MinterEllison

Construction Law Update

August 2018

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Legislative update

New South Wales

Bill proposes stricter obligations and penalties for NSW Security of Payment Act

Building and Construction Industry Security of Payment Amendment Bill 2018 (NSW)

Andrew Hales | Richard Crawford | Stella Luo

Key Point

The NSW government has released a draft bill, the *Building and Construction Industry Security of Payment Amendment Bill 2018* (NSW) (**SOP Bill**) proposing significant reforms to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**).

If passed in its current form, the SOP Bill would create stricter compliance obligations for principals and head contractors as well as greater investigation and enforcement powers under the SOP Act.

Key changes

New offences

Directors and other officers of a corporation, including managers, may be personally liable for an offence committed by a corporation (such as those under sections 13(7) and 13(8) of the SOP Act - see *Penalties* below):

- if they are an accessory to the offence; or
- for certain offences (termed 'executive liability offences') – if they know or ought reasonably to know that an offence would be committed and they fail to take all reasonable steps to prevent or stop the commission of that offence.

Penalties increased

For incorporated head contractors penalties would increase from 200 penalty units (currently $22,000) to 1,000 penalty units (currently $110,000) for:

- serving a payment claim on a principal without a supporting statement that all subcontractors have been paid for the construction work concerned – section 13(7) of the SOP Act; and
- providing a supporting statement knowing that the statement is false or misleading in a material particular – section 13(8) of the SOP Act.

Deadlines for time for progress payments would be reduced

- for principals: 10 business days (down from 15)
- for head contractors: 20 business days (down from 30).

Endorsement

Payment claims would be required to state that they are made under the SOP Act.

Reference dates

- Contractors would be entitled to make a payment claim at least once per month for work carried out in that month.
- Specific reference dates apply in the case of a single one-off payment, a milestone payment and when a contract has been terminated.

Liquidation

If in liquidation a corporation will not be able to take any action to enforce a payment claim or an adjudication determination.

Adjudications

- Regulations may prescribe for how applications and responses are lodged.
- Claimants may withdraw an application at any time before it is determined.
- Adjudicators will have to determine applications within 10 business days after either a response is lodged or (if a response is not lodged) the deadline for lodging a response.
- Persons authorised to nominate adjudicators may be required to observe a code of practice.

Supreme Court review

Allowed for a jurisdictional error made by an adjudicator, including setting aside the determination or remitting the matter to the adjudicator for redetermination.

Service of documents

The requirements would apply to all documents, not just notices.

Submissions on the SOP Bill

The public consultation period in respect of the SOP Bill ends on 18 September 2018. Submissions may be made to Fair Trading NSW via email.

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New ban on combustible cladding in NSW

Building Products (Safety) Act 2017 (NSW)

Richard Crawford | Jeanette Barbaro | Stella Luo

Significance

New ban on combustible cladding in NSW has widespread impacts on builders, manufacturers and suppliers for existing and new buildings.

The ban

From 15 August 2018, it is prohibited to use aluminium composite panels (**ACPs**) with a core comprised of more than 30% polyethylene in New South Wales in any external cladding, external wall, external insulation, façade or rendered finish in the following buildings:

- Class 2, 3 and 9 buildings with a rise in storeys of three or more (Type A)
- Class 5, 6, 7 and 8 buildings with a rise in storeys of four or more (Type A)
- Class 2, 3 and 9 Buildings with a rise in storeys of two or more (Type B)
- Class 5, 6, 7 and 8 buildings with a rise in storeys of three or more (Type B).

The ban was made by the Commissioner for Fair Trading pursuant to the *Building Products (Safety) Act 2017* (NSW) (**BPSA**) and will remain in force indefinitely and until revoked.

The ban applies irrespective of when the building was constructed. In effect, it applies retrospectively to all existing buildings that have the banned ACPs in the external cladding, external walls, external insulation, façade or rendered finish.

Are there any exceptions?

Yes. Two exceptions apply:

- the ACP has successfully passed the AS 1530.1 test for combustibility prescribed by the National Construction Code (**NCC**) and an accredited testing laboratory has produced the test results on or after 1 July 2017, which describe the methods and conditions of the test and the form of construction of the tested ACP or prototype wall assembly or façade; **or**

- the ACP and the proposed external wall assembly has successfully passed the AS5113 test **and** the person or entity wanting to use the ACP documents has declared by statutory declaration that the ACP will be installed in a manner identical to the tested prototype wall assembly or façade **and** an accredited testing laboratory has produced the test results on or after 1 July 2017 describing the methods and conditions of the test and the form of construction of the tested ACP or prototype wall assembly or façade.

Impact on existing buildings

If you own an existing building that has the banned ACPs in any external cladding, external wall, external insulation, façade or rendered finish then:

- the Commissioner of NSW Fair Trading (**Commissioner**) may issue a building notice to you, the occupier, your local council, the relevant enforcement authority or the Commissioner of Fire and Rescue NSW;
- the Commissioner may publish a building notice on the internet if it is in the public interest to do so; and
- your local council and other relevant authorities have power to issue you with a *building product rectification order* requiring you to:
    - eliminate or minimise a safety risk posed by the use of the banned ACPs; and/or
    - remediate or restore the building following the elimination or minimisation of the safety risk.

Building owners may be compelled to remove and replace the banned ACPs on existing buildings if they cannot eliminate or minimise the safety risk without removal.

Who may be liable under the ban?

Builders, manufacturers and suppliers may potentially be liable for contravening the ban under section 15 of the BPSA. It will be an offence if they:

- 'cause' the banned ACPs to be used in a building; for example they built using ACPs or supplied the ACPs for use in the construction of the external cladding, external wall, external insulation, façade or rendered finish; or
- in trade or commerce, represent that a banned ACP is suitable for use in the external cladding, external wall, external insulation, façade or rendered finish of a building.

Penalties for non-compliance

Corporations may be fined up to $1.1 million for contravening the ban, with a further penalty of $110,000 for each day the offence continues.

Contravening the ban is also an executive liability offence, meaning directors and managers may be personally liable if they knew or ought to have known of the offence and failed to take all reasonable steps to prevent it.

Individuals may be liable for fines of up to $220,000 and/or 2 years' imprisonment. There is a further penalty of $44,000 for each day the offence continues.

What does this mean for you

- The ban applies even if it can be shown that the ACPs were used in accordance with the NCC at the time of construction - the Commissioner has openly stated that the NCC is not sufficient to regulate building products and cannot be relied upon in isolation to manage the risk of using the banned ACPs.
- If you are buying a building, ensure you enquire about the external cladding, external wall, external insulation, façade or rendered finish of the building because if banned ACPs have been used, the responsibility for undertaking rectification rests with the **current owner** of the building.

- If you are selling, seek legal advice as to whether you need to disclose that your building has or may have the banned ACPs in the external cladding, external wall, external insulation, façade or rendered finish, that you have received a building notice or a *building product rectification order*.
- If you are planning or designing a building using the banned ACPs, take steps to change the design before construction begins.
- If you are in the process of constructing using the banned ACPs, act now to remove and replace them. It will often be easier to do so during construction than later when the building is occupied, operational or tenanted.
- Check to see whether the ACPs on your building have passed either an AS1530.1 test (most ACPs are unlikely to pass this test) or the AS5113 test (this is a relatively new test) to take advantage of one of the two exceptions.
- Consider conducting an AS5113 test of your external wall assembly to establish if the second exception applies. Note, testing must be conducted by an accredited testing laboratory and a statutory declaration as to how the wall assembly has been installed will also be needed.

For full details of the ban, see the Commissioner's ban notice.

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In the Australian courts

New South Wales

Liquidator clawback risk: Head contractor pays creditors of subcontractor under industrial pressure

Hosking v Extend N Build Pty Ltd [2018] NSWCA 149

Andrew Hales | Michael Hughes

Key Point

Developers or head contractors are often put in the undesirable position of having to pay secondary subcontractors directly. This has always carried the risk of liquidators seeking to claw back payments as unfair preferences – but some peace of mind may now be available following this decision.

Significance

The NSW Court of Appeal found that a head contractor did not make payments in accordance with its contractual regime with its subcontractor because the head contractor had terminated the subcontract. Importantly, the terms of the direct payment clause of the subcontract did not impose any obligation on the head contractor to make those payments, particularly after the subcontract had been terminated.

Although the liquidator was generally unsuccessful, the decision also demonstrates that payments may be voidable as an unfair preference if made pursuant to a contractual right or obligation capable of being characterised as a 'transaction' to which the insolvent subcontractor is a party and the payment is made from its property.

Facts

The head contractor entered into a contract with the subcontractor for building work at ANZ Tower, Sydney before voluntary administrators were appointed to the subcontractor. The subcontractor eventually went into liquidation.

The subcontractor engaged several secondary subcontractors to carry out some of the work. The subcontractor ultimately failed to pay the secondary subcontractors, and as a result they ceased work

at the premises. On the same day, the head contractor received a letter from the union, the CFMEU, requesting that it make payments directly to the secondary subcontractors, which the subcontractor had failed to make. The subcontractor also made a written request to the head contactor to make those payments to the secondary subcontractors 'as discussed'.

Shortly after, the head contractor wrote to the CFMEU outlining an arrangement for the payment of the outstanding amounts owing to the secondary subcontractors. The letter also stated that the arrangement was 'as discussed'. The payments under the arrangement were made.

One of the secondary subcontractors (**Kennico**) did not receive any payments from the head contractor under the arrangement. However, the subcontractor paid Kennico of its own accord, but not any of the other secondary subcontractors.

In the course of the liquidation, the liquidators commenced proceedings against the secondary subcontractors contending that the payments were voidable as unfair preferences and were entered into at a time when the subcontractor was insolvent.

Important points in the primary decision

Brereton J of the Supreme Court of NSW found that:

- the subcontractor was insolvent at the relevant times;
- the payments by the subcontractor to Kennico were unfair preferences; and
- the payments by the head contractor to the five other secondary subcontractors were not unfair preferences because they were not made by or received from the subcontractor. Rather, they were made through the arrangement between the head contractor and the CFMEU, to which the subcontractor was not a party, with that arrangement being reached in response to industrial pressure.

Appeal decision: subcontractors were not preferred, but the clawback risk remains

The liquidators failed to establish the threshold requirement for an unfair preference for the payments to the five secondary subcontractors because the subcontractor and the secondary subcontractors were not parties to the transaction.

The important points made by the Court of Appeal were:

- identifying the 'transaction' to which the insolvent subcontractor was said to be a party. This needed to be done without reference to a 'chain of causation' which connected the subcontractor to the payments but did not establish that the subcontractor was a 'party to the transactions'. There was no evidence that the subcontractor was a party to any of the transactions by which the head contractor paid the five secondary subcontractors;
- a transaction can be made up of a series of interrelated dealings, and the outcome of the case would have been different if, as a result of an arrangement (whether express or inferred) between the subcontractor and the head contractor, the head contractor reached an arrangement with the subcontractor and its creditors, pursuant to which those creditors were paid; and
- the statutory defence was unavailable to Kennico because a reasonable person in the position of Kennico would have had 'a positive apprehension or fear' that the subcontractor would be unable to pay its debts at the time that the payments were made. The payments to Kennico were made over a period of two months after it had completed the work, and Kennico knew that the subcontractor was 'unable to pay everyone'.

Practical significance

Counterparties of potentially insolvent companies should be careful as to whether any payments they are making are transactions between the insolvent company and the creditors. If the insolvent company and its creditors are not parties to the transaction there will not be any unfair preference.

Careful contract drafting is also important. As was the case here, the terms of the subcontract can minimise the risk of direct payments from the head contractor to secondary subcontractors being attacked as unfair preferences, but this will not eliminate the risk.

Critically, this case turned on the fact that under the subcontract, the head contractor had a discretionary right without an obligation to pay the secondary subcontractors directly, and the head contractor exercised its right to terminate the subcontract for convenience. So by the time the payments were made to the secondary subcontractors, the head contractor had already ceased its contractual relationship with the subcontractor.

The payments made by the head contractor to the secondary subcontractors in this case would have been unfair preferences if:

- the subcontractor had directed the head contractor to make a payment to the secondary subcontractors out of moneys otherwise payable by the head contractor to the subcontractor; or
- the transaction resulted from the contractual arrangements that existed between the head contractor and the subcontractor, which would have made the secondary subcontractors party to the payment transaction.

For counterparties, even if a pre-liquidation transaction is not an unfair preference, the risks remain that a liquidator may seek to challenge the transaction relying on the numerous other statutory rights of recovery available to them, for example, to recover payments made pursuant to uncommercial transactions.

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Adjudication decision withstands irrational and unreasonable appeal

Pinnacle Construction Group Pty Ltd v Dimension Joinery & Interiors Pty Ltd [2018] NSWSC 894

Richard Crawford | Michelle Knight | Emily Miers

Key Point

The case highlights the difficulties in challenging an adjudicator's determination based on grounds such as a breach of natural justice and/or irrationality and unreasonableness. The judge echoed previous authorities to emphasise that adjudications are a form of 'rough justice' and adjudicators should be afforded 'very considerable latitude … as to the manner and form of the determination'.

Facts

Pinnacle Construction Group Pty Ltd (**Pinnacle**), as head contractor, engaged Dimension Joinery & Interiors Pty Ltd (**Dimension**) on the development of a residential development comprised of 103 apartments in Dee Why. Pinnacle and Dimension entered into a contract on 17 January 2017 (**contract**) which stipulated that progress claims were only to be submitted once and on the 15th day of every month.

Pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**) and the contract, Dimension submitted a payment claim on 12 December 2017 for the amount of $144,630.80. The payment claim encompassed works completed between 20 February 2017 and 10 November 2017 and specified a reference date of 15 November 2017. In response, Pinnacle scheduled an amount of '$Nil'.

Dimension proceeded to adjudication. The adjudicator determined that Pinnacle owed Dimension $111,470.80. Pinnacle challenged the adjudicator's determination on the following grounds:

- there was no reference date available to support the payment claim;
- it had been denied procedural fairness; and

- the adjudicator's findings were irrational or unreasonable.

Decision

The judge dismissed each of the grounds and dismissed the proceedings with costs.

Reference date arose after completion of work and was available to support the claim

The payment clause in the contract stipulated that claims are to be submitted 'once' and on the 15th day of every month. Reference dates continue to arise after work ceases, unless the contract provides otherwise. Pinnacle contended that the payment clause could not be interpreted to mean that reference dates would continue to arise after work had ceased and therefore the payment claim the subject of the adjudication was in respect of a reference date that had already been used.

The court did not agree with Pinnacle's interpretation and found that the payment clause did not prevent the recurrence of reference dates after work had been completed and Dimension was entitled to submit a claim on 12 December 2017. Further, Dimension did defect rectification work during the relevant period. The performance of defect rectification work is sufficient to cause a further reference date to arise where, as in this case, the contractor is entitled to the release of monies withheld for such work under the contract.

Procedural fairness was not denied

Pinnacle contended that certain findings by the adjudicator were made without it being provided with the opportunity to respond. In relation to one finding, the court held that while the adjudicator had used 'colourful language' in criticising Pinnacle, there was no sinister implication in those words and the adjudicator was simply accepting Dimension's submissions. The judge recognised that whilst the adjudicator had also accepted other submissions of Dimension which did not accurately reflect the contents of the documents to which they related, Pinnacle did not take issue with these submissions in its response and there was therefore no denial of procedural fairness.

No absence of rationale or reasonable reasoning on adjudicator's part

Pinnacle's submissions that the adjudicator's findings were so irrational and unreasonable as to go beyond jurisdiction were based on its allegations of a breach of natural justice. As the judge did not accept those grounds it was unsurprising that this ground was also dismissed. Notably, the judge accepted that 'it would require a most extraordinary case for a court to find an adjudicator's decision to be unlawful because it is irrational …'. This was understandable in the context of the SOP Act which promotes 'rough justice' with the main purpose of achieving an informal, summary, and quick outcome, aligning with a 'brutally fast' approach.

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Consumer protection warranties in the Home Building Act – developers and builders beware

The Owners – Strata Plan No 66375 v King [2018] NSWCA 170

Andrew Hales | Stella Luo

Key Point

Immediate subsequent homeowners may enforce implied statutory warranties against developers for certain residential building work under section 18C of the *Home Building Act 1989* (NSW) (**HBA**). The scope of a developer's liability under section 18C remains unsettled. At the least, a developer will be liable for breaches arising from defective work within the scope of the specific contract with the builder. However, the judgment of Ward JA suggests that a developer's liability extends to all residential building work done on the developer's behalf, irrespective of whether the developer has rights against the builder in respect of that work.

Significance

This decision highlights greater legislative and judicial concern for protecting consumers' interests in residential building contracts. It suggests that developers and builders may be liable for breaches of statutory warranties arising from design defects even if work was carried out in compliance with the building contract in circumstances where the builder did not prepare the design plans and specifications.

Note that for contracts executed on or after 15 January 2015, section 18F(1)(b) of the HBA provides a statutory defence for developers and builders who have reasonably relied on instructions given by a third party professional, such as an architect. This provision did not apply in the present case.

The case is also a reminder of the importance of clear and consistent drafting in building contracts, particularly in identifying the relevant parties to the contract. Proper records should also be retained to avoid future evidential difficulties in relation to contractual disputes.

Facts

During early 2000, the respondents, David and Gwendoline King (**Kings**) engaged Beach Constructions Pty Ltd (**Builder**) to construct a mixed residential and commercial strata development on land owned by the Kings.

Numerous design defects became apparent after the units had been sold, including missing seals on lift doors, missing heat detectors in residential units and various fire and safety defects. These defects did not arise from work undertaken by the Builder, but rather from omissions in design plans and specifications that the Builder followed in accordance with the construction contract.

The appellant Owners Corporation was the immediate subsequent owner of the common property of the development. The Owners Corporation brought proceedings in 2007 against multiple parties in relation to the defects, including the Kings and Meridian Estates Pty Ltd, a company of which the Kings were sole directors (**Meridian**).

The case concerned the Owners Corporation's claim against the Kings. The Owners Corporation argued that the Kings were developers and therefore bound by section 18C of the HBA. Section 18C (now section 18C(1)) provided that:

> '*a person who is the immediate successor in title to … a developer who has done residential building work on land is entitled to the benefit of the statutory warranties as if the … developer were required to hold a contractor licence and had done the work under a contract with that successor in title to do the work*.'

Under section 3A of the HBA, an individual or a partnership or a corporation on whose behalf residential building work is 'done' in certain circumstances is a developer who does the work.

It was not in issue that the design defects breached section 18B(c) of the HBA (now section 18B(1)(c)), which contains an implied warranty that the work will comply with the law.

In short, if the Kings were found to be developers, then they could be liable for breaching statutory warranties implied into the construction contract by the HBA.

The Kings argued that they were not party to the construction contract and that the relevant developer was Meridian. Tender documents issued to the Builder named Meridian as principal. However, drafts of the construction contract, related documents and correspondence inconsistently identified Meridian and the Kings as being party to the contract. An executed copy of the construction contract could not be found.

The Owners Corporation's claim failed at first instance as the primary judge held that:

- the Kings were not 'developers' because they were not parties to the original construction contract; and

- even if the Kings were 'developers', they were not liable for certain 'design defects' because the Builder was not liable for those defects.

The Owners Corporation lodged an appeal in the Court of Appeal.

Decision

The Court of Appeal allowed the appeal (by majority) and ordered that judgment be entered against the Kings in the sum of $5,093,168, which included $452,943 in respect of the design defects.

Issues in identifying the developer

The Court of Appeal unanimously held that the Kings were 'developers' for the purposes of applying the HBA. The court inferred from site meeting minutes that it was most likely that the Kings had executed the construction contract in their personal capacities. Note that this aspect of the decision is no longer relevant to proceedings commenced on or after 25 October 2011 due to the passage of the *Home Building Amendment Act 2011* (NSW). An owner of land on which residential building work is done is now deemed a developer under section 3A(1A) of the HBA, even if the owner is not a party to the relevant building contract.

Scope of developers' liability under the statutory warranties

The primary judge had held that even if the Kings were developers, they were only liable within the scope of work undertaken under the construction contract. In other words, the Owners Corporation could only claim against the Kings to the extent that the Kings could claim against the Builder for breaching the statutory warranties. The defects arose from omissions in the design plans and specifications which meant they did not comply with the law, for which the Builder was not responsible. The primary judge therefore reasoned that the Kings did not breach the statutory warranties.

The Court of Appeal disagreed and the majority found (Leeming JA dissenting) that as developers, the Kings were liable for breaching statutory warranties under the HBA in respect of the design defects.

Ward JA held that a developer's liability for breaching statutory warranties covered all work done on behalf of the developer, not just work done under the contract between the developer and builder. Her Honour emphasised that the main regulatory purpose of section 18C was to ensure immediate subsequent purchasers could have recourse to the person responsible for defective building work where there is otherwise no legal relationship. A developer cannot escape liability for breaching statutory warranties simply because the breach related to work beyond the scope of its particular building contract with the builder.

In contrast, Leeming and White JJA found that the scope of the notional contract created between the developer and subsequent owner by section 18C of the HBA was limited to the terms of the building contract between the developer and builder. Their Honours reasoned that section 18C was intended to ensure that subsequent homeowners had the benefit of statutory warranties in cases where there was no contract for residential building work. Consequently, section 18C did not widen the scope of the notional contract over and above that of the construction contract.

Nonetheless, White JA held that the Kings were liable for breaching the warranty that the building work will comply with the law. It did not matter that the Builder had complied with the plans and specifications of the construction contract; the work ultimately did not comply with the Building Code of Australia.

In reaching this conclusion, White JA referred to the following two warranties under section 18B of the HBA:

- that the work will be carried out in accordance with the plans and specifications set out in the construction contract (section 18B(a), now section 18(1)(a)); and
- that the work will comply with the law (section 18B(c), now section 18B(1)(c)).

His Honour held that under those warranties read together, the builder warrants that construction of the work in accordance with the plans and specifications will comply with the law. The developer warrants the same by extension under the notional contract created by section 18C of the HBA.

Leeming JA dissented and found that the Kings did not breach the statutory warranty implied by section 18B(c) of the HBA because the statutory warranties should not be construed so as to impose on a builder liability for failing to identify defects in plans and specifications that it had not been engaged to prepare.

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Queensland

Variations to contract, unsatisfactory performance and breach of contract not sufficient to discharge surety upon proper construction of contract and guarantee

Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd [2018] QCA 174

Andrew Orford | Laura Berry | Elissa Morcombe

Key Point

Clear drafting is required to discharge obligations under an indemnity or guarantee. The existence of an indemnity or guarantee does not of itself allow a court to depart from the natural and ordinary meaning of unambiguous clauses.

Significance

The Queensland Court of Appeal has dismissed an appeal seeking declaratory relief to discharge obligations under a guarantee. In rejecting the arguments that variations to the contract, unsatisfactory performance and breach of contract could have the effect of discharging the guarantee, the court extensively considered the proper construction of the terms of the contract and guarantee.

Facts

Mineralogy Pty Ltd (**Mineralogy**) wrote to and requested BGP Geoexplorer Pte Ltd (**BGP**) to enter into a contract with Mineralogy's subsidiary, Palmer Petroleum Pty Ltd (**Palmer Petroleum**). In the letter Mineralogy offered to guarantee the performance of Palmer Petroleum's obligations under the contract if BGP entered into the contract.

Under the contract, BGP agreed to conduct seismic surveys of designated below-sea areas within the Gulf of Papua and to provide reports on the work areas. BGP completed the survey work and compiled reports. As it carried out work under the contract, BGP progressively invoiced Palmer Petroleum. After a substantial invoiced amount remained unpaid, BGP served a statutory demand on Palmer Petroleum.

Mineralogy commenced proceedings against BGP seeking declaratory relief from an obligation to pay money to BGP under a guarantee. BGP denied that Mineralogy was entitled to the relief claimed and counterclaimed on the guarantee for unpaid invoices.

Mineralogy's three claims – new contract arising due to amendments, right to withhold payments, misleading and deceptive conduct

The contract had been amended four times in accordance with article 19.1 of the contract, which anticipated the possibility of changes to the scope of the work during the course of the contract. Significantly, clause 4(a) of the guarantee provided that Mineralogy would not be released or discharged from liability under the guarantee by any '*alteration to, addition to or deletion from the Contract or the scope of the work to be performed under the Contract*'. Mineralogy claimed that the four amendments fundamentally altered the contract and gave rise to a new agreement, which therefore meant the guarantee no longer had any application.

Under article 5.8 of the contract, Palmer Petroleum could withhold payments on account of BGP's unsatisfactory performance under the contract. Mineralogy argued that Palmer Petroleum was entitled to withhold payment on all invoices once BGP performed any of its contractual obligations unsatisfactorily.

Mineralogy further claimed that BGP engaged in misleading or deceptive conduct by misrepresenting its skill and competence to provide a report as to the prospective existence and volume of resources of oil and condensate. This was to be inferred from the absence of opinions with respect to those topics in the report.

At trial, Mineralogy's claims were dismissed and an order was made on the counterclaim that it pay BGP for unpaid invoices and interest. Mineralogy subsequently filed a notice of appeal against the judgment.

The appeal

Mineralogy advanced grounds of appeal, which can be broadly categorised as errors of the primary judge in:

- construing clause 4(a) of the guarantee to apply to amendments made to the contract such that Mineralogy was not discharged from any liability under the guarantee;
- failing to exclude from the scope of clause 4(a) of the guarantee those amendments to the contract that released or would release Palmer Petroleum's rights against BGP for actual or anticipatory breach of contract (ie any such amendments would discharge Mineralogy's guarantee obligations);
- rejecting the claim of unsatisfactory performance of work that did not relate to an invoiced item of work; and
- rejecting the claim of misleading or deceptive conduct.

Decision

The Queensland Court of Appeal dismissed the appeal and accepted the primary judge's reasoning that:

- a strict interpretation of guarantee provisions did not necessitate reading down the broad wording of clause 4(a) of the guarantee to limit its scope to only those alterations, additions or deletions to the contract effected by means of article 19.1 of the contract. That would be an unrealistically narrow interpretation;
- a proper construction of clause 4(a) of the guarantee avoided discharge of the guarantee by any alteration to, addition to or deletion from the contract or the scope of work to be performed which expressly or impliedly released enforceable rights that Palmer Petroleum may have had against BGP for breach of the contract;
- article 5.8 of the contract only applied to invoiced items of work which Palmer Petroleum *bona fide* disputed as unsatisfactory; and
- even if misleading and deceptive conduct could be proved by Mineralogy, it was not entitled to relief under section 87(1) of the *Trade Practices Act 1974* (Cth) as there was no evidence that Minerology would not have entered into the guarantee had it known of the alleged misleading or deceptive representation as to BGP's competence.

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Unless you hold a licence, don't expect recourse under Queensland's security of payment legislation

St Hilliers Property Pty Ltd v Pronto Solar Innovations Pty Ltd [2018] QSC 164

Michael Creedon | Amy Dunphy | Lachlan Pramberg

Key Point and Significance

If a contractor completes work for which it does not hold a licence, it will not have any recourse under the security of payment legislation in Queensland.

Facts

St Hilliers Property Pty Ltd (**St Hilliers**) was the contractor to Bouygues Construction Australia Pty Ltd who was the head contractor for the construction of solar farms in central Queensland.

Pronto Solar Innovations Pty Ltd and Pronto Projects Pty Ltd (each a **Pronto entity**) entered into separate subcontracts with St Hilliers to perform subcontract works on the solar farms. The subcontract works included pile driving and pre-drilling activities. Neither Pronto entity held any form of licence to perform building work under the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCCA**).

On 19 December 2017, both Pronto entities served payment claims under their respective subcontracts on St Hilliers. Each payment claim purported to be made under section 17 of the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIPA**).

On the basis of the payment claims, on 20 December 2017, each Pronto entity also served St Hilliers with a Form 1 Notice of Claim of Charge and a Form 2 Notice to Contractor under the *Subcontractors' Charges Act 1974* (Qld) (**SCA**).

St Hilliers commenced proceedings against each Pronto entity seeking cancellation of the claims of charge under section 21 of the SCA and declarations that the claims under BCIPA were invalid.

Each Pronto entity refuted the arguments advanced by St Hilliers and also sought an estoppel prohibiting St Hilliers from arguing the Pronto entity was not entitled to issue its payment claim under section 42 of the QBCCA. The basis for the estoppel claim was an affidavit filed by the special projects officer for each Pronto entity that outlined a series of conversations with the authorised agent of St Hilliers which took place before the service of the payment claims. The conversations were to the effect that St Hilliers had expressly stated to each Pronto entity that it would not require a building licence as it would be working under St Hillier's licence.

Decision

Daubney J found in favour of St Hilliers and cancelled the claims of charge under the SCA and declared that the claims made under BCIPA were invalid. His Honour also rejected each Pronto entity's estoppel application.

In reaching his decision his Honour held:

- Each subcontract was for the performance of 'building work' within the meaning provided in schedule 2 of the QBCCA. His Honour held the phrase 'building work' extends beyond the traditionally understood meaning and included the piling and drilling works and also held that, despite the Pronto entities' submissions, the piling and drilling works were not excluded under the *Queensland Building and Construction Commission Regulation 2003* (Qld) (**QBCC Regulation**). His Honour also identified that licences were in fact required for the pile driving and pre-drilling activities under schedule 2 of the QBCC Regulation.

- As the Pronto entities did not hold any licence to complete the respective contracted works they were not entitled to any monetary or other consideration under section 42 of the QBCCA (which expressly requires a person not to carry out building work unless the person holds a contractor's licence of the appropriate class).
- As no payments were due under either of the subcontracts no payments could be secured by a charge under the SCA.
- Payment claims which were made by each Pronto entity purportedly under BCIPA were not valid payment claims because an unlicensed contractor, rejected under section 42(3) of the QBCCA, cannot be entitled to progress payments under BCIPA (relying on Williams JA in *Cant Contracting Pty Ltd v Casella* [2006] QSC 242 at [30]).
- Neither Pronto entity could raise an estoppel to prevent St Hilliers from relying on section 42 of the QBCCA. In rejecting the estoppel application his Honour relied on the decisions in *Multiplex Constructions Pty Ltd v Rapid Contracting Pty Ltd (in liquidation) & Anor* [1999] QCA 306 and *Zullo Enterprises Pty Ltd & Ors v Sutton* (CA No 8045 of 1998, 15 December 1998), where it was held that section 42(3) of the QBCCA precludes a restitutionary claim.

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Nuisance – an illustration of the principles with respect to a statutory body

State of Queensland v Baker Superannuation Fund Pty Ltd & Anor; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd & Anor [2018] QCA 168

David Pearce | Sarah Ferrett | Sam Rafter

Key Point

For the purposes of the tort of nuisance, in deciding whether an interference is caused by the unreasonable use of a statutory body's land, the content of any applicable legislation will inform whether the interference resulted from an unreasonable use of the statutory body's land.

Facts

The State of Queensland (**State**) is the owner of land used as a public facility for recreational activities referred to as the Brisbane Valley Rail Trail which, until 1993, was the Brisbane Valley rail line (**Valley Trail**).

In or around 1884 during the construction of the rail line, an embankment was formed to provide a level surface for the rail track. Two culverts were installed in that embankment (**Culverts**) so that surface water could pass underneath the embankment and follow the line of the pre-existing channel.

The Michael Vincent Baker Superannuation Fund Pty Ltd (**Baker**) owned land adjoining the Valley Trail (**Adjoining Property**). The distance from the Adjoining Property to the Culverts was approximately four or five metres.

From about 1999, there was an increase in the volume of water flowing through the Culverts on to the Adjoining Property due to clearance and development activity of other landowners on the other side of the rail line. The Adjoining Property became badly eroded by the passage on to it of this surface water through the Culverts.

In February 2000, Baker wrote to Queensland Rail (now Aurizon Operations Limited (**Aurizon**)) to complain about the erosion of the Adjoining Property. Prior to that, there was no evidence that Aurizon had knowledge of the erosion. In May 2000, Aurizon wrote to Baker denying liability.

At the time Aurizon received Baker's complaint about the erosion, the future of the Valley Trail was being reviewed under a process for the rationalisation of Aurizon's land holdings pursuant to sections 214 to 219 of the *Transport Infrastructure Act 1994* (Qld) (**TIA**). Under section 215 of the TIA (numbered section 126B at the time), Aurizon was required to identify rail corridor land as well as land

which was not existing rail corridor land but was of strategic importance to the State as part of the transport corridor within five years of its commencement. The five-year timeframe was extended by a further period of two years under the TIA with the result that at all material times for the case against Aurizon, the Valley Trail was held by Aurizon under the 'transitionary land rationalisation process' for the purposes of the TIA.

In June 2002, the Valley Trail was declared non-rail corridor land pursuant to section 215 of the TIA and was transferred to the State as unallocated State land.

Baker commenced proceedings against Aurizon and the State, claiming that by not preventing the flow of water through the Culverts during their respective periods of ownership, each of Aurizon and the State committed an actionable nuisance. The trial judge found that Baker had proved an actionable nuisance against both Aurizon and the State. Both the State and Aurizon appealed against the trial judge's reasons.

Decision

The Court of Appeal dismissed the claim of nuisance against Aurizon but upheld the claim against the State.

No actionable nuisance against Aurizon

The court found that Aurizon only became aware of erosion in 2000. The court found that, prior to transferring ownership of the Valley Trail to the State in June 2002, Aurizon had acted reasonably (being the one of the critical elements of nuisance) by not abating the interference on the basis that:

- the cost of works to restore the Valley Trail to its natural state would be at least in the order of some hundreds of thousands of dollars;
- it had not created the state of affairs, upon which the action for nuisance was founded; and
- its ownership of the Valley Trail was in doubt pending completion of the process under section 215 of the TIA and it was susceptible to being divested of the Valley Trail without compensation.

Accordingly, the court found that Aurizon could not have been expected to abate the nuisance and that there was no actionable nuisance against Aurizon.

Actionable nuisance against the State

The court found the position against the State was quite different with there being no evidence that the works required to abate the nuisance would have compromised the use of the Valley Trail as a public recreational facility and the only justification for not carry them out was cost savings to the State.

Accordingly, the use of the Culverts on the Valley Trail no longer constituted a use of the State land in a reasonable and proper manner, having regard to the damage which that the Culverts continued to cause to the Adjoining Property.

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Victoria

Is there a bare reason in there? A cautionary tale

Nuance Group v Shape Australia [2018] VSC 362

Alison Sewell | Tom Johnstone | James Webster

Key Point

The Victorian Supreme Court has quashed a security of payment determination because the adjudicator failed to undertake his core function of determining whether the construction work the subject of a claim had been performed and the value of that work.

Significance

This finding serves as a cautionary tale for adjudicators to provide sufficiently comprehensible reasons in a determination.

The decision also confirms that the review processes under the Act in respect of determinations do not preclude a party from contesting the original determination.

This decision serves as a useful reminder that an adjudicator must demonstrate that they have turned their mind to whether the construction work the subject of a claim has been performed and the value of that work.

Facts

In July 2016 The Nuance Group (Australia) Pty Ltd (respondent) engaged SHAPE Australia Pty Ltd (claimant) to carry out works at the retail duty-free space at Melbourne Airport.

In March 2018 the claimant made a payment claim under the Building and Construction Industry Security of Payment Act 2002 (Vic) (Act) for $3.5m. After the respondent rejected this claim with a payment schedule identifying $nil payable, the claimant made an adjudication application for a reduced amount of $2.2m.

The adjudicator issued an adjudication determination in the amount of $1.4m. The respondent then sought a review of the adjudication determination under the Act. The review adjudicator issued a review determination based on the adjudication determination in the amount of $1.2m.

The respondent commenced proceedings in the Supreme Court to quash the adjudication determination and the review determination, on the basis that the original adjudicator had erred in making his determination.

Decision

Digby J quashed the adjudication determination on the basis that the adjudicator had failed to undertake the adjudication determination in accordance with the Act. By extension, the review determination was also quashed because it was based on an invalid adjudication determination.

Separately, his Honour held that the respondent's decision to initiate the review process under the Act in respect of the original adjudication determination did not waive its right to challenge that determination.

The task required of the adjudicator

Section 23 of the Act requires the adjudicator to determine the amount of the progress claim to be paid.

Digby J stated that section 23 at a minimum requires a determination as to whether the construction work the subject of the claim has been performed and its value. While the adjudicator must also provide reasons, his Honour confirmed that bare reasons which render the adjudicator's determination comprehensible will suffice.

The adjudicator's erroneous approach

Digby J held that by undertaking a process of working backwards from the claimant's total claimed amount, and by simply accepting the total amount claimed and then deducting the claims that the adjudicator found to be excluded amounts, the original adjudicator had failed to perform the functions required by section 23 of the Act.

Despite the low threshold regarding the reasons for a determination, in this case Digby J found that the adjudicator had failed to provide sufficiently comprehensible reasons and basis for the amount determined.

To show how the adjudicator arrived at his determination, the claimant needed to make a number of inferences and extrapolations. His Honour held that in such circumstances a fair reading of the adjudication determination itself failed to provide comprehensible reasons in relation to the determination of the adjudicated amount.

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Construction Law Update editor

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

Contributing partners

Email firstname.lastname@minterellison.com

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

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