Construction Law Update

December 2018 – February 2019

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Legislative update

NEW SOUTH WALES

NSW Government crackdown on the building industry

Andrew Hales

The NSW government announced on 10 February 2019 its intention to introduce a wide-ranging raft of reforms to the NSW building industry. Minister for Better Regulation, Matt Kean's media release is a response to the findings of the 2018 Shergold Weir report (**Report**).

The reforms will be based on 24 recommendations in the Report. The authors of the Report found significant problems with Australia's building regulatory systems across all jurisdictions. The recommendations seek to improve Australian building safety and compliance. Matt Kean's response to the report is that NSW adopt most recommendations, including requirements that:

- Building designers, including engineers, declare that building plans specify a building that will comply with the National Construction Code.
- Builders declare that buildings have been built according to their plans.
- Building designers and builders be registered.

A Building Commissioner will also be appointed to act as the consolidated building regulator in NSW with the responsibility of licensing and auditing practitioners.

Duty of Care

The Minister has stated that reforms will clarify the law to ensure that there is an industry-wide duty of care to homeowners and owners corporations giving them a right to compensation where a building practitioner has been negligent. This indicates a response to the frustration of owners after the High Court decision of *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 (analysed in our *Construction Law Update, October 2014 edition*). The High Court held that Brookfield as the builder did not owe a duty of care to the Owners Corporation for economic loss suffered as a result of latent defects in the common property that arose from the negligent construction of a high-rise apartment building. The scope of a more far-reaching duty is presently unclear. We will keep you up-to-date on developments as they unfold.

Impact on contractors

The Report recommends the registration of building practitioners under categories reflective of their qualifications. A function of the proposed register is to ensure that building and design work may only be conducted by those practitioners appropriately qualified for the job. The term 'building practitioners' is undefined in the Report but includes a non-exhaustive list of categories including builders, project managers, surveyors and inspectors. Under the categories of architects, engineers, plumbers and fire safety system installers, further subdivision into specific disciplines is recommended. These reforms may impact the scope and type of work that building practitioners may legally engage in.

The Report also recommends that all registered architects, engineers and designers responsible for design work provide a formal declaration of their reasonable belief that their design documentation is compliant with the National Construction Code.

Building Commissioner

The Report recommends that regulators be afforded a broad suite of powers to monitor ongoing building work and enforce compliance through disciplinary action. The appointment of a Building Commissioner appears to be the NSW Government's response to this recommendation. The powers of this office outside those relating to licensing and auditing are unclear. If the NSW Government has adopted the full scope of the Report's recommendations, additional powers of entry, evacuation, seizure and prosecution will be available.

Impact on developers

Although not mentioned in the media release, the Report recommends the creation of a building compliance process that governs the approval of variations throughout a project. Developers and builders may have to submit design variations and product substitutions to building surveyors for approval before the commencement of the associated work. The Report also contemplates that this varied work, and the work generally, should be subject to mandatory independent inspections at identified notification stages.

What will this mean for you?

All sections of the building industry should be alert to potential liability they may have to owners of residential and commercial buildings. Building practitioners must be prepared for their work to be monitored by an external regulatory regime and to be held accountable for losses that arise from defective work.

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In the Australian courts

AUSTRALIAN CAPITAL TERRITORY

'Pay first and argue later' concept underpinning SOPA demonstrated yet again

Canberra Drilling Rigs Pty Ltd v Haides Pty Ltd [2018] ACTSC 282

Richard Crawford | Nicholas Grewal | Angela Li

Key point and significance

As long as it can be demonstrated that a construction contract existed between the parties, the *Building and Construction Industry (Security of Payment) Act 2009* (ACT) (**Act**) will apply and the entitlement to serve a payment claim will arise. The court does not need to determine whether or not the work was actually performed under the construction contract in every case; it is enough that one party 'claims to be' entitled to a progress payment and that the other party 'may be' liable to make the payment.

A payment claim may include unpaid amounts that were the subject of a previous payment claim and not all work claimed needs to be performed within the preceding 12 months of that payment claim. It is sufficient as long as some of the work was undertaken within the preceding 12 months of that payment claim.

Facts

Core Building Group (**Core**) contracted Canberra Drilling Rigs Pty Ltd (**Canberra Drilling**) to perform piling and anchoring works for a multi-story residential building development (**Mezzo project)**. Canberra Drilling subcontracted Haides Pty Ltd (**Haides**) to perform hard ground drilling and anchoring works for the Mezzo Project.

Haides undertook anchoring and drilling work on the Mezzo project in April and May 2016. A payment claim was served for $165,000 of which Canberra Drilling paid $120,000. A year later, at the request of Core, Haides did two more days of work on 31 May 2017 and 1 June 2017 (**additional work**). Canberra Drilling claimed it was not aware of Core's request for the additional work.

Haides then served a second payment claim on Canberra Drilling for $287,068.50 dated 16 June 2017, which included the additional work and the outstanding amount for work performed in April and May of 2016. On 1 September 2017, Haides served a third payment claim which was identical to the second payment claim, save for a different 'claim date' of 31 August 2017. These two payment claims did not state a reference date.

Haides received no payment for the works and applied for adjudication of the third payment claim. The adjudicator issued a determination that Canberra Drilling pay Haides $284,057.50. Canberra Drilling commenced judicial review proceedings, challenging the adjudicator's decision on error of law.

The grounds of the challenge were:

- The additional work was not work carried out under the contract between Canberra Drilling and Haides.
- The second and third payment claims were made in respect of the same reference date, which Canberra Drilling contended is 30 June 2017, in contravention of section 15(5) of the Act.
- The same work was claimed in both the first payment claim and the third payment claim, in further contravention of section 15(5) of the Act.
- Because it was for works for which Haides was not entitled to claim payment, insofar as the third payment claim related to the additional work, the third payment claim was not a valid payment claim due to the time limit stipulated in section 15(4)(b) of the Act.

Decision

The court dismissed all four grounds of Canberra Drilling's application with costs. McWilliam AsJ held that Canberra Drilling had failed to establish any error of law in the adjudicator's decision and found that the third payment claim was valid.

Ground 1: Not necessary to determine whether or not work is actually performed under construction contract

In this case the construction contract was oral and the parties disputed the nature of work to be performed and the contract price. The court noted that the Act permits a person to make a claim if they *'are entitled'* to a process payment and also if that person *'claims to be'* entitled to a progress payment. Therefore the court held that a claim under the Act is not the forum to resolve contractual terms in order to establish whether or not work was performed *'under the contract'* since this would defeat the entire objective of the Act.

His Honour held that a basic and essential requirement for an adjudicator to make a determination is the existence of a construction contract between the parties. However, this does not require determining whether or not the work was actually performed 'under the contract' in every case. It is sufficient that:

- there was a construction contract between Haides and Canberra Drilling;
- Haides claims the work was done under it; and
- it is at least arguable that the work was either expressly incorporated or necessarily part of the work to be performed under the contract.

Ground 2: Not the same reference dates for second and third payment claims

Section 15(5) of the Act prohibits a claimant giving more than one payment claim for each reference date. McWilliams AsJ noted that the Act does not require work to have been carried out in a particular month in order for it to be a *'named month'* to correlate with the definition of a reference date. His Honour preferred to construe the Act as allowing a claimant to issue a payment claim any time up to 12 months (in the absence of any time stipulated in the contract) from the date the work was last carried out. Applying this construction of the Act:

- the additional work carried out on 1 June 2017 gave rise to a reference date of 30 June 2017, and subsequent reference dates of 31 July 2017 and 31 August 2017;
- the third payment claim's reference date was 31 August 2017 which is different from the second payment claim's reference date of 30 June 2017;
- with a reference date of 30 June 2017, the second payment claim which was served on 16 June 2017 would be invalid since Haides's entitlement to serve this payment claim arose only on and from 30 June 2017.

Ground 3: Permissible to claim unpaid items in respect of the same work in subsequent payment claims

Section 15(6) of the Act makes it clear that section 15(5) of the Act does not prevent a claimant from including in a payment claim an amount that has been the subject of a previous payment claim. A claimant is entitled to make a claim for earlier work done and for which it has not been paid. Canberra Drilling did not make any payment of the second payment claim and it was therefore permissible for Haides to include those unpaid items in its third payment claim.

Ground 4: Sufficient that some of the work covered in the third payment claim was in the preceding 12 months

McWilliam AsJ held that the third payment claim was within the time frames imposed by the Act. While acknowledging the essential compliance with the time limit in section 15(4) of the Act, his Honour held that it was sufficient so long as some of the work in a payment claim was undertaken in the 12 months preceding the payment claim in question.

His Honour also observed that Canberra Drilling's argument depended on the court finding that the additional work was outside the scope of the contract between Canberra Drilling and Haides because it would have meant the work claimed in the third payment claim (served on 1 September 2017) was last carried out in May 2016. Since his Honour had already found under the first ground that Haides was entitled to claim for the additional work, the third payment claim was valid.

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NEW SOUTH WALES

The right to an offsetting claim against valid payment claims

Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd [2018] NSWSC1647

Richard Crawford | Sam Skinner | Alana Galasso

Key point and significance

The terms of relief in this case reiterate the imperative in the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) of 'pay first, litigate later'. However, if a party seeks to use a statutory demand under section 459G of the *Corporations Act 2001* (Cth) as a way of recovering a judgment under the Act, the court will still determine whether an offsetting claim exists even though the offsetting claim was not raised in a payment schedule. This is because the statutory demand regime is not a debt recovery mechanism but a precursor to winding up.

A company facing a statutory demand which it contests on the ground of an offsetting claim should be expected to take immediate action to bring that claim forward for determination in the proper forum.

Additionally, when calculating 'days' for the purpose of assessing liquidated damages, it is important to stipulate whether it be 'calendar days' or 'working days'. Failure to do so may leave a client exposed to a greater liability period than originally contemplated.

Facts

Budget Demolitions Pty Ltd (**Budget**) served on Grandview Ausbuilder Pty Ltd (**Grandview**) a statutory demand in respect of two unpaid progress claims made under the Act. Grandview sought to set aside the statutory demand under section 459G of the *Corporations Act 2001* (Cth).

Grandview issued a payment schedule for the first payment claim, providing for payment of the full amount claimed, but never paid the sum. Grandview did not respond to the second payment claim within the ten-day period allowed under section 14(4) of the Act.

Despite Grandview's admission that Budget was owed the sums contained within the payment claims, Grandview maintained that it had three separate offsetting claims cumulatively exceeding the amount of the statutory demand, being:

- a liquidated damages claim for delay in completion;
- a claim for liquidated milestone damages for failure to perform certain works at certain times; and
- a damages claim for costs to complete the works.

Decision

The court found that Grandview had established the existence of an offsetting claim but only for $220,000 in relation to liquidated damages for delay in completion but dismissed Grandview's other offsetting claims.

Liquidated Damages for Delay

Parker J was prepared to order the statutory demand be reduced by $220,000 but only on terms that Grandview undertake to commence proceedings as quickly as reasonably practicable to assert its offsetting claim.

His Honour assessed the potential right to liquidated damages for delay to be at $220,000, far less than Grandview had calculated. The damages should have been calculated per day of delay after the specified date of practical completion and should not have included any period of time that Grandview excluded Budget from the site by its own actions.

As part of an offsetting claim, the court should only be concerned with whether the claim for liquidated damages is 'genuine and sustainable', and not the likelihood of it being sustained at a hearing. Accordingly, the potential right to liquidated damages for delay were measured from the date of practical completion until the date on which Budget suspended works.

As Budget was unable to point to any provision of the contract expressly limiting the phrase 'per day' to working days, Budget was exposed to liability for 50 calendar days.

Liquidated milestone damages

The claim for liquidated milestone damages ($3.816m) failed in its entirety. The subcontract did not prescribe a day rate for failure to reach milestones, leaving the claim without proper justification. Grandview failed in its attempt to rectify the contract to include the appropriate rate after his Honour applied the *Graywinter* principal (*Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund* (1996) 70 FCR 452; [1996] FCA 822). That is, it is not open to the plaintiff seeking to set aside a statutory demand to introduce a new ground not supported by the original accompanying affidavit.

Cost to complete works

The claim for costs to complete works failed in its entirety as the figure for loss of bargain damages was negative. If Grandview had validly terminated the contract, it would be entitled to damages which would put it in the position it would have been had the contract been completed with its terms. His Honour calculated the figure as follows:

$1.1 million (cost to complete works)

+

$1.2 million (amount already paid under the contract

-

$2.5 million(the total contract price – as noted above, it is necessary to include what Grandview would have had to pay under the contract if the terms were fulfilled as this would have been their final position).

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No jurisdictional error if an adjudicator misconstrues contract

Icon Co (NSW) Pty Ltd v Australia Avenue Developments [2018] NSWCA 339

Richard Crawford | Ashley Murtha | Max Vos

Key point

The NSW Court of Appeal has confirmed that an error in construing the contract or in understanding the payment claim does not constitute jurisdictional error by an adjudicator and therefore cannot form a basis upon which the adjudication can be quashed.

Significance

The NSW Court of Appeal emphasised that it is not appropriate for the court to analyse the manner in which an adjudicator deals with the payment claims in their determination.

Facts

This case is the appeal of *Australia Avenue Developments Pty Ltd v Icon Co (NSW) Pty Ltd* [2018] NSWSC 1578 (analysed in our *Construction Law Update, November 2018 edition*).

As you may recall, the case involved a review of an adjudication determination under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) between Icon Co (NSW) Pty Ltd (**contractor**) and Australia Avenue Developments Pty Ltd (**developer**) for the construction of the Opal Tower in Sydney. A key issue in the dispute concerned the jurisdiction of the adjudicator to consider a number of 'backcharges' that were not included in the payment claim. Parker J of the NSW Supreme Court reviewed the adjudicator's determination and held that the determination was invalid because the adjudicator had engaged with the backcharges and thus had incorrectly dealt with the contents of the payment claim.

The contractor appealed that decision on the grounds that:

- the court erred by examining the approach adopted by the adjudicator when forming an opinion as to the meaning of the contract; and
- the respondent did not identify error in how the adjudicator addressed the issues; rather it submitted that the adjudicator should not have addressed the issues otherwise than by accepting the respondent's position.

Decision

The New South Wales Court of Appeal upheld the appeal and set aside the original judgment.

Basten JA followed the reasoning set out by Giles JA in *Downer Construction (Australia) Pty Ltd v Energy Australia* [2007] NSWCA 49 and found that it was within the adjudicator's power to form an opinion as to the meaning of the contract and the payment claim. As such, there was no reviewable error by the adjudicator. It was therefore not appropriate for the primary judge to have engaged in an analysis of the manner in which the adjudicator dealt with the payment claim in her determination.

In reaching this conclusion the court made the following observations:

- the Act does not provide a right to appeal adjudicators findings with respect to matters of fact – so long as they are within jurisdiction. In addition, there is no review for errors of law on the face of the record, and thus the adjudicator's determination of legal issues will also be unreviewable;
- while the construction of a contract will usually involve questions of law, the Act implicitly confers on the adjudicator the power to form an opinion as to the meaning of the contract for the purposes of an adjudication; and
- the Act requires that the adjudicator 'is to consider' the provisions of the construction contract and the payment claim. However, an error in construing the contract or in understanding the payment claim does not constitute jurisdictional error and therefore cannot form a basis upon which the adjudication can be quashed.

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NORTHERN TERRITORY

It pays to be prepared! Adjudicators need not ask for submissions for issues that are not a surprise to the parties

JKC Australia LNG Pty Ltd v Inpex Operations Australia Pty Ltd & Ors [2018] NTCA 6

Lachlan Drew

Significance

During an adjudication proceeding, where an issue was not put forward by the parties, but was nonetheless one that could be anticipated by, and should not be a surprise to, the parties, then it is incumbent on the parties to prepare submissions in relation to that issue. The adjudicator need not specifically request the parties to make submissions.

Facts

In 2012 Inpex Operations Australia Pty Ltd (**INPEX**) entered into an EPC contract (**Contract**) with JKC Australia LNG Pty Ltd (**JKC**), under which JKC was required to provide engineering, procurement, supply, construction and commissioning of certain facilities for the Ichthys project.

JKC issued invoices to INPEX, which were disputed. JKC made an application under the *Construction Contracts (Security of Payments) Act 2004* (NT) (**Act**) in connection with the invoices.

In correspondence with the parties prior to making a determination, the adjudicator raised the question of whether provisions implied into deficient construction contracts by section 20 of the Act should be imported into the Contract, and invited the parties to make submissions. Both parties responded saying that there was no basis for importing the provisions.

Notwithstanding this, the adjudicator determined that section 20 operated to imply the provisions into the Contract. Clause 6 of those implied provisions provided that INPEX needed to issue the notice of dispute 14 days after receiving the payment claim. This was different to the terms of the Contract, which gave INPEX 21 days to do so. As INPEX did not issue its notice of dispute with 14 days, it was required to pay the full amount of the claim. This was the case even though INPEX issued its notice within 21 days, as required by the Contract.

INPEX sought relief in the nature of certiorari to quash the determination, on the basis that the adjudicator did not afford INPEX procedural fairness. Her Honour held that:

- procedural fairness required the adjudicator to notify the parties of "proposed conclusions that were not put forward by the parties and could not be easily anticipated"; and
- a failure to provide such procedural fairness which deprived a party of the possibility of a successful outcome will enable the Court to set aside the adjudication.

As the adjudicator had not given INPEX reasonable notice of the basis upon which he intended to make his determination (namely that he would rely on section 20 despite both parties submitting that there was no basis to do so) and a fair opportunity to address that proposed basis, and make submissions as to why he should not decide that way, her Honour found there was jurisdictional error.

JKC appealed, with the sole ground being that her Honour erred in concluding that the adjudicator failed to afford INPEX natural justice.

Decision

The court allowed the appeal. It held:

- it has long been established that the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires. In the case of the security of payments schemes, the rapid adjudication process is a trade-off between speed and efficiency on the one hand, and contractual and legal precision on the other;

- while it is incumbent on a decision-maker to notify the parties of proposed conclusions that were not put forward by the parties and could not be easily anticipated, generally speaking the parties must anticipate possible findings and make submissions on potential findings;
- the test is an objective one, and resolves to whether the party asserting the breach of procedural fairness received express notice, or should reasonably have anticipated, that either the adjudicator or the other party would rely upon the issue or principle concerned (in this case clause 6 being implied into the Contract by section 20 of the Act);
- the adjudicator sought submissions on whether clause 6 was to be implied into the Contract, and in doing so, the possibility of a finding that no notice of dispute was given within 14 days was clearly flagged; and
- that the adjudicator implied clause 6 should not have come as any surprise to INPEX. It was not incumbent on the adjudicator to go back to the parties for further submissions in the event he determined that cause 6 was implied into the Contract.

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When is there a 'conflict of interest' where an adjudicator is appointed to determine multiple payment disputes simultaneously

Northern Territory of Australia v Woodhill and Sons Pty Ltd [2018] NTSC 30

Lachlan Drew

Significance

Section 34(3)(b) of the NT Act precludes an adjudicator from determining more than two payment disputes simultaneously but does not negate the adjudicator's appointment itself. The parties' consent is not a prerequisite to the appointment. The courts have also clarified that an adjudicator in this situation cannot rely on the 'conflict of interest' provisions under the NT Act to determine only the first dispute whilst declining to determine the second dispute..

Facts

The Northern Territory of Australia (**Territory**) engaged Woodhill and Sons Pty Ltd (**Woodhill**) to carry out civil works under various contracts.

Woodhill made an application for adjudication of a payment dispute under a contract (**First Application**) and, a few days later, made a separate application under a different contract (**Second Application**).

The adjudicator accepted the appointment for the First Application, and the parties did not object. The registered appointer then appointed the adjudicator for the Second Application but did not seek the parties' consent, presumably on the basis that it considered the indication of consent to the first appointment was sufficient.

The Territory objected to the Second Appointment, on the basis that under section 34(3)(b) of the *Construction Contracts (Security of Payments) Act 2004* (NT) (**Act**), an adjudicator may adjudicate two or more payment disputes between the parties simultaneously if the parties consent. The Territory had not given its consent.

The adjudicator proposed to continue to adjudicate the First Application, but withdraw from the Second Application. The Territory objected to this.

The questions considered by the Court were:

- whether section 34(3)(b) precludes an adjudicator who has been appointed to adjudicate two payment disputes between the parties from adjudicating either payment dispute in circumstances where one party has not provided its consent to that adjudication; and
- if so, whether an adjudicator may withdraw from, decline or otherwise disavow one appointment and proceed with the adjudication of the other payment dispute.

Decision

The Court held:

- the appointment for the First Application and Second Application just four days apart gave rise to a situation of simultaneous application;
- that being the case, the adjudicator was precluded from determining both payment disputes without the parties' consent (which was not forthcoming);
- consent of the parties is not a precondition to appointment, and accordingly, the adjudicator was validly appointed for both applications. Section 34(3)(b) operates only to preclude the adjudicator from adjudicating disputes simultaneously in the absence of consent. It does not negate the appointment itself;
- the Act only contemplates the withdrawal of an adjudicator, once appointed, in circumstances where there is a conflict of interest. It was not open to the adjudicator to decline or otherwise disavow his appointment in the adjudication of the Second Application, and to proceed with the First Application; and
- it was open to Woodhill to withdraw the Second Application (whereupon the adjudicator would be at liberty to proceed with the Second Application), or to wait until the expiry of the prescribed time (when the Second Application would be dismissed).

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QUEENSLAND

Costs awarded in unsuccessful application for judicial review of a QBCC decision

Bourne v Queensland Building and Construction Commission (No 2) [2018] QSC 311

Michael Creedon | Clare Turner | Hugh Pegler

Key point and significance

Costs have been awarded against a director seeking judicial review of a decision of the Queensland Building and Construction Commission (**QBCC**) to seek to recover monies for a statutory insurance claim from an insolvent company's directors. The QBCC's decision to commence proceedings of this nature is not one susceptible to judicial review.

Facts

Bourne was a director of a building company, Kirra Homes. A former client of Kirra Homes successfully lodged a statutory insurance claim with the QBCC after terminating a building contract. Kirra Homes failed to pay the money owing to the QBCC for the claim and was placed into liquidation.

The QBCC subsequently commenced proceedings to recover the money from the directors of Kirra Homes in the District Court of Queensland. Bourne sought judicial review in the Supreme Court of Queensland of the QBCC's decision to commence that proceeding.

The QBCC then succeeded in an application to have the originating application for review dismissed – see *Bourne v Queensland Building and Construction Commission [2018] QSC 231*.

The parties made submissions in respect of the costs of proceedings.

Bourne submitted that because the QBCC issued a notice of debt to Kirra Homes for building works which were already the subject of QCAT proceedings, Kirra Homes was denied the opportunity to challenge effectively the scope of works required of it and the payment required to be made to the QBCC. Bourne argued that this conduct justified a decision not to make a costs order in favour of the QBCC.

The QBCC submitted that any alleged conduct complained of may be curable by costs orders in the District Court proceeding and that this alleged conduct had no bearing on the court's decision to dismiss the application for review.

Douglas J noted that the QBCC had pointed out the problems with Bourne's application and invited her to withdraw her originating application with no order as to costs. His Honour also noted that changes in Bourne's submissions caused a hearing to be adjourned, and the preparation for that hearing was rendered useless.

Decision

Bourne was ordered to pay the QBCC's costs on a standard basis for both Bourne's originating application and the QBCC's application to have that originating application dismissed.

The QBCC's costs thrown away by the adjournment were to be paid by Bourne on an indemnity basis.

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Unlicensed builder successfully claims reasonable remuneration in excess of the contract price for construction of a chapel

Chapel of Angels Pty Ltd v Hennessy Builder Pty Ltd & Anor [2018] QDC 218

Julie Whitehead | Laura Berry | Lisa Fox

Key Point

The Queensland District Court held that a builder, who carried out unlicensed building work, is entitled to reasonable remuneration such that the owner, despite being successful in its claim to recover payments made under the contract, owes the builder $67,492.88 (in addition to the payments made under the contract).

Significance

A builder can claim reasonable remuneration for work carried out which may be in excess of the contract price despite not holding the appropriate licence. It is crucial for owners to conduct a licence search, prior to contracting a builder, to ensure that the builder is licensed to carry out the whole of the works. A licence search can be conducted on the *Queensland Building and Construction Commission website*.

Facts

Hennessy Builder Pty Ltd (**Builder**) was engaged by Chapel of Angels Pty Ltd (Owner) to construct a chapel.

On 6 December 2012, the parties executed the contract with an agreed contract sum of $652,312.79. After execution of the contract, problems emerged as a result of errors in the plans relevant to the scope of work. Importantly, the errors were not the fault of the Builder. The plans were revised multiple times. In May 2013, the final amended plans were provided to the Builder and both parties agreed to vary the contract to reflect the amended scope of work

In March 2014, the Owner took back possession of the project site by changing the locks to the chapel. Later that month, together with a payment claim for $98,316.24 pursuant to the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIP Act**), the Builder delivered a notice of intention to terminate the contract.

On 8 April 2014, the Builder terminated the contract on the ground that the Owner failed to meet its payment obligations and on 9 May 2014, the Builder applied for an adjudication decision requiring the Owner to pay the Builder $96,526.24 plus interest (which was later successful).

On 23 October 2014, the Owner commenced proceedings against the Builder.

The Owner's claims

- **Unlicensed status breached QBSA Act and invalidated the adjudication determination**: The Owner claimed that the chapel should be categorised under the Building Code of Australia (BCA) as a two-storey building, which fell outside the scope of the Builder's licence. As the scope of work under the contract included work for which the Builder was unlicensed, the Builder had contravened section 42(1) of the *Queensland Building Services Authority Act 1991* (Qld) (**QBSA Act**) (the precursor to the *Queensland Building and Construction Commission Act 1991* (Qld)).

- **Entitlement to sums paid under the contract and cessation of further payment obligations, including the adjudicated amount**: As a result of the alleged breach of section 42(1) of the QBSA Act, the Owner was entitled to recover all sums paid under the contract because the Builder had undertaken and carried out unlicensed work in breach of the QBSA Act.
- **Breach of contract**: The Builder had breached the contract by failing to comply with the contract's requirements for articulating variations.
- **Cost of resolving contract document errors**: The Builder was not entitled to a sum of $15,000 for the cost of resolving inconsistencies and errors in the contract documents.

The Builder's defence

- **Licensed under BCA and therefore not in breach of section 42(1) of the QBSA Act**: The Builder asserted that, on the proper construction of clauses 1.1 and 3.1 of the BCA, the chapel should be categorised as two one-storey buildings, which meant that it held the proper licence to carry out all the works under the contract and was not in breach of section 42(1) of the QBSA Act.
- **Entitlement to restitution on a quantum meruit basis**: The Builder conceded that if the court found it to be unlicensed and in breach of section 42(1) of the QBSA Act, the Owner would be entitled to recover payments it had made under the contract and the adjudication determination would be invalidated. However, the Builder claimed that it was still entitled to reasonable remuneration for the all the work, calculated on the alternate basis with or without regard to section 42(4) of the QBSA Act.
- **Denied the allegation of breach of contract**.
- **Entitled to cost of resolving errors**: The Builder maintained that it was entitled to $15,000 for resolving errors in the contract documents.
- **Claim for outstanding amounts under the contract**: Counterclaimed for the remaining amount due under the contract plus interest and costs of $98,316.24.

Decision

Both parties had partial success. The Owner was successful in its claim to recover payments under the contract and the invalidation of the adjudication decision, however, failed on its claim for breach of contract. The Builder was successful in its claim for reasonable remuneration for the works carried out on the chapel on a quantum meruit basis, however, was unsuccessful in its claim for payment under the contract.

In reaching this decision, the court found that the Builder's 'low-rise' building licence did not allow it to construct a two-storey building. The court found that the Builder was therefore not licenced to carry out the scope of work contained in the contract and in contravening section 42 of the QBSA Act, it was not entitled to any payment, meaning that the Owner was entitled to recover all monies paid under the contract, totalling $632,615.32.

Notwithstanding the Owner's success, the court accepted that the Builder was entitled to recover remuneration for part of the works carried out on a quantum meruit basis which totalled $700,108.20. As such, the net sum due between the parties was found to be $67,492.88 in favour of the Builder.

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Rendering a subcontractor's charge void – a lot tougher than expected

Civex Pty Ltd v Fredon (Qld) Pty Ltd [2018] QDC 208

Andrew Orford | Petrina Macpherson | Oliver Mathias

Key Point

The District Court of Queensland has confirmed that duplicate notices of claim of charge served under the *Subcontractors' Charges Act 1974* (Qld) (**Act**), which included errors requiring amendment, are not necessarily void.

Significance

Incidental errors in the construction of a notice of claim of charge and serving duplicate notices of claim of charge for the same work do not necessarily render a charge void. The judicial inclination is to back the subcontractor, with minor errors in substance and form being remedied in consideration of the broader context. The court found that it is necessary to look beyond procedural error and establish a more substantive argument.

Facts

Lendlease Building Pty Ltd (**Lendlease**) was engaged by the Department of Defence to carry out an upgrade of air traffic management infrastructure at the Amberley Air Base. Lendlease entered into a major works subcontract with Fredon (Qld) Pty Ltd (**Fredon**) to carry out electrical works and Fredon engaged Civex Pty Ltd (**Civex**) as a sub-subcontractor to undertake part of the electrical works.

On 17 August 2017, Fredon terminated the sub-subcontract with Civex for convenience. Clause 21 of the sub- subcontract obliged Fredon to pay Civex for work executed prior to the termination date, however, a dispute arose between Civex and Fredon as to the amount owing to Civex.

On 14 and 16 November 2017, Civex served notices of claim of charge on Lendlease and Fredon for the amounts of $486,850.66 (**first charged amount**) and $484,418.41 (**second charged amount**) respectively. On 13 December 2017, Civex commenced proceedings against Fredon and Lendlease as required under the Act to perfect the second notice of claim of charge.

In April 2018, Lendlease paid the sum equal to the second charged amount into court pursuant to section 11(5) of the Act and the proceedings against it were discontinued by Civex.

Fredon brought an application seeking to strike out parts of Civex's Statement of Claim and a finding that Civex's notice of claim of charge was void or invalid under the Act. Fredon contended that:

1. Civex's Claim and Statement of Claim were not proper proceedings constituted under section 15(3) of the Act;
2. Civex's Statement of Claim was deficient in that its pleadings which referred to a 'Head Contract' were wrong both in fact and at law and the Statement of Claim was therefore void;
3. Civex's notices of claim of charge were not enforceable as no facts were put forward to support its claim that retentions are payable under the sub-subcontract;
4. Civex's notices of claim of charge were not enforceable due to the respective failures to explain why a charge in the sum of the first charged amount existed and to plead a cause of inaction in respect of that first charged amount;
5. Civex's use of the word 'building' was not defined or otherwise explained and therefore the Statement of Claim is void;
6. Civex's Statement of Claim incorrectly pleaded restitution if the sub-subcontract was found to be unenforceable as the Act cannot apply if the relevant contract between the parties is unenforceable; and
7. Civex's second notice of claim of charge was not valid because it duplicated the charge for work already claimed in the first notice of claim of charge and the duplication is expressly prohibited by sections 10(7) and 10(8) of the Act.

Decision

Fredon's application was dismissed and costs reserved.

Paragraphs 1, 2, 4, 5 and 6 of Fredon's arguments were rejected and matters 3 and 7 were directed to trial for determination.

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CMC and WICET bowled over in the Queensland Court of Appeal

***Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Limited; Wiggins Island Coal Export Terminal Pty Limited v Civil Mining & Construction Pty Ltd* [2019] QCA 12**

Andrew Orford | Sarah Ferrett | Hugh Pegler

Key Point

Appeals by two contracting parties have been dismissed by the Queensland Court of Appeal. The location and heading of a schedule proved decisive in a finding that figures in that schedule were not prescribed by the contract for the purpose of valuing delay costs. Separately, the fact that submissions admitted as evidence served only a discrete purpose—they could only be used to calculate the extent of a delay, and not accurately calculate the quantum of damage suffered—did not render them irrelevant.

Significance

The appeals saw a number of interesting contractual interpretation arguments rejected by the court.

Contracting parties must ensure that figures intended to be used for the later valuation of variations and extensions of time are clearly expressed and cross-referenced. Careful regard ought to be had to the location and headings of schedules and clauses, as these may inform findings about the parties' intentions.

The decision also provides useful guidance on the valuation of costs, and the calculation of interest.

Facts

Wiggins Island Coal Export Terminal Pty Limited (**WICET**) contracted Civil Mining & Construction Pty Ltd (**CMC**) to undertake earthworks and civil works for a coal export terminal near Gladstone.

WICET caused CMC to be delayed 208 days in completing the work, to which CMC was entitled to an extension of time to the date for practical completion.

The contract provided that if CMC was granted an extension of time for delay, WICET would pay for 'on-Site overheads' attributable to the delay, valued under clause 40.5, which provided that 'if the Contract prescribes specific rates or prices to be applied in determining the value, those rates or prices shall be used'.

The contract contained a table of rates headed 'Schedule of Daywork Indirect Personnel and Facilities Rates', which CMC contended were 'specific rates or prices' to be applied in the determination of the 'on-Site overheads'. The trial judge rejected that contention. The central question of CMC's appeal was whether the rates were specific rates that ought to be applied.

CMC submitted that the schedule was the only place in the contract that on-Site overheads attributable to delay were expressed, and that no other provision of contract dealt with the issue. It was argued that the schedule had no purpose other than to provide the rates.

WICET's appeal centred on the submissions of a CMC supervisor, Mr Vance (**Vance submissions**). It was argued that a schedule prepared by Mr Vance ought not to have been admitted into evidence as it represented a significant departure from the case pleaded to that point. It was argued that the case pleaded was for delays 'during' the relevant events, while the Vance submissions represented a claim for a prolongation of resources at the end of the works, as it referred to dates after the relevant delay. The delay period it identified was also inconsistent with the period that was pleaded.

Decision

The appeals of both CMC and WICET were dismissed with costs.

With respect to CMC's appeal, the court found that none of the contractual provisions on which CMC relied purported to require the rates to be applied and there was not a sufficiently identifiable link between the valuation to be performed and the rates. Additionally, the schedule heading and its location within the contract suggest that the rates were only applicable to the valuation of daywork variations directed by the principal's representative. The court rejected CMC's contentions that the word 'Daywork' in the heading was an error and that there was no other work to be done by the schedule. CMC's pre-contract response to a

clarification on pricing was held to support the conclusion that the parties' intention was that the schedule was for daywork, not for valuing extensions of time.

WICET's primary appeal was rejected on the basis that the Vance submissions responded to WICET's pleaded case, and to the report prepared by their expert. The Vance submissions were not found to be a claim for the prolongation of resources at the end of the works as argued by WICET. The calculation of the extra amount of time the works took to complete were consistent with the pleaded case, and they did no more than illustrate the number of days delay caused by CMC's access being impeded. Reference to dates after the actual delay was merely to illustrate when the works would have been completed had the delay not occurred. The trial judge was held correct to have admitted the Vance submissions into evidence.

WICET's appeal of the trial judge's finding on costs and interest also failed. A requirement for the principal's representative to 'value' costs caused by their direction did not require calculation using actual costs, it was sufficient to use costs incurred (but not actually paid). WICET's submissions on interest were also rejected. Interest was held to run from the time WICET ought to have properly assessed and paid a variation claim, not from the time the final form of the claim was articulated in CMC's pleadings.

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Court-appointed expert to provide further opinion despite plaintiffs' additional expert evidence

Fricke & Anor v WH Frier Building Contractors Pty Ltd & Ors [2019] QSC 6

Michael Creedon | Amy Dunphy | Emma Page

Key Point

In circumstances where a court-appointed expert has not directly addressed certain issues that are crucial to one party's case, courts will give the court-appointed expert an opportunity to provide further evidence on those issues, in the first instance, before allowing additional evidence from new experts under rule 429N(3) of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**).

Significance

Parties should pay careful attention to the directions provided to a court-appointed expert to ensure the expert's report will consider all critical issues to their case. If the report does not cover all critical issues, it is recommended that orders are sought from the court before additional experts are retained to avoid unnecessary costs in circumstances where leave might not be given to adduce any additional expert evidence.

Facts

The plaintiffs pursued a claim in negligence against the defendants for defective construction of two units that they had purchased off the plan.

On 25 November 2016, the court appointed an expert (Mr Wright) to provide a report addressing *'the extent of the work necessary to rectify the defective construction of the residential units including consideration of the issue raised at paragraph 45(a) of the second amended statement of claim'*. These directions gave rise to an oversight in the expert's report with respect to the plaintiffs' claim, that the only effective remedy was the demolition and reconstruction of the units, because that part of the plaintiffs' claim was set out in paragraph 44 of the statement of claim.

On receipt of the report, the plaintiffs wrote to the court-appointed expert seeking a conference to address the issues not raised in the report. The expert declined on the basis that he had been engaged by all parties and instead offered to consider a written request circulated to all of the parties prior to any response. The plaintiffs sought to rectify the issue of having to seek consent from five defendants, which they submitted would be *'unworkable, cumbersome and* [would] *unnecessarily increase costs'* by retaining further experts including a civil engineer and a geotechnical engineer.

The plaintiffs applied for orders pursuant to rule 429N(3) of the UCPR to be given leave to call the engineer and geotechnical engineer as expert witnesses and a direction that pursuant to rule 429 of the UCPR that the plaintiff be entitled to rely on a quantity surveyor report. Leave was granted for the plaintiffs to rely on the quantity survey report as this was not opposed by the defendants; however, the defendants did oppose the plaintiffs relying upon the evidence of both engineers. The defendants submitted that it was not in their interest to be seeking any further opinion on the issue and that if the plaintiffs sought the further opinion, the plaintiffs ought to pay a reasonable cost for such an opinion.

Decision

The court did not grant the plaintiffs leave to adduce the additional evidence from new experts at this point in time.

Crow J was persuaded by the fact that the parties had utilised the one expert, Mr Wright, for over two years. His Honour determined that it was premature to appoint new experts until Mr Wright had an opportunity to consider the issues raised in paragraph 44 of the statement of claim, given this reference had been absent from his appointment. The costs of any further report by Mr Wright would be borne by the plaintiffs, it not being in the defendants' interest to be seeking further opinion on this issue.

If Mr Wright advised that he is unable to provide a further report in a timely and costly fashion, then the application was to be adjourned and brought on expeditiously (to consider whether it was reasonable to appoint more than one expert).

The court noted that if Mr Wright provided an addendum report taking a different opinion, then the court might be persuaded to see whether there was a reasoned basis to exercise the discretion pursuant to rule 429N(3) of the UCPR and allow the evidence of the additional experts.

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Charges discharge liability in an adjudication

Livingstone Shire Council v EarthTEC Pty Ltd and Ors [2018] QSC 271

Andrew Orford | Petrina Macpherson | Hugh Pegler

Key Point

An adjudicator has fallen into jurisdictional error by failing to take into account notices of charge served under the *Subcontractors' Charges Act 1974* (Qld) (**Charges Act**) which caused a respondent to pay money into court. The respondent contended that this ought to be accounted for in the determination of its liability to the applicant.

Significance

The list of matters to be considered by an adjudicator in the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIP Act**) will not be construed narrowly. The BCIP Act does not preclude a statutory provision raised in a payment schedule or properly made submission from consideration by an adjudicator, even where it is not in the list of matters to be considered, provided it relates to a matter explicitly included in the list.

Facts

Livingstone Shire Council (**Livingstone**) engaged EarthTEC Pty Ltd (**EarthTEC**) to perform roadworks between Yeppoon and Roslyn Bay in Queensland.

A dispute arose over a payment claim made under the BCIP Act and the parties proceeded to an adjudication. Livingstone also terminated the contract with EarthTEC. Following termination, some of EarthTEC's subcontractors served notices of claims of charge pursuant to the Charges Act. In response Livingstone paid around $1.1 million into court.

Livingstone contended that the money paid into court ought to be accounted for in determining the adjudication, otherwise it might be required to pay for the same work twice.

As part of the adjudicator's decision, the adjudicator found that he did not have jurisdiction to consider the notices of charge as the Charges Act was not explicitly included as a matter for consideration in section 26(2) of the BCIP Act (which sets out the matters an adjudicator must have regard to in making their determination).

The adjudicator found that consideration of section 4 of the BCIP Act, which prevented a person who had claimed under the Charges Act from also making a claim under the BCIP Act, was outside his jurisdiction. On this basis, he also could not have regard to the potential duplicate liability of the respondent under both the Charges Act and the BCIP Act.

On application, Livingstone argued that this construction amounted to jurisdictional error and emphasised that, pursuant to section 26(2)(d) of the BCIP Act, the adjudicator was obliged to consider *'all submissions, including relevant documentation, that have been properly made'*, and that this included the respondent's submissions made in relation to the Charges Act.

EarthTEC contended in response that there was no reference at all to section 4 of the BCIP Act in section 26(2) of the BCIP Act and, as such, the independent operation of section 4 of the BCIP Act would exclude the notices of charge from consideration.

Decision

The court found in favour of Livingstone and held that the adjudicator's decision was infected by jurisdictional error.

Adopting a purposive approach, the court found that the proper construction of section 26(2) of the BCIP Act was not one which excluded consideration of the Charges Act. Section 4 of the BCIP Act existed to prevent duplicate claims, and in an appropriate case an adjudicator would be bound to consider it.

The court found an adjudicator is not precluded from making a finding that a respondent's liability to a claimant is discharged by money paid into court under the Charges Act. This amounted to jurisdictional error, as proper consideration of the matters in section 26(2) of the BCIP Act was a pre-condition to the adjudicator's authority to make a decision.

The court also considered whether the adjudicator, by omitting to seek submissions from the parties, failed to accord natural justice. The court held that the issue of whether the adjudicator could consider the submissions in relation to the Charges Act was critical to the determination of the adjudication application, and the failure of the adjudicator to raise the issue in repeated requests for further submissions amounted to a denial of natural justice.

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Adjudication process to proceed because subcontractor's progress payment tied to value of the work and not profit share arrangement

Monadelphous Engineering Pty Ltd v Acciona Agua Australia Pty Ltd & Anor [2018] QSC 310

Andrew Orford | Sarah Ferrett | Emma Page

Key Point

A contract will not be an excluded contract for the purposes of the statutory payment regime under section 3(2)(c) of the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIPA**) (or the equivalent section 61(2)(c) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld)), where it expressly contemplates a process for progress claims to be paid, in accordance with the value of the work completed, notwithstanding that any final or profit sharing adjustment between the parties cannot be calculated until the conclusion of the project.

Significance

Whether a contract is an excluded contract for the purposes of the statutory payment regime depends on the obligations under the contract. Parties who intend for any entitlement to payment to be calculated by reference to their profit sharing arrangements only and not by reference to the statutory payment regime must ensure the contract is drafted accordingly.

Facts

Monadelphous Engineering Pty Ltd (**Monadelphous**) was contracted by the Northern SEQ Distributor and Retail Authority, trading as Unitywater, to upgrade an existing sewerage treatment plant at Kawana. Monadelphous subcontracted Acciona Agua Australia Pty Ltd (**Acciona**) to complete the works. The agreement between the parties included a formal instrument of agreement as well as a collaboration deed and a subcontract. Importantly, the subcontract set out a process for progress claims.

Acciona served a monthly payment claim on Monadelphous. Monadelphous disputed the claim. Acciona then commenced adjudication proceedings under the statutory payment regime pursuant to the BCIPA. Monadelphous sought an interlocutory injunction to have the adjudication proceedings restrained on the basis that the statutory payment regime did not apply to the contract, by reason of section 3(2)(c) of the BCIPA, as consideration payable for construction work carried out under the contract was to be calculated other than by reference to the value of the work carried out . An interlocutory injunction was granted on 9 November 2018.

At trial, Monadelphous submitted that while Acciona could claim progressively for certain costs, it could only claim for those costs in excess of their 50% participation interest by reason of sharing machinery in the collaboration deed. As such, Monadelphous submitted that the relationship between the parties was akin to joint venturers and any consideration for construction work was to share equally in the costs and surplus in the project. Therefore, the BCIPA did not apply to the subcontract.

Acciona submitted that the BCIPA did apply because:

- the collaboration deed and subcontract could be read together;
- the collaboration deed was silent in respect of the progress payments Acciona was entitled to receive under the subcontract;
- the correct position was that the amount payable for construction work was tied to the value of the construction work, by reference to the lump sum in the formal instrument of agreement, and was not affected by the terms of the collaboration deed.

Decision

The Queensland Supreme Court dismissed Monadelphous's claim and ordered the existing interlocutory injunction be dissolved.

Douglas J reasoned that the proper construction of the subcontract led to the conclusion that consideration payable for construction work under the subcontract was to be calculated by reference to the lump sum set out in the formal instrument of agreement which reflected the value of the work and related goods and services.

His Honour held that any surplus or other final adjustment required between the parties could still be calculated in accordance with the subcontract, in particular the collaboration deed, and that it did not matter that the surplus or other final adjustments could not be calculated until the subcontract was completed because the subcontract expressly contemplated the payment of progress claims by reference to the value of the work.

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Court to ensure the Industry Payments Act is not circumvented when exercising discretion to order payment into court of disputed adjudication amount

***Runaway Bay Investments Pty Ltd as trustee for Runaway Bay Investments Unit Trust v GCB Constructions Pty Ltd and Ors* [2018] QSC 292**

Michael Creedon | Laura Berry | Hazal Gacka

Significance

The Supreme Court of Queensland has held that an important consideration when exercising its discretion to order payment to the court of a disputed adjudication amount is that the policy of the Industry Payments Act is not circumvented.

Facts

GCB Constructions Pty Ltd (**GCB**) entered into a contract with Runaway Bay Investments Pty Ltd (**Runaway Bay**) to build a restaurant. Following a dispute, GCB made an adjudication application pursuant to the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIPA**). The adjudicator appointed to decide the application found that an amount of $61,054.44 was payable to GCB.

When Runaway Bay failed to pay the adjudicated amount, GCB obtained an adjudication certificate in the sum of $72,392.10 and then obtained judgment in the District Court for the certified amount pursuant to section 31 of BCIPA.

Following this, Runaway Bay applied to the Supreme Court for a declaration that parts of the adjudicator's decision were void on the basis of jurisdictional error or denial of natural justice, and for an injunction restraining GCB from enforcing or relying on the affected parts of the decision.

GCB then applied for an order pursuant to rule 658 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) or the court's inherent jurisdiction that Runaway Bay be required to pay the certified amount into court pending determination of Runaway Bay's application.

Decision

Lyons SJA found in favour of GCB and ordered Runaway Bay to pay the certified amount (plus interest) into court.

Her Honour first considered section 31(4)(b) of BCIPA which provides that if a party commences proceedings to set aside a judgment (arising from the filing of an adjudication certificate), then the party must pay any unpaid portion of the adjudicated amount into court as security pending final determination of those proceedings. Her Honour found that Runaway Bay's originating application was not a proceeding of the type envisaged by section 31(4) of BCIPA as it did not seek to have the judgment set aside but rather sought to challenge the adjudicator's decision. Although Lyons SJA noted that the application would essentially have the same consequence if successful, the mandatory requirement under section 31(4) of BCIPA of paying the adjudicated amount into court did not apply here.

Lyons SJA then considered the broader issue, namely whether the court should nonetheless exercise its discretion to require payment pursuant to rule 658 UCPR or the inherent jurisdiction of the court to ensure that the policy of BCIPA was not circumvented. Her Honour affirmed a number of analogous cases where the courts have considered that the policy of security of payment legislation is to provide a legislative entitlement to be paid for work which is undertaken pursuant to a construction contract, together with a regime whereby a properly obtained adjudication decision can be enforced against a respondent. Lyons SJA was compelled by the arguments in the cases that GCB relied upon that the policy of BCIPA is that a claimant is to be given protection of payment particularly where a respondent seeks to challenge an adjudicated amount.

Her Honour found that due to the particular circumstances of this case, it was not mandatory under BCIPA that Runaway Bay pay the money into court prior to judgment of its application, but nevertheless, the general policy of BCIPA supported making an order requiring the payment. Her Honour held that the policy of BCIPA was relevant to the exercise of her Honour's discretion to make the order because the court is cautious to ensure that legislation was not circumvented.

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Santos loses ability to call on $55m bank guarantee – strict compliance a must

Santos Limited v BNP Paribas [2019] QCA 11

Andrew Orford | Laura Berry | Emma Page

Key Point

A successful call on security requires strict compliance with the requirements set out in the security instrument. Where the security instrument provides that any letter of demand must purport to be signed by an authorised representative of the beneficiary, the strict compliance principle requires that the demand

contain an express statement of the signatory's authority (and not merely list the signatory's position, as was the case for Santos).

Significance

Letters of demand must be carefully drafted and comply strictly with the contract and/or the security instrument to ensure they are valid. We recommend seeking legal advice when calling on security.

Facts

Under the terms of the performance security between Santos Limited (**Santos**) and BNP Paribas (**BNP**), BNP was liable to pay the security amount ($55m) to Santos in circumstances where BNP received *'a notice in writing in the form of the letter attached to this Bank Guarantee (amended as applicable), purporting to be signed by an authorised representative of*' Santos. The draft letter included the following express statement, under the signature, *'Authorised signatory of Santos Limited*'.

Santos sent a letter of demand to BNP in December 2015. The letter was not on Santos letterhead, was signed by the General Manager of Development for Santos – GLNG Upstream Project, and did not include any express statement as to the General Manager's authority for Santos. BNP therefore refused to meet the demand.

Santos and BNP sought summary judgment against each other. Santos sought summary judgment on the basis that its demand met the requirements of the security. BNP sought summary judgment on the basis that the demand did not.

Decision at first instance

The primary judge granted BNP's application for summary judgment. His Honour noted that the principle of strict compliance necessitates that a provider of security should only accept documents that strictly comply with the requirements set out in the security. His Honour held that the demand failed to comply with the requirements of the security by reason of the omission of a statement that the signatory of the letter was the authorised representative or authorised signatory of Santos.

Appeal

Santos appealed the primary judge's decision.

Decision

The Court of Appeal (**CA**) dismissed the appeal.

The CA noted that the security made three requirements of the demand: written notice, in the form of the draft letter (amended as applicable), and purported to be signed by an authorised representative of Santos. The CA reasoned that but for the requirement that the demand be in the form of the draft letter, there might have been force to Santos's argument that its demand did purport to be signed by an authorised representative of Santos. However, the terms of the security instrument had to be read with the draft letter attached to it, and accordingly use of the word 'purporting' was qualified and illuminated by the terms of the draft letter. The terms of the security instrument together with the draft letter meant that an express statement of authority was a necessary requirement. Accordingly, the strict compliance principle required Santos to include an express statement of authority in its letter of demand.

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Feelings are not 'dealings' which engage the duty of good faith

Sentinel Robina Office Pty Ltd v Clarence Property Corporation Ltd [2018] QCA 314

Michael Creedon | Mark Wheelahan | Emma Page

Key Point

The Queensland Court of Appeal has confirmed that a joint owner's secret recruitment of its co-owner's employee was not a dealing under the deed between the parties for the purpose of engaging the duty of good faith.

Significance

There are two points of significance to take away from this decision:

- First, the duty of good faith is directed at the contractual objectives and bargain between the parties. The absence of the words '*under this Deed*' in a good faith clause does not give the duty a broader application. It is critical when drafting for commercial arrangements, other than partnerships that impose a general duty of good faith, to expressly state that the duty applies to all dealings between the parties including those outside of that arrangement, where that is the intention of the parties.
- Secondly, to successfully litigate for a breach of good faith, where that breach involves dealings with a third party and not the applicant, the applicant must demonstrate that they, their business, the joint venture parties or the joint venture business has suffered prejudice.

Facts

This is an appeal of an earlier decision that we have previously analysed in our *Construction Law Update, May 2018 edition*.

The parties are co-owners of an office building. Their co-ownership is regulated by a deed. Clause 16.9 of the deed provides that:

> *'Without limiting the generality of any other provision of this deed the parties agree that in the performance of their respective duties and the exercise of their respective powers under this deed and in their respective dealings with each other, they shall act in the utmost good faith'.*

The appellant alleged its co-owner breached clause 16.9 and did not act in good faith by secretly employing one of the appellant's employees. Importantly, the appellant did not allege harm to it or the appellant's business.

At trial, Jackson J held that the duty imposed by clause 16.9 was concerned with the parties respective dealings with each other under the deed and not with other matters. Jackson J held that the respondent's conduct did not relate to dealings between the parties in the course of their relationship under the deed.

The appellant appealed the primary judge's decision.

Decision

The Court of Appeal unanimously dismissed the appeal and agreed with the primary judge's reasons.

In reaching this decision, the court rejected the appellant's submission that the absence of the express qualification *'under the Deed'* following the words *'respective dealings'*, in the drafting of clause 16.9, gave rise to a broader duty of good faith not limited to dealings with respect to the contract. The court held that the words *'under the Deed'* when the clause referred to duties and powers defined the respective duties and powers by reference to their presence in the deed. The absence of the words when the clause referred to dealings is explained by the fact that dealings, by their nature, would not be set out in the deed.

The court went on to conclude that the dealing in dispute was not between the respondent and the appellant but between the respondent and a third party. The fact that a senior officer of the appellant felt offended by the respondent's conduct did not convert the respondent's conduct into a dealing with the appellant. The respondent's dealing with the third party did not bear any relationship to the deed or the bargain between the parties. As such, the court held the duty of good faith was not engaged.

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Disgruntled property owners lose out in a protracted claim against their local council

Woolnough & Anor v Isaac Regional Council [2019] QSC 17

Julie Whitehead | Clare Turner | Hugh Pegler

Key Point

Actions in trespass and nuisance against a local council who installed a sewer main at a private property have failed in the Queensland Supreme Court.

Significance

Effective pleadings and probative expert evidence are crucial to the conduct of any litigation involving construction works. The self-represented plaintiffs' pleadings in this case were the subject of a number of pre-trial arguments and rulings, which saw their statement of claim amended extensively and a claim in negligence struck out.

Facts

The plaintiffs, the Woolnoughs, became the owners of 23-25 Bovey Street, Nebo in 2006. The property was within the Local Government area of what was then Nebo Shire Council and is now Isaac Regional Council (**Council**).

The Council progressively installed underground sewer mains in Nebo, one of which traversed the rear of the Woolnoughs' property.

The Woolnoughs brought an action in trespass, based on the contention that the sewer main was unlawfully installed without their consent or knowledge in about July 2007. The Council submitted that it was installed in 2005, with the consent of the previous owners of the property.

The Woolnoughs also brought an action in nuisance, based on an assertion that from 2010 untreated sewerage had surfaced and smelt on the property. The Woolnoughs also sought to recover for subsidence allegedly caused to the slab of a shed, house and fences on the property by the sewerage leaking.

Decision

The Woolnoughs' claim was dismissed in full.

Henry J found that the sewer main was installed in 2005, not 2007 as alleged. Testimony of the previous property owner to this effect and a significant volume of documentary evidence adduced by the Council meant that the claim for trespass failed.

The claims for subsidence and nuisance also failed care of comprehensive expert evidence which supported the contentions of Council.

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SOUTH AUSTRALIA

SA court issues SOPA guidance on the nature of a 'statewide shutdown'

McMahon Services Australia P/L v John Holland P/L [2018] SADC 134

James Kearney | Megan Lawson

Significance

This case provides guidance as to what will constitute a 'statewide shutdown' for the purpose of the exclusion to business day under the *Building and Construction Industry Security of Payment Act 2009* (SA) (**Act**). Consideration is also given to whether the inclusion of claims for amounts which do not arise from the relevant reference date period will invalidate a payment claim.

Facts

John Holland Pty Ltd (**John Holland**) subcontracted McMahon Services Australia Pty Ltd (**McMahon**) in respect of the construction of the Calvary Hospital. On 20 February 2017, McMahon served a payment claim on John Holland of $277,713.42 for 'claims this period' (**Period Claim Amount**) and also included a demand for the sum of $927,000.63, comprised of the Period Claim Amount plus amounts claimed under a previous payment claim (**Demand Amount**). On 15 March 2017, John Holland served its payment schedule.

At issue was whether:

- McMahon had served a valid payment claim; and
- John Holland served a payment schedule within time.

The Act is unique in that business day is defined to exclude days on which there is a 'statewide shutdown' of 'operations of the building and construction industry'.

14 March 2017 was scheduled as a rostered day off (**RDO**) for workers under both John Holland's own enterprise agreement and four major building industry unions, meaning a considerable portion of the workforce on site were away. John Holland submitted that this March 2017 RDO satisfied the definition of 'statewide shutdown' and was therefore not a business day, which meant that the payment schedule was due on 15 March 2017 and had been served within time.

McMahon disagreed, asserting that different RDOs were scheduled for other organisations or unions such that the balance of the industry may still be operating on any given RDO. McMahon sought summary judgment on the basis that it was entitled to recover the payment claim amount as a debt due under section 15(2)(a)(i) of the Act.

At first instance, the District Court Master declined to enter summary judgment as John Holland had a reasonable basis on which to defend McMahon's claim. The issue on appeal was whether John Holland had established that there was a reasonable basis for its defences.

Decision

In this appeal, as the court was focused on whether a reasonably arguable defence was available, rather than a final merits determination, its findings are useful guidance and not determinative of the issues.

Valid payment claim

Dart J held that McMahon had complied with section 13(2)(b) of the Act in relation to the Period Claim Amount.

In respect of the Demand Amount, while a claimant may include in a payment claim an amount previously claimed pursuant to section 13(6) of the Act, his Honour considered that the claimant still needed to comply with section 13(2) of the Act so as to allow the respondent to understand the basis of the claim. His Honour remarked in obiter that it was not appropriate to make a claim for payment by mere incorporation of another document. His Honour considered that the Demand Amount did not comply with section 13(2) of the Act.

However, as the Demand Amount did not purport to be a 'claim this period', his Honour found that in itself this likely did not render the payment claim invalid but the inclusion of the Demand Amount provided a basis on which John Holland could argue the payment claim was not valid. There was therefore a basis to uphold the District Court Master's decision not to enter judgment summarily in favour of McMahon.

Served within time

Dart J considered the ordinary meaning of the words in the definition of business day and held that a complete or total shutdown of work in the industry was not necessary. The definition requires a shutdown of operations of the building and construction industry and that this be statewide. His Honour did not consider that the definition required the shutdown to be 'complete'.

His Honour acknowledged the Act requires a respondent to act 'promptly' in responding to a payment claim. However, his Honour observed that in order to respond, a principal may need to make enquiries of employees and contractors as to work carried out and variations and that this process would be inhibited if substantial parts of the workforce were not available. Consequently, his Honour considered that the question of whether an RDO amounted to a statewide industry shutdown was, to some extent, a matter of fact and degree. His Honour concluded that sufficient doubt existed to provide John Holland a reasonable basis to defend McMahon's claim.

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VICTORIA

Summary judgment on a SOPA claim: What is the Standard of Proof?

Best Fab Pty Ltd v Australian High Bay Installations Pty Ltd [2018] VCC 1053

Jeanette Barbaro | Christian Camilleri | Ben Knight

Significance

This case considered the standard of proof to be satisfied before summary judgment can be entered in a security of payment claim. The court considered two different standards of proof and, without deciding which was the correct test, applied a standard of proof that required the applicant to establish the six elements of a security of payment claim on a 'balance of probabilities'.

Facts

The contract between the parties

In its capacity as head contractor, Australian High Bay Installations Pty Ltd (**respondent**) engaged Best Fab Pty Ltd (**claimant**) to assist in the supply and installation of a cold storage racking system in a warehouse. The agreement between the claimant and respondent was partly in writing and partly oral, with no formal contract signed by the parties.

The progress payment claim

The claimant made a payment claim under *the Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) for the amount of $330,000 on the basis of a separate payment arrangement to the terms documented in the draft contract. The claimant contended that the respondent failed to issue a valid payment schedule within the required time and the claimant was therefore entitled to summary judgment.

In submissions, both parties agreed that the standard of proof was that if the defendant's version of facts is reasonably open (and not fanciful), then the application should be dismissed.

Decision

Morrish J dismissed the claimant's summary judgment application.

Standard of proof

Two different standards of proof were considered by the court:

- Has the applicant established the elements of a security of payment claim on a 'balance of probabilities' (the first approach)? and
- Has the applicant proven that the respondent has no real prospect of success (the second approach, which is typically applied in ordinary summary judgment applications).

Morrish J applied the first approach because her Honour considered it to be more favourable to the plaintiff. However, in doing so she was not required to determine what was the applicable standard of care in such cases. Her Honour was also not prepared to adopt the second approach which both parties agreed should apply.

Without determining which was the correct standard to apply, Morrish J indicated that the first approach better served the object and purpose of the Act which placed great importance on having a streamlined and speedy process.

Her Honour considered that the Act merely required six elements to be proven in order for an applicant to be successful and, if satisfied, an applicant is immediately entitled to relief. The failure to satisfy the elements of such a claim resulted, in effect, in the 'sudden death' of the security of payment claim. For these reasons a security of payment claim lent itself to being determined summarily on a 'balance of probabilities'.

However, her Honour also reflected that the interests of justice may be better served by requiring an applicant to prove that the respondent has no real prospect of success or that its defence is fanciful.

Respondent will not be wound up where 'genuine dispute' exists

Cat Protection Society v Arvio [2018] VSC 757

Peter Wood | Christian Camilleri | Sarah Kennedy

Significance

In circumstances where the construction contract expressly provides for reference dates, a claimant will be limited to such dates even if the contract has been terminated.

Facts

The Cat Protection Society of Victoria (**respondent**) engaged Arvio Pty Ltd (**claimant**) under a construction contract to build an animal shelter.

Approximately $3.5 million of works were completed before the respondent purported to terminate the contract on 26 February 2018. The claimant ceased performing the works on or around this time.

On 24 May 2018 the claimant served a purported 'final' payment claim for $468,725.37 pursuant to the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**). The respondent provided a payment schedule on 22 June 2018 assessing the value of the claim as $Nil. Consequently, the claimant made an adjudication application. The adjudicator determined that respondent was liable to pay the claimant $210,145.77 (**Determination**).

The respondent sought judicial review of the Determination on the basis of jurisdictional error on four grounds:

1. the finding that the Act permits a claimant to serve a payment claim following the termination of a contract;
2. the finding that there was a reference date in the contract to sustain the payment claim;
3. the inclusion of excluded amounts; and
4. failing to value the payment claim.

The respondent contended that the payment claim was a claim for final payment rather than a progress claim and accordingly, the express contractual precondition for a final payment claim of 'practical completion' was never achieved and a reference date did not arise.

The claimant maintained that the payment claim was a progress payment claim for payment for works performed up until the date the contract was terminated, despite the fact that the claim was described as a 'final claim' for the purposes of the Act, included amounts for the return of retention and deposit monies and the remainder of the contract sum.

Decision

The court found in favour of the respondent on the first two grounds and quashed the Determination. In light of this, the court decided that it was unnecessary to consider the third and fourth grounds.

Digby J considered the elements of the payment claim objectively finding that it was a final rather than a progress claim insofar as the first two grounds were concerned. Particularly, the claim:

- was expressed to be a final payment claim for the purposes of the Act;
- included a claim for return of retention moneys;
- included a claim for return of deposit moneys; and
- appeared to claim the unpaid balance of the contract sum, taking into account that only part of the works was completed prior to the contract being terminated.

Digby J held that these claimed amounts extended beyond the 'value of materials supplied and works done' which were covered by ordinary progress claims under the contract.

As to the second ground, given that practical completion had not been achieved there was no available reference date for the claimant to have made its final payment claim on 24 May 2018.

In obiter, Digby J noted that the contract between the parties did not expressly provide for a final payment claim. In such circumstances, it may have been open to the claimant to rely on the default reference dates set out in section 9(2)(d) of the Act where a contract does not prescribe a reference date for a final payment claim. However, in the circumstances, the claimant maintained that the payment claim was a claim for a progress payment (not a claim for final payment) and it abandoned its previous reliance on the default reference dates set out in section 9(2)(d) of the Act. Consequently, it was not open to the court to determine that a reference date existed after termination.

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Stay of proceedings will be automatically granted where mutual debts are owed in winding up proceedings

Coal Projects Pty Ltd v Maicome Pty Ltd [2018] VCC 1730

Jeanette Barbaro | Eliza Richardson | Bec Cunningham

Key Point

This case provides an example of when progress payment claims will be automatically stayed.

Where there have been mutual debts between parties and one of the parties is an insolvent company that is being wound up, proceedings with respect to the debts are automatically stayed, including proceedings involving enforcement of adjudication determinations made under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**).

Facts

Maicome Pty Ltd (**Maicome**) and Coal Projects Pty Ltd (**Coal**) entered into a domestic building contract to construct 12 units in February 2012. In 2013, Coal submitted a total of 7 invoices which Maicome failed to pay.

Following this, a number of issues arose for Cole, namely:

- on 22 May 2013 the Victorian Building Authority (**VBA**) cancelled the building practitioner registration of Coal's sole director; and
- on 31 May 2013 Maicome terminated the domestic building contract; and
- on 5 June 2013 a winding up action was commenced in the Supreme Court against Coal by an unrelated creditor.

On 11 June 2013, Coal served a payment claim under the Act on Maicome for the unpaid amounts. Maicome did not provide a payment schedule in response to the payment claim. Coal subsequently lodged an adjudication application and successfully obtained a determination for the claimed amounts. Maicome engaged another builder to complete the works and did not pay Coal as determined by the adjudicator.

On 28 November 2013, an ex parte judgment was entered in favour of Coal against Maicome (**Judgment**) in the amount of $305,737.77, which represented the claimed amounts together with interest and costs (**Judgment Sum**).

Maicome subsequently filed an application for summary judgment seeking to set the Judgment aside. The court stayed the proceedings, subject to Maicome providing security, which was provided in the form of a 12-month performance bond. The performance bond expired in due course and the parties continued to fail to resolve their debts.

Submissions and questions to be determined

Coal argued that the Judgment should be upheld and that the stay on the Judgment ordered by Anderson J had in effect lapsed because of the expiry of the performance bond and as such Maicome was in default of those orders and was liable for the Judgment Sum.

Maicome sought to have the Judgment set aside on the basis that Coal was not a 'claimant' under the Act due to the cancellation of the relevant builder's registration by the VBA. Alternatively Maicome sought a stay on the Judgment as a result of claims it made against Coal by way of set-off against the Judgment Sum, arguing that such a stay should happen automatically as a result of the operation of section 553C of the *Corporations Act 2001* (Cth) (**Corporations Act**).

The court was required to consider three key questions:

- Given the cancellation of the building practitioner's registration, can Coal technically be a 'claimant' under the Act?
- Assuming the Judgment was entered regularly, should a further stay be ordered?
- If a stay is ordered, should Maicome provide further security as a condition of any stay being granted?

Decision

The court found in favour of Maicome on all three questions.

Cancellation of licence

Ryan J considered that since the progress claims related to work done at a time when the relevant building practitioner was registered, the subsequent cancellation of registration did not affect Coal's ability to bring a claim. At that time the claim was submitted, Coal was solvent; therefore, theoretically Coal would have been able to appoint a new licensed director and continue to carry out construction work.

Should a stay be ordered?

Her Honour held in favour of Maicome that a stay on execution of the Judgment is warranted until the parties' rights are finally determined by the accounting required under section 553C of the Corporations Act. Further, her Honour noted that, as contemplated by section 47 of the Act, the Judgment obtained by Coal is an interim judgment and not a final one. Consequently, the parties' rights can subsequently be readjusted pursuant to section 553C of the Corporations Act at a later date and, until then, it is unknown as to what amount is owing and by whom. Her Honour applied the Court of Appeal case of *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 (analysed in our *Security of Payment Roundup of 2016 cases*) where it was found that companies in liquidation are precluded from relying upon the scheme prescribed for interim payment.

Should security be a condition of the stay?

On the issue of whether security should be provided, Ryan J held that section 553C of the Corporations Act came into effect once the winding up order was made. If a further order is made for the provision of security, it would defeat the purposes of the section, which provides that the original debt has effectively gone and the only amount to be determined is the balance between the amount claimed and any cross claim, being matters to be worked out by the liquidators on the lodging of a proof of debt. Accordingly, her Honour held that it was not appropriate that Maicome be ordered to provide further security for the current level of the Judgment Debt.

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'Paid' means in the hands of, under the control of, and immediately accessible

Cornonero Pty Ltd v Bright Moon Buddhist Society & Anor [2018] VSC 737

Peter Wood | Christian Camilleri | Melissa Greeves

Significance

'Paid' as contemplated by section s 28B(5) and 28B(6) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) means that the funds are in the hands of and readily accessible to the claimant before a review application is made by the respondent. Little leniency will be shown to a party who fails to ensure payments are cleared well-within the expiration of five business days required under the Act.

Facts

On 18 January 2017, Cornonero Pty Ltd (**claimant**) and Bright Moon Buddhist Society (**respondent**) contracted for the claimant to carry out construction work on the respondent's land. A dispute arose in regard to a payment claim, which resulted in the claimant submitting an adjudication application. On 1 June 2017 it was determined that the claimant was entitled to a progress payment of $677,250.16 (**first determination**). It was accepted that the respondent received the first determination on 5 June 2017, meaning 13 June 2017 was the last date by which an application for review of the first determination could be made. The respondent submitted the review application on 13 June 2017, which included a proof of payment receipt dated 12 June 2017 and a payment summary identifying a further payment as 'processing' as at 13 June 2017.

On 14 June 2017, an adjudicator was appointed to review and determine the first determination. The director of the claimant deposed that $250,000 cleared in the claimant's account on 15 June 2017. On 21 June 2017 the adjudicator determined that the plaintiff was entitled to $103,388.11 (**second determination**).

The claimant sought judicial review of the second determination on four grounds that the adjudicator committed jurisdiction error, or erred in law, by determining that:

- the first defendant validly commenced the review application despite failing to pay the adjudicated amount to the claimant before making its application;
- the first defendant validly commenced the review application despite failing to pay the alleged excluded amounts into a designated trust account before making its application;
- certain variations were excluded amounts; and
- that the total sum of second class variations exceeded the ten percent cap.

Decision

Digby J held that the second determination should be quashed and the respondent should be restrained from seeking an adjudication certificate or seeking to enforce the second determination.

Section s 28B(5) and 28B(6) of the Act stipulate that an application may only be made if the respondent has 'paid' the claimant the adjudicated amount and has paid the alleged excluded amounts into a designated trust account.

Digby J was required to determine whether the word 'paid' in those provisions means when the transfer of funds is initiated, or when the funds clear, and are in the hands of, under the control of, and are immediately accessible to the claimant. His Honour found that the language of section 28B(5) and 28B(6) of the Act, and in particular the phrase 'may only be made if', makes it clear that the requirements for the defined amounts to be paid are, in each case, preconditions to the respondent's application to review an adjudication determination. Further, it was his Honour's view that the relevant intention of Parliament in including the requirement for funds to be 'paid', is to ensure that the funds are in the hands of and readily accessible to the claimant before a review application is made by the respondent. This is, in part, to ensure that the claimant is not financially disadvantaged as a result of a respondent seeking a review.

Factually, his Honour found that the required payments were not made by the respondent within time and therefore the statutory preconditions were not satisfied. Given that the funds did not clear until 15 June 2017, the funds were not effectively transferred to, and readily accessible in, the trust account prior to the review application, and therefore not 'paid' in accordance with the meaning of the term in section s 28B(5) and 28B(6) of the Act. This non-compliance, in his Honour's view, resulted in the second determination being vitiated.

As grounds 1 and 2 were made out, his Honour did not consider it necessary to deal with grounds 3 and 4.

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Pay now, argue later – a contractor's rights to prompt recovery under the Security of Payment Act upheld

Geotech Pty Ltd v Broadspectrum (Australia) Pty Ltd & Anor [2018] VCC 1047

Peter Wood | Christian Camilleri | Anna Stephenson

Significance

A principal is not entitled to advance a crossclaim or raise a defence in an application for summary judgment where it has failed to issue a payment schedule and make payment of the payment claim within the required time.

Facts

Geotech Pty Ltd (**claimant**) was party to two agreements with an unincorporated joint venture between Broadspectrum (Australia) Pty Ltd and Comdain Civil Constructions Pty Ltd trading as TransCom Connect (**respondent**) under which it was to:

a) construct a weir and fish lock at Box Creek (**Box Creek Agreement)**; and

b) construct a weir regulator at the Fish Point Weir in Swan Hill (**Swan Hill Agreement**).

Payment Claims

In early 2017, the claimant sent the respondent payment claims under the Box Creek Agreement and the Swan Hill Agreement (**2017 claims**). The respondent subsequently served payment schedules to the claimant outside the 10 business day timeframe prescribed under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**).

The claimant served a further payment claim under the Fish Point Weir Agreement in March 2018 for $560,383.40, which included the amount it had previously claimed in 2017. The respondent certified $109,305.63 in its payment schedule, refusing to pay that amount because it was owed $248,109.94 under the Box Creek Agreement. The claimant commenced adjudication proceedings in respect of the payment claim and the adjudicator determined that the respondent was required to pay the claimant $462,162.36, plus interest. The adjudicated amount was subsequently paid by the respondent (save for a discrepancy in the calculation of interest).

The claimant commenced proceedings to recover the unpaid portion of the 2017 claims plus interest.

The respondent contended it had a right to setoff for liquidated damages under both agreements and therefore the dispute between the parties should instead be resolved through the contractual mechanisms, being the arbitration which it commenced and sought a stay of proceedings in the interim.

Decision

Cosgrave J found in favour of the claimant.

Citing the 'pay now and argue later' policy of the Act, Cosgrave J found that the respondent was not entitled to advance a crossclaim or raise a defence in relation to the adjudicated amounts claimed and that the respondent should pay the claimant and make different arrangements to pursue any other claims it had against it (eg for liquidated damages).

In relation to the argument that the proceeding should be stayed and the dispute referred to arbitration, Cosgrave J was not satisfied that the dispute which the respondent sought to raise was arbitrable and therefore, did not grant the stay sought by the respondent.

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Progress payment adjudications – better late than never

Ian Street Developer v Arrow International [2018] VSC 294

Peter Wood | Rahul Bhattacharya | Ben Knight

Key Point

A decision made by an adjudicator under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) outside the prescribed time limits will not be invalid.

Significance

This case confirms that the Victorian position is aligned with the NSW position – respondents cannot rely on the lateness of an adjudication decision in order to invalidate an unfavourable decision.

Facts

Late adjudication decision

Arrow International (**claimant**) made a progress payment claim on 31 May 2017 against Ian Street Developer (**respondent**) under the Act for $882,608.14. The respondent's superintendent scheduled a zero amount in the payment schedule and the claim was referred to adjudication by the claimant on 28 June 2017.

After an extension of time was granted under section 22(4) of the Act, the adjudicator determined that the respondent was liable to pay the claimant $381,446.78 together with 50% of the adjudicator's fee. The adjudicator delivered a decision on 28 July 2017, 21 business days after being appointed and accepting the application.

How long does an adjudicator have to make a decision?

Due to the extension of time, the trial judge had to determine the time limit set by the Act. The initial time limit set by the Act for an adjudication decision is 10 days from the date of acceptance by an adjudicator of the adjudication application, with an ability to extend this time up to 15 days. The question the court had to determine was whether this 15 day period is in addition to the initial 10 days, or whether 15 days is the upper limit.

Trial judge found the adjudicator's decision to be valid

The trial judge held that the late decision of the adjudicator was not invalid. In coming to this decision, the trial judge:

- determined that the proper construction of section 22(4) of the Act allows for an adjudicator to make a decision up to 15 business days after the acceptance of the application by the adjudication. Importantly, the court noted that the Act makes a number of references to instances where an adjudicator's decision would be void. However, there is no reference to invalidity due to lateness; and
- considered cases concerning out of time determinations under the Act as the corresponding provisions in the Act are essentially identical to the Act. The trial judge noted that the Act allows parties to act upon an adjudicator's late decision (including allowing the claimant to withdraw the application).

Decision

On appeal, the court agreed with the trial judge in finding that an adjudication decision will not be invalid where the decision is delivered outside the time limits set by the Act. The court also accepted the trial judge's interpretation of section 22(4) of the Act in that an adjudicator granted an extension of time should make a decision within 15 business days from the acceptance of the adjudication application.

Although the Act is silent on whether an adjudication decision is voided where the adjudicator is late in delivering that decision, the court took the view that such a consequence is for Parliament to decide and it not for the court to read additional words into the Act to achieve this consequence. The court noted a number of previous cases had warned of 'gap-filling', and held that the task in the present case was simply to expound the meaning of the statutory text. Guiding its decision, the court found that it was bound to follow

the decision in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28. In that case, the court held that where a statute is silent as to a subject matter, it is not intended to support an alternate construction inconsistent with the text or content of the Act. The court highlighted that this was a question of understanding Parliament's intention in the absence of an express provision addressing the issue.

After considering a number of authorities, the court held that there was nothing in the Act that indicated that Parliament had intended to render an adjudicator's decision invalid simply due to it being delivered outside of the time requirements. The court determined this based on the fact that the Act:

- considers a number of circumstances where an adjudicator's decision will be invalid;
- deals with circumstances where an adjudicator delivers a late decision; and
- was established for the benefit of claimants, and invalidating a decision due to a factor outside of their control would be in conflict with this purpose.

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Successful defence of summary judgment application where payment schedule not provided

John Beever (Aust) Pty Ltd v Roads Corporation [2018] VSC 635

Peter Wood | Christian Camilleri | Duncan MacKenzie

Significance

This decision provides a considered explanation of how section 16 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) operates alongside procedural requirements of Victorian court rules regulating applications for summary judgment. Respondents to payment claims made under the Act who find themselves in the situation of having failed to provide a payment schedule within the time prescribed under the Act will find this decision to be a useful reference.

Facts

Roads Corporation (**respondent**) is a statutory corporation trading under the name VicRoads. It engaged John Beever (**claimant**) to perform strengthening and other maintenance works to the Wallen Road Bridge which links the suburbs of Richmond and Hawthorn across the Yarra River.

On 28 September 2017, the claimant purported to serve a payment claim under the Act for $290,148.61. The respondent failed to serve a payment schedule. The claimant applied for judgment by writ for this amount under section 16(2)(a)(i) of the Act (**summary judgment application**). The respondent resisted the application on several grounds. It also made application to strike out the claimant's claim for the amount sought on the basis that its pleadings failed to disclose an alleged 'reference date' (**strike out application**).

Decision

The court found in favour of the respondent, dismissing both the application for summary judgment and the strike out application.

Summary judgment application

Section 16(2)(a)(i) provides that where payment is due and the respondent fails to pay the claimed amount in the time prescribed, the claimant may recover the unpaid portion of the claimed amount as a debt due to the claimant in any court of competent jurisdiction.

Both parties proceeded on the basis that the claimant's application for judgment under section 16(2)(a)(i) of the Act was in the nature of an application for 'summary judgment' and accordingly regulated by the relevant court rules (being rule 22 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic)). Digby J determined that the court should apply the 'no real prospects of success' test referred to in section 61 of the *Civil Procedure Act 2010* (Vic) to determine whether the defence to the application disclosed any grounds of challenge.

Having set out the elements the claimant would need to prove on the 'balance of probabilities' to succeed in its application, his Honour turned to consider each of the respondent's grounds of defence to the application, namely that the payment claim:

- was not supported by a valid reference date having regard to the regime for determining such a date created under the parties' construction contract;
- did not formally comply with section 14(2) of the Act insofar as it contained amounts which were not referrable to any identified construction work; and
- included amounts in the nature of non-agreed variations which are excluded under the Act.

Digby J concluded in respect of each ground that the claimant failed to demonstrated that the respondent had 'no real prospect of success' in arguing that the requirements of section 16(2)(a)(i) of the Act were not satisfied. The application was accordingly dismissed.

Strike out application

The respondent contended that as the claimant's statement of claim failed to plead a reference date, it was liable to be struck out. His Honour found that the claimant's pleading was 'sound and sufficiently comprehensible' and that there was no requirement for pleading 'conditions precedent to a valid payment claim or recite … the relevant provisions and operation' of the Act. The strike out application was also dismissed.

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'Better late than never' – When adjudication determinations are made out of time

PHHH Investments No 2 Pty Ltd v United Commercial Projects Pty Ltd [2018] VSC 15

Peter Wood | Christian Camilleri | Desiree Chong

Key Point and Significance

A failure by the adjudicator to make an adjudication determination within the time limit set by section 22(4) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) does not of itself invalidate the determination.

Facts

PHHH Investments No 2 Pty Ltd (**respondent**) contracted United Commercial Projects Pty Ltd (**claimant**) to perform alterations and additions to the respondent's commercial building at 282-284 Victoria Street, Brunswick (**Site**).

On 15 June 2017, the claimant served a payment claim under section 14 of the Act on the respondent for certain works conducted at the Site. On 29 June 2017, the respondent served a payment schedule on the claimant for $0 within the required time. An adjudication application was made by the claimant on 13 July 2017 and the adjudicator accepted the appointment on 17 July 2017.

During the course of the adjudication, the claimant sent a letter to the adjudicator on 25 July 2017 requesting that the adjudicator request further submissions from the claimant. In the letter, the claimant stated it understood the adjudicator may require further time to accommodate the further submissions and that *'the claimant is happy to agree to a reasonable request for same'*.

The adjudicator issued a notice to the parties dated 26 July 2017 requesting further submissions pursuant to section 22(5) of the Act and an extension of time pursuant to section 22(4)(a) of the Act to 7 August 2017. However that notice was not received by either party.

On 3 August 2017, the claimant raised that it had not received the adjudicator's notice dated 26 July 2017. On 4 August 2017, the respondent stated in a letter to the adjudicator and the claimant that the last day on which the adjudicator could have made a determination under section 22(4)(a) of the Act was 31 July 2017 and therefore, a determination made after that date would be invalid and of no effect.

On 7 August 2017, the parties were advised by email that the adjudicator had made a determination, which was subsequently released to the parties on 14 August 2017 after the adjudicator's fees were paid.

The respondent initiated proceedings to quash the determination on the basis that the adjudicator had committed jurisdictional error or erred in law by issuing the determination late.

Decision

The court found in favour of the claimant, holding that the determination was made 'out of time' but not invalid.

No implied agreement to an extension of time

Riordan J found that the word 'agrees' in section 22(4)(b) of the Act should be afforded its ordinary meaning. The language used in the claimant's letter of 25 July 2017 indicated an intention to agree to a reasonable request by the adjudicator for an extension of time, not an outright agreement without a request, especially if the request was not reasonable. Without an agreed extension, his Honour's finding was that the determination was out of time.

Determination not void

Not only would a finding of invalidity be inconsistent with the object of the Act, the two specified consequences of non-compliance with the adjudication time limit according to section 28(2) of the Act do not include an invalidating the determination.

It was further considered that providing the claimant a right to withdraw the application under section 28(2) of the Act would serve no purpose if an out of time determination was a nullity and the claimant, who was not responsible for the non-compliance, would suffer an inconvenience (including the cost of a further adjudication) and be deprived of the benefit of an adjudication determination despite completing their submissions.

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Respondent will not be wound up where 'genuine dispute' exists

Re Advanced Controls Pty Ltd [2018] VSC 639

Peter Wood | Nikki Miller | Ben Knight

Key Point

Under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**), if a valid payment claim is served by a claimant and no payment schedule is provided by the respondent, the amount can be recovered as a debt due and payable. If a statutory demand is made in respect of that debt and it remains unpaid, the respondent will not be able to have the statutory demand set aside (or any subsequent winding up proceedings dismissed) on the basis that there is a genuine dispute regarding the unpaid debt.

Significance

This case provides an illustration of the interaction between the winding up provisions of the *Corporations Act 2001* (Cth) following the making of a statutory demand and the provisions of the Act. A court will not grant a winding up order where there is a 'genuine dispute' as to the debt; respondents to claims should be wary that a genuine dispute will not exist where a payment claim is validly served under the Act and the respondent fails to serve a payment schedule in accordance with the requirements of the Act.

Facts

Gordon McKay Pty Ltd (**first claimant**) commenced proceedings to wind up Advanced Controls Pty Ltd (**respondent**). However, the first claimant resolved its debts with the respondent. In this proceeding Nilsen (Vic) Pty Ltd (**applicant**) sought substitute itself as the plaintiff in place of the first claimant.

The applicant entered into a building contract with the respondent in 2016. Pursuant to this contract, the applicant alleged that the respondent owed moneys in relation to variations, in particular, moneys in respect of an extension of time, additional cable ladders and removal of redundant cables and equipment. The total amount claimed by the applicant was of $195,942.06.

An invoice for this amount was issued to the respondent in 2018. The applicant argued that this invoice was a payment claim issued under the Act, and as it had not been disputed by the respondent in accordance with the Act, the amount claimed could was not susceptible to being the subject of a genuine dispute. However, the respondent argued that the Act did not apply to this particular invoice.

The respondent argued that:

- it had a bona fide genuine dispute as to the debts because the variations were not requested, nor did they instruct the applicant to undertake the works; the amounts claimed in respect of the variations were not 'claimable variations' as defined under the Act and were therefore 'excluded amounts' for the purposes of the Act and not entitled to be claimed under it; and
- the time-related costs were excluded by section 10B(2) of the Act and therefore the claim in respect of those moneys was not made pursuant to the Act.

Decision

The court held in favour of the respondent in finding that there was a 'genuine dispute' as to whether the moneys claimed by the applicant were claimable amounts under the Act.

No 'genuine dispute' in circumstances where claim complies with the Act

The court followed previous cases that held that an application for winding up will not usually be entertained where there is a 'genuine dispute' as to a debt. The court also agreed with a number of previous cases that supported the proposition that a 'genuine dispute' will not exist where a claimant validly serves a payment claim and the respondent fails to serve a payment schedule. This is due to the operation of section 16(4) of the Act, which prevents a respondent from raising any defence or bringing any cross claim where it fails to serve a payment schedule. This is because following such events, the Act creates a statutory liability which cannot be disputed.

Court finds 'genuine dispute' as to whether the amounts were claimable under the Act

The main question the court had to determine was whether or not the variations were 'claimable amounts' under the Act. The court found that the correspondence between the parties revealed that there was no clear or unequivocal instructions to carry out the variations. In addition, the court also found that there was a genuine dispute as to whether the extension of time claim was an excluded amount.

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Excluded amounts – when a claim for payment is a claim to 'recoup' liquidated damages

Shape Australia v The Nuance Group [2018] VSC 808

Peter Wood | Tom Kearney | Desiree Chong –

Key point and significance

In obiter, Digby J accepted the second adjudicator's reasoning that the claimant's claim was a claim to recoup liquidated damages and that it was therefore a claim for an excluded amount under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**).

We consider that the second adjudicator's determination was contrary to the purpose and object of the Act, which, in this decision, Digby J identified as ensuring cash flow is maintained through a network of contractors. If the second adjudicator's reasoning is accepted claimants will be prevented from claiming and being paid amounts otherwise due, because of the timing of when they dispute the levying of liquidated damages.

Facts

The plaintiff, Shape Australia Pty Ltd (**claimant**) was contracted by the first defendant, The Nuance Group (Australia) Pty Ltd (**respondent**) to perform demolition, refurbishment and fit out works for a retail space at Melbourne International Airport (**contract**).

On 29 June 2018, Digby J quashed an adjudication determination made in relation to payment claim 13 (**PC-13**) (**first adjudication determination**) and held that the adjudicator failed to perform his basic and essential function as required under sections 23(3)(a) and (b) of the Act.

On 27 July 2018, the claimant made a second adjudication application in respect of payment claim 14 (**PC-14**) which included uncontested individual line items claimed in PC-13 (**second adjudication application**). On 24 August 2018, the adjudicator determined that PC-14 was not a valid payment claim and determined that a nil amount was payable by the respondent to the claimant.

In its response to payment claims 1-13, the respondent had levied liquidated damages which were assessed by the superintendent under the contract to adjust the contract sum. As a result the second adjudicator found that the payment schedule in response to PC-14 did not set off an amount in response to PC-14 but relied on the adjusted contract sum to withhold payment. The second adjudicator concluded that the claimant's claim was a claim to recoup liquidated damages and that it was therefore a claim for an excluded amount under the Act.

By originating motion dated 25 September 2018, the claimant sought various orders, including the remittal of the first adjudication application or the second adjudication application to be re-determined, and that both applications should be characterised as claims for reimbursement of liquidated damages, not excluded amounts.

Decision

The court dismissed the claimant's application.

No reference date, no valid payment claim

Digby J determined that the second adjudication application was correctly determined. As no new work had been performed since PC-13 was issued, PC-14 was the second payment claim made in respect of the same reference date as PC-13. PC-14 had no valid reference date and was therefore, not a valid payment claim.

Liquidated damages are excluded amounts

Vickery J's decision in *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183 (***Seabay***) determined that claims for liquidated damages were excluded amounts under the Act, and therefore that respondents could not set off such claims in payment schedules under the Act.

Digby J considered whether the second adjudicator's conclusion that the claimant's claim was a claim to recoup liquidated damages, and that it was therefore a claim for an excluded amount under the Act, was a correct application of *Seabay* and in accordance within the proper meaning of section 10B(2) of the Act.

His Honour concluded that the second adjudicator was correct to consider that *Seabay* supported his finding and was correct to exclude the entirety of PC-14 as an amount calculated to recover earlier superintendent-effected adjustments to the contract sum.

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The Victorian Security of Payment Act applies to prefabrication work carried out in Victoria for erection in Tasmania

South City Plaster Pty Ltd v Modscape Pty Ltd [2018] VCC 1576

Peter Wood | Christian Camilleri | Bec Cunningham

Key Point

The *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) will apply to claims for prefabrication work carried out in Victoria for erection in other states. Practically, when a construction contract is made in Victoria and the claim issued substantially relates to work carried out in Victoria, the Act will apply.

Facts

Modscape Pty Ltd (**respondent**), was engaged by Fairbrother Pty Ltd to supply and install 64 fabricated modules for use in the Royal Hobart Hospital Temporary Decant Facility in Tasmania (**Project**).

The respondent engaged South City Plaster Pty Ltd (**claimant**) for the plastering work of the modules.

The claimant served two invoices each endorsed with the words 'this claim is made under the Securities [sic] of Payment Act' under the cover of an email. The invoices raised by the claimant were $297,448.80 and $33,300.96.

The respondent did not serve a payment schedule in accordance with the Act and only paid the claimant $100,000.00 of the amount claimed.

The claimant issued proceedings claiming $230,749.70 pursuant to section 16(2)(a) of the Act.

The respondent argued that the Act did *'not apply to the construction contract to the extent it deals with construction work carried outside of Victoria and related to goods and serves supplied in respect of construction work carried out outside Victoria'*.

The respondent also argued that in any event, no valid payment claim had been issued because:

- the payment claim did not expressly refer to the Act;
- the payment claim pertained to part of a much larger contract which was the subject of a pending court proceeding;
- multiple payment claims were served for the same reference date in contravention of section 14(8) of the Act; and
- a valid reference date did not exist for the payment claim.

The respondent also contended that given the complexity of the matter, it was unsuitable for determination by summary judgement.

Decision

The court found in favour of the claimant.

In regards to the territorial application of the Act to the dispute, Macnamara J considered that the quotations and purchase orders did not call for any work to be done outside the State of Victoria and therefore the Act applied. This conclusion was reached on a factual analysis with his Honour preferring the evidence of the respondent that the plastering work was undertaken at a workshop in Victoria.

His Honour also had regard to:

- the general common law presumption that Victorian legislation purports to regulate events and things in Victoria and not elsewhere; and
- the definition of construction work under the Act.

On the validity of the payment claim his Honour was satisfied that the invoices constituted a valid payment claim, finding that:

- reference to the 'Securities [sic.] of Payment Act' on the invoices was sufficient to satisfy the requirements of the Act;
- the payment claim pertained to a separate and distinct contract not multiple contracts as contended by the respondent;
- multiple claims were not issued for the same reference date; and
- a valid reference date did in fact exist.

His Honour rejected the respondent's argument that the present application should be treated as an application for summary judgment that would require a higher burden of proof under section 63 of the *Civil Procedure Act 2010* (Vic). Instead, Macnamara J preferred the view that granting summary relief under the Act was akin to an interim order and therefore did not require the higher threshold of proof.

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Does a reference date for final payment arise following termination of a contract?

Vanguard Development Group Pty Ltd v Promax Building Developments Pty Ltd & Anor [2018] VSC 386

Peter Wood | Chris Hey | James Webster

Significance

Regard must be had to the precise terms of a contract to determine whether a reference date under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) arises for final payment following the termination of that contract.

If in a subsequent adjudication, a respondent seeks to rely on defects that existed at the time of an earlier adjudication but were only subsequently identified, the adjudicator must consider whether these defects alter the value of the works.

Facts

Vanguard Development Group Pty Ltd (**respondent**) engaged Promax Building Developments Pty Ltd (**claimant**) to construct 10 apartments at 47 Dickens Street, Elwood.

SC-22 of the contract provided that 'notwithstanding any other term of the contract and/or its termination' the reference date for a 'final claim for payment' was the date the claimant last undertook any works on site. Clause N11 of the contract prescribed that a 'final claim' could be made when:

- all defects liability periods have ended;
- the claimant has rectified all defects and finalised all incomplete work; and
- the works have been completed in accordance with the contract.

On 15 December 2017 (being the last day the claimant performed works on the site), the claimant issued a payment claim under the Act (**December Payment Claim**). After the respondent issued a payment schedule proposing to pay 'nil', the claimant referred the matter to adjudication and was awarded a sum of $230,000 (**First Adjudication**).

On 27 February 2018 the contract was terminated.

Notwithstanding the termination of the contract, on 8 March 2018 the claimant served a new ‘claim for final payment’ in the amount of $340,000 (**March Payment Claim**). The respondent responded by issuing a payment schedule proposing to pay 'nil'.

The claimant referred the March Payment Claim to adjudication (**Second Adjudication**). In the Second Adjudication, the adjudicator relied on SC-22 in finding that there was a valid reference date for the payment claim, alternatively the adjudicator relied on section 9(2)(d) of the Act. In determining that $210,000 was payable to the claimant, the adjudicator concluded that issue estoppel and section 23(4) of the Act precluded him from considering defects that existed at the time of the First Adjudication that were subsequently identified.

Decision

Kennedy J quashed the Second Adjudication determination on the grounds of jurisdictional error.

No valid reference date

In concluding that there was no valid reference date under the contract, her Honour held that a 'final claim for payment' could only be submitted where the three circumstances identified in clause N11 of the contract had been satisfied. This was not the case. As such, the March Payment Claim was not a 'final claim for payment' within the meaning of SC-22 and the reference date under that clause had not arisen.

Consistent with *Southern Han Breakfast Point Pty Ltd (in Liq) v Lewence Construction Pty Ltd* [2016] HCA 52 (analysed in our *Roundup of 2016 cases*), her Honour also held that no default reference date arose under section 9(2)(d) of the Act because SC-22 made express provision for a reference date for final payment.

Adjudicator failed to re-assess the value of defective work

In respect of the defects that existed at the time of the First Adjudication, Kennedy J held that section 23(4) of the Act required the adjudicator to direct himself to the question of the 'value of the works'. Where the respondent invited the adjudicator to do so, the adjudicator was required to ask himself whether he was satisfied that the 'value' of the works was altered by reason of the existence of the further alleged defects. The adjudicator's failure to do so constituted a jurisdictional error.

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WESTERN AUSTRALIA

In itself, being successful in an adjudication determination isn't proof that a 'construction contract' exists for SOPA purposes

Easy Stay Mining Accommodation Pty Ltd v Grounded Construction Group Pty Ltd [2018] FCA 519

Tom French | Sally Ross

Significance

The decision of the Federal Court establishes that a contractor cannot rely solely on a successful adjudication determination to prove the existence of a 'construction contract' for the purpose of the *Construction Contracts Act 2004* (WA) (**CCA**).

Facts

In February 2017, Grounded Construction Group Pty Ltd (**GCG**) commenced construction of a mining camp near Laverton for Easy Stay Mining Accommodation Pty Ltd (**Easy Stay**). In June 2017, GCG evacuated the site upon the request of Easy Stay. GCG issued seventeen invoices for the works completed between May and June. On 30 June 2017, GCG issued a statutory demand for $1,828,478 for works completed. Easy Stay applied to set aside the statutory demand.

First adjudication applications

GCG lodged adjudication adjudications under the CCA in respect of nine of the invoices. Between 21 and 24 July adjudication determinations were published in favour of GCG. The total amount determined to be payable in respect of those nine invoices by Easy Stay was $948,018. Easy Stay paid this amount in October after obtaining a personal undertaking that a director of GCG would repay the amount if an application by Easy Stay for judicial review of the determinations was successful.

Subsequent adjudication applications

In August, GCG lodged adjudication applications in respect of five more of the invoices. Those applications were successful and the total extra amount payable by Easy Stay was $549,013.06. Easy Stay did not pay this amount. GCG sought to enforce these adjudications and Easy Stay sought judicial review of each of the determinations.

Claims

Easy Stay claimed there was no enforceable contract and GCG was entitled only to a claim in *quantum meruit* for work done on the construction site. Further, Easy Stay alleged there was no construction contract for the purpose of the CCA and therefore no jurisdiction for an adjudicator to make any determination regarding the invoices.

GCG claimed there was no genuine basis on which to dispute the existence of a contract for the purposes of the CCA, stating that the contract was entered into by Easy Stay upon the execution of a document dated 22 February 2017. The document recorded schedules of rates to apply to the works and incorporated GCG's standard terms and conditions.

Decision

Based on the evidence of both parties, Colvin J determined there was a genuine dispute over the existence of the debt, and set aside the statutory demand in accordance with section 459H of the *Corporations Act 2001* (Cth).

Colvin J dismissed GCG's argument that the determinations established that there is a construction contract for the purpose of the CCA and that the court must enforce the adjudication determinations. In dismissing this argument, his honour emphasised that the adjudication process does not make any determination other than the determination of an amount to be paid by the force of the statutory provisions. While the existence of a construction contract is necessary for the adjudicator to make a valid payment determination, the court is not bound by the adjudicator's views in respect of the existence of that contract.

An order to set aside the statutory demand was made, and Easy Stay was entitled to majority of the costs.

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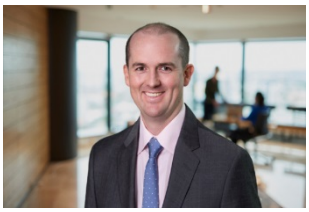

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