hilchrist subsequently commenced proceedings against Visual Integrity, Mr Butcher and Zoe Butcher in the District Court, claiming the outstanding balance of $535,000. Hilchrist submitted:

- the later agreement did not supersede the earlier agreement because the parties were different;

- Mr Butcher and Zoe Butcher were, by implication, parties to the later agreement;
- if Mr Butcher was not party to the later agreement, he had engaged in misleading and deceptive conduct.

Hilchrist further claimed Mr Butcher dishonestly represented he would be contractually responsible for performance of obligations under the later agreement, to which he was not a party.

In response, Visual Integrity:

- submitted the earlier agreement fell into the third category in *Masters v Cameron* (1954) 91 CLR 353, and was not a binding agreement;.
- further alleged it entered into the later agreement in full reliance on the warranties given, including those as to the accuracy of Sign Site's accounts, which Mr Butcher knew to be false;
- argued that, by signing the later agreement, Hilchrist had breached a condition of the later agreement that all warranties were true and correct in every respect, meaning it would not be eligible to receive goodwill payments.

Decision

McGill DCJ found the goodwill payments were not immediately payable nor recoverable under the later agreement as they were conditional and separate to the payment schedule.

On the question of whether the later agreement had superseded the earlier agreement, McGill DCJ found the agreement fit squarely within the first category of *Masters v Cameron*.

His Honour held the use of the term 'without prejudice' in the earlier agreement had no effect on this. The earlier agreement was based on a without prejudice offer which was then accepted. It then had effect until the later agreement was signed. While a change in parties usually indicates a new contract, the same natural persons signed both agreements, which indicates a superseding contract.

His Honour further held it was not possible to imply additional parties into the later agreement as it would contradict the definitions of 'buyer' and 'seller'.

On the question of whether Visual Integrity breached warranties or conditions of the later agreement, Visual Integrity could not validly rely on the warranties it knew to be false. Further, the agreement's conditions which, if breached, would render Hilchrist ineligible to goodwill payments were only those intended to do so, regardless of poor drafting.

McGill DCJ further held Mr Jones knew Mr Butcher was not a party to the later agreement before signing it, and therefore was not entitled to any relief for misleading and deceptive conduct.

| back to Contents

Victoria

The *Civil Procedure Act* test for summary judgment is not applicable to summary determinations under Security of Payment legislation

3D Flow Solutions Pty Ltd v LTP Armstrong Creek Pty Ltd [2018] VCC 674

Owen Cooper | Tom Kearney | Duncan MacKenzie

Significance

Parties seeking summary determination under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) should make their application by originating motion. Where parties apply to recover payment under section 16(2)(a)(i) of the Act, the test for summary judgment under the *Civil Procedure Act 2010* (Vic) (**CPA**) does not apply.

Facts

LTP Armstrong Creek Pty Ltd (**respondent**) was the owner of the land on which an aged care facility (**project**) was to be constructed. It engaged MOC Development Pty Ltd (**construction manager**), a related entity, to undertake the role of construction manager. By a subcontract dated 19 October 2016 (**contract**), the construction manager engaged 3D Flow Solutions Pty Ltd (**claimant**) to carry out drainage works for the project.

On 1 November 2017 (**first payment claim**), 30 November 2017 (**second payment claim**) and 22 December 2017 (**third payment claim**) the claimant submitted claims under the Act to the construction manager.

The respondent alleged that:

- by emails from the construction manager to the claimant on 4 December 2017 and 12 December 2017, which alleged that certain works under the contract were defective, it had provided a payment schedule in response to the second payment claim; and
- by a report emailed by the construction manager to the claimant on 3 January 2018, which related to alleged defective works under the contract, it had provided a payment schedule in response to the third payment claim.

Neither respondent nor construction manager paid any of the amounts claimed in the three payment claims which totalled $105,556.72.

The claimant applied to the County Court for summary judgment by originating motion against the respondent for $105,556.72 as a debt due under a construction contract pursuant to section 16(2)(a)(i) of the Act.

Decision

Woodward J awarded summary judgment in favour of the claimant for the full amount of $105,556.72.

What is the test for an application for judgment under section 16(2)(a)(i) of the Act?

The respondent submitted that the test for an application made under section 16(2)(a)(i) of the Act was identical to the test for summary judgment under section 63 of the CPA, namely whether a respondent to an application has a 'real as opposed to fanciful' prospect of success.

Woodward J disagreed. While acknowledging that the issue had not been the subject of any authoritative determination, his Honour considered that an applicant seeking relief under section 16(2)(a)(i) of the Act by way of originating motion needed to establish 'on the balance of probabilities' that the prerequisites to a claim for a debt due under section 16(2) of the Act were satisfied.

Did the respondent's payment schedules comply with section 15 of the Act?

Woodward J found that neither of the alleged payment schedules complied with the Act. This was on the basis that they either failed to:

- identify the payment claim to which they related and the amount proposed to be paid (as required by sections 15(2)(a) and (b)) of the Act; or
- indicate the reason for withholding payment (as required by section 15(3)) of the Act.

| back to Contents

Ability of a claimant to make a payment claim post termination

Green Suburban Pty Ltd v Vita Built Pty Ltd [2018] VSC 330

Alison Sewell | Chris Hey | Lucy Wang

Significance

A payment claim under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) must be supported by a valid reference date. Where a construction contract has been terminated it is important to consider the precise terms of the relevant contract to determine if a claimant has a right to issue a payment claim post termination.

Facts

Green Suburban Pty Ltd (**respondent**) engaged Vita Built Pty Ltd (**claimant**) to build 16 townhouses and a basement carpark at Doncaster. The contract specified that the 'reference' date for submitting progress claims was the 24th of the month.

On 14 February 2018, the respondent served a notice of default and immediate termination on the claimant due to the occurrence of an 'insolvency event' under the contract. The claimant accepted that the contract had been validly terminated and no work was performed by the claimant on site after termination.

Clause Q6 of the contract provided that where the contract has been terminated due to an 'insolvency event' the respondent '*will not be bound to make any further payment to the contractor unless an obligation to pay arises under clause Q9*' (**clause Q9**). Clause Q9 set out a process whereby, following termination of the contract, the architect would calculate the amount owing by one party to the other and issue a certificate in respect of that amount.

On 3 April 2018, the claimant served a payment claim on the respondent for $189,468.40. The respondent did not issue a payment schedule responding to the payment claim.

Adjudicator found payment claim supported by 24 March 2018 reference date

The adjudicator issued his determination pursuant to section 23 of the Act for the full amount of the payment claim. The adjudicator determined that the payment claim was supported by the reference date of 24 March 2018.

The respondent commenced proceedings seeking to quash the adjudication determination on a number of grounds, including the ground that there was no valid reference date under the contract.

Decision

Kennedy J held that the payment claim was not supported by a valid reference date and quashed the adjudicator's determination.

Her Honour held that that the right to issue a progress payment on the 24th of the month was suspended on termination and that no reference date could arise until the process under clause Q9 had been completed. This was because it was the issue of a certificate pursuant to clause Q9 that gave rise to the payment obligation post-termination.

Her Honour applied the reasoning of the High Court in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 345 (analysed in our Roundup of 2016 security of payment cases) in concluding that the existence of a reference date is a precondition to the making of a valid payment claim under section 14 of the Act.

Ultimately, given that the payment claim of 3 April 2018 was not supported by any reference date the adjudicator had no jurisdiction to make his determination.

| back to Contents

A strict, legalistic interpretation of Security of Payment legislation is not aligned with its purposive, payment-friendly objectives

SJ Higgins Pty Ltd v The Bays Healthcare Group Inc [2018] VCC 805

Owen Cooper | Tom Kearney | Bianca Pyers

Significance

This case confirms that the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) should not be construed in an 'unduly technical manner'. Rather the Act should be implemented free of 'excessive legal formality'.

Facts

On 12 August 2016 The Bays Healthcare Group Inc (**respondent**) contracted SJ Higgins Pty Ltd (**claimant**) to design and construct a post-natal facility at Bays Hospital, Mornington (**contract**).

The contract included provisions requiring that:

- payment claims served under the contract were to be served on the contract's superintendent; and
- payment claims made under the Act were to be served on the respondent (rather than the superintendent).

Pursuant to the Act, the claimant made several payment claims as follows:

- on 31 May 2017 the claimant served a payment claim on the superintendent only for the amount of $292,693.30 (**payment claim 14**);
- on 17 August 2017 the claimant served a payment claim on the superintendent only for the amount of $175,387.54 (**payment claim 15**); and
- on 1 September 2017 the claimant served a payment claim, in the form of a tax invoice enclosing the superintendent's payment schedules in response to payment claims 14 and 15 (without including these payment claims themselves), on the respondent for the amount of $175,387.54 (**payment claim 16**).

The respondent did not provide a payment schedule, or pay any amount, in respect of payment claim 16.

The claimant applied to the County Court for summary judgment by originating motion against the respondent for $175,387.54 as a debt due under a construction contract pursuant to section 16(2)(a)(i) of the Act.

Decision

Woodward J awarded summary judgment to the claimant in the amount of $167,957.54 (being the full amount claimed by payment claim 16 less excluded amounts under the Act).

His Honour found that payment claims 14 and 15 were not validly served under the Act, because they had been served on the superintendent, and not the respondent, in circumstances where the contract explicitly made clear that the superintendent was not authorised to receive claims under the Act.

As a result payment claim 15 had not validly used a reference date under the Act, and it was open for the claimant to make payment claim 16 in respect of that same reference date.

The respondent had alleged that payment claim 16 did not identify the construction work to which it related and so was not a valid claim under section 14(2)(c) of the Act. His Honour cited authorities from Victoria and New South Wales and reiterated that the Act was not to be interpreted in 'an unduly technical manner' and that to comply with section 14(2)(c) of the Act it was only necessary for a payment claim to provide a respondent with the material which was reasonably necessary to make the payment claim objectively comprehensible.

Woodward J further noted that in undertaking that objective analysis it was appropriate to take into account the background knowledge of the parties as evidence by their past dealings and exchanges of information.

Accordingly, because payment claim 16 referred to payment claims 14 and 15, by reference to the payment schedules in response to those claims, and because the respondent had received copies of those claims (as provided to it by the superintendent), payment claim 16 did identify the construction work to which it related and was a valid claim under the Act.

| back to Contents

Construction Law Update editor

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

Contributing partners/senior lawyers

Email firstname.lastname@minterellison.com

Sydney	Richard Crawford | Andrew Hales	**T** +61 2 9921 8507 / 8708
Melbourne	Owen Cooper | Alison Sewell	**T** +61 3 8608 2159 / 2834
Brisbane	David Pearce	**T** +61 7 3119 6386
Canberra	Richard Crawford	**T** +61 2 9921 8507
Adelaide	James Kearney	**T** +61 8 8233 5685
Perth	Tom French	**T** +61 8 6189 7860
Darwin	Lachlan Drew	**T** +61 8 8901 5921
Hong Kong	Steven Yip	**T** +852 2841 6843

ME_150640730