Construction Law Update

November/December 2019

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In the Australian courts

NEW SOUTH WALES

Ask for permission, not forgiveness – why contractors need to ask for the principal's permission to engage subcontractors

***Advanced National Services Pty Ltd v Daintree Contractors Pty Ltd* [2019] NSWCA 270**

Andrew Hales | Phoebe Roberts | Amy Ryan

Key point

This decision emphasises the importance of compliance with contractual subcontracting provisions in order for a contractor to be entitled to payment for those subcontracted services.

Significance

A contractor may find that it is not entitled to payment for subcontracted services, even in circumstances where those services have otherwise been delivered in accordance with the contract.

Facts

Daintree Contractors Pty Ltd (**principal**) and Advanced National Services Pty Ltd (**contractor**) entered into a contract (**contract**) under which the contractor was engaged to perform commercial cleaning services for clients of the principal (**cleaning services**).

The contract expressly prohibited the contractor from subcontracting without the principal's prior written approval. The contractor subcontracted approximately 90% of the cleaning services without the principal's approval. The principal alleged various breaches of contract by the contractor – the most significant being the use of subcontractors to perform the cleaning services, which the principal alleged was a fundamental breach. The principal purported to terminate the contract.

The contractor claimed payment for the performance of a portion of the cleaning services, which remained partially unpaid by the principal. Whilst the principal did not dispute that the cleaning services had been performed, the principal did not pay the full amount of monies claimed by the contractor.

The contractor argued that the contract was not a personal contract but a contract to produce a result (ie cleaning services). The principal argued that in the absence of its prior written approval, personal performance was required in order for the contractor to earn the agreed fee for the performance of the cleaning services.

In the District Court of New South Wales, the primary judge found in favour of the principal and decided that the contractor was only entitled to payment of 10% of the amount claimed. The contractor appealed on the question of whether, by employing unauthorised subcontractors to perform the works, the contractor had 'earned' the right to payment of the contract price.

Decision

The Court of Appeal dismissed the appeal and found that:

- a right to payment under a contract is a separate right that accrues from the partial execution of the contract; and
- in light of the terms of the contract, the performance obligation of the contractor was personal and could not be discharged by using subcontracted labour without the principal's approval. Therefore, the contractor had not earned the right to payment of the contract price for the subcontracted cleaning services provided. For this reason, the contractor was not entitled to the balance of the unpaid monies that it was claiming (approximately 90% of the amount claimed).

No luck here on the alternate reference date, but a payment claim may include claims for work performed after a reference date

Hanson Construction Materials Pty Ltd v Brolton Group Pty Limited [2019] NSWSC 1641

Andrew Hales | Phoebe Roberts | Kawshalya Manisegaran

Key point and significance

It is not within an adjudicator's jurisdiction to determine an alternate reference date to the reference date proposed by the parties, unless the adjudicator gives the parties the opportunity to make submissions on the matter.

It may have previously been understood from earlier decisions of the court that a claim for payment should only be made for work performed up to the relevant reference date. Obiter comments in this decision support a contrary position that, subject to the terms of the contract, a claim for payment supported by a reference date could include claims for work performed after the reference date.

Facts

Hanson Construction Materials Pty Ltd (**principal**) engaged Brolton Group Pty Limited (**contractor**) to build a quarry processing plant for a guaranteed maximum price of $85M. The principal terminated the contract on 3 October 2018.

Reference dates under the contract accrued on the last Tuesday of each month. On 28 August 2019, the contractor submitted a payment claim for $6.3M which comprised a number of previous claims, a number of subcontractor invoices for work performed during the period 25 September 2018 to 10 October 2018, and a claim for interest for delayed payment up to 28 August 2019.

The principal served a payment schedule stating the amount it intended to pay as 'nil', following which the contractor lodged an adjudication application for the claimed amount. In its adjudication response, the principal identified the appropriate reference date as being 25 September 2018, but argued that the adjudicator did not have jurisdiction to adjudicate the claim as the amounts claimed were not supported by that reference date (given that some of the amounts claimed were in relation to works performed after the reference date and could not be supported by any later reference date as no further reference dates arose under the contract following termination).

The adjudicator came to an alternate conclusion that the reference date arose on 23 October 2018 as, in his (erroneous) belief, the contract expressly provided for a reference date after termination.

The principal sought a declaration that the adjudication determination was void. In the Supreme Court of New South Wales, the contractor initially argued that the adjudicator was entitled to select a reference date of 23 October 2018; however, the contractor conceded that this was incorrect during the course of the hearing. As such, during the course of the hearing, both parties agreed that the adjudicator had erred and the proper reference date for the claim was 25 September 2018, although the contractor said that this was not a reviewable error.

Decision

The court held that the determination was void as it was not open to the adjudicator to determine an alternate reference date when the parties were in agreement as to the relevant reference date.

Further, the court affirmed that there will be a denial of natural justice where an adjudicator determines a dispute on a basis for which neither party has contended without giving the parties an opportunity to make submissions on the matter. In this case, the court found that it was not open in the circumstances for the adjudicator to choose a reference date of 23 October 2018 without giving the parties an opportunity to make submissions on that choice.

No conditional relief

The court held that the error that the adjudicator made went to the heart of the payment claim and altered the lens through which the payment claim was assessed. In order to 'sever' the adjudicator's determination in a way that could provide conditional relief would mean that the court would have to decide various matters on the merits of each party's submissions, which was not part of the court's jurisdiction in this matter. Therefore, no conditional relief was granted.

Claims for work performed after the reference date

In obiter, the court suggested that there is nothing in the *Building and Construction Industry Security of Payment Act 1999* (NSW) or *Southern Han* which requires that, for a payment claim to be valid, it must only relate to work done before the reference date in respect of which the payment claim was served.

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If you actually receive a payment claim, compliance with service requirements of security of payment legislation will not matter

MN Builders Pty Ltd v MMM Cement Rendering Pty Ltd [2019] NSWDC 734

Andrew Hales | Hamish Hosking | Olivia Borgese

Key point and significance

Summary judgment will be granted to a party where the other party has not issued a payment schedule in response to a tax invoice constituting a 'payment claim' for the purposes of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) and there are no triable issues.

Once it has been accepted that a respondent has actually received a payment claim, compliance with s 31 of the Act, regarding service of the payment claim, becomes redundant.

Facts

MN Builders Pty Ltd (**builder**) and MMM Cement Rendering Pty Ltd (**subcontractor**) entered into a subcontract for rendering services in connection with building works at Liverpool, NSW.

The subcontractor issued 7 tax invoices for the work performed pursuant to the subcontract and all but the last invoice was paid by the builder. The builder alleged that in accordance with a quote from the subcontractor, the price was calculated per square metre and the subcontractor had been overpaid.

The subcontractor claimed that it charged on a lineal basis rather than a per square metre basis in accordance with a verbal agreement with the builder's foreman since most of the surfaces were less than $1m^2$.

The subcontractor contended that its invoice constituted a 'payment claim' for the purposes of the Act. As the builder did not serve a payment schedule within 10 business days, the subcontractor said that the builder was liable to pay the full amount claimed in the 7^{th} invoice as a debt due.

The builder denied liability on the basis that no such oral agreement had been entered into and that in any event its foreman did not have authority to enter into such an agreement on behalf of the builder. For this reason, the builder said that it was not party to a 'construction contract' for the purposes of the Act.

The builder also denied that the payment claim had been validly served. The subcontract stipulated that claims were to be served by email to the builder's accounts section. The builder said that the claim had been provided by hand to the builder's foreman who was not the 'person' who could be served with the claim under s 31 of the Act. But it was accepted that the builder's foreman had forwarded a copy to the builder's accounts section.

As such, the builder argued that the subcontractor's application for summary judgment must fail on the basis of two triable issues:

- what was the 'construction contract' for the purposes of the Act; and
- whether and how the payment claim was served.

Decision

The District Court granted summary judgment for the subcontractor pursuant to the Act. In coming to its decision, the Court did not accept that any triable issues existed. In particular:

- although there was a dispute about the verbal agreement as to the method for calculating payment, the underlying 'construction contract' entitled the subcontractor to make a claim under the Act; and
- taking into account the statutory purpose of the Act, once it is accepted that the claim had actually been received by the respondent, questions about compliance with the facultative regime in s 31 of the Act become redundant.

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The twists and turns of termination and contractual cure periods

Visual Building Construction Pty Ltd v Armitstead (No 2) [2019] NSWCA 280

Andrew Hales | Michelle Knight | Naomi Graham

Key point and significance

If your contract contains a notice period within which a default may be cured before termination, this period will be enforced by the courts. Where a 'once and for all breach' of contract is technically never capable of being remedied, such as a failure to comply with a time provision, be careful as the court may consider whether the default has been remedied 'in substance' (so long as the remedy could be achieved within the cure period).

Facts

Armistead (**owner**) entered into a building contract with Visual Building Construction Pty Ltd (**builder**) to construct a duplex (**contract**).

The builder commenced works but did not obtain a construction certificate prior to doing so, as required under the contract and the development consent.

During the works, the owner issued a notice of termination of the contract listing a number of defaults, including that the builder failed to:

- complete the works by the date for completion;
- obtain the necessary approvals from the council for a construction certificate; and
- rectify defective works.

The contract provided that if the owner wished to terminate the contract for a particular default, and the default could be remedied, the owner was required to notify the builder in writing that, unless the default was remedied within 10 business days, the owner would terminate the contract. If the default could not be remedied, the contract allowed the owner to terminate the contract by giving immediate written notice to this effect.

In the District Court of New South Wales the primary judge held that the contract was validly terminated. The builder appealed contending that the owner did not provide the required 10 business days' notice prior to termination to allow the builder to remedy the defaults.

Decision

The Court of Appeal unanimously dismissed the appeal, holding that the contract was validly terminated.

The contract only required the owner to provide 10 business days' notice before terminating where the default was capable of being remedied within that notice period. In this case:

- the council had refused to issue a building certificate for the work carried out;
- a construction certificate was required prior to commencement of the works and this could never be remedied; and
- the builder only had four weeks to complete the works under the contract as varied and had taken no steps to obtain a construction certificate.

The court also held that the builder's failure to take any steps to obtain a building certificate or a construction certificate meant that the builder had repudiated the contract. The owner had accepted the repudiation by the notice of termination or the commencement of proceedings. The termination on this available ground, even if not expressly relied upon, would still be valid.

The court also considered that, although technically it may not be possible to remedy a default such as a 'once and for all breach' like the failure to obtain a construction certificate prior to commencing the works, this could be remedied in substance during the 10 business day cure period by, for instance, obtaining the necessary approvals from the council in respect of unauthorised works and obtaining a construction certificate for works yet to be performed. However, in this case the court found that the builder's defaults were not capable of being cured within the 10 business day period.

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QUEENSLAND

Causal links preferred to global claims in construction disputes

Alexanderson Earthmover Pty Ltd v Civil Mining & Construction Pty Ltd [2019] QSC 259

Michael Creedon | Sarah Cahill | Chris Nliam

Key point and significance

This case reiterates the importance of establishing a causal link between the alleged action and the damage claimed in pleadings, otherwise it may be struck out as a global claim. Alternatively, the plaintiff must plead and establish that it is impossible or impracticable to disentangle parts of the loss that can be attributed to each claim.

Facts

The plaintiff, Alexanderson Earthmover Pty Ltd (**subcontractor**) entered into a civil works subcontract with the defendant, Civil Mining & Construction Pty Ltd (**contractor**). Following the completion of the works, the subcontractor commenced proceedings against the contractor and the contractor counterclaimed. This case considers a number of interlocutory matters, referred to as 'skirmishes aplenty'. However, the focus of this update is on the contractor's applications to strike out pleadings relating to global claims. The contractor claimed that the subcontractor failed to identify a causal link between the contractor's alleged actions and the alleged damages the subcontractor suffered.

The subcontractor made three claims in paragraphs 36 to 38 of its statement of claim relating to alleged delays by the contractor to give it access to different parts of the work site. The subcontractor claimed these delays caused its plant, equipment and personnel to be on standby and that it was entitled to recover payments as a result. The contractor contended that the subcontractor had not established which specific delay allegedly caused which plant and which workers to be placed on standby.

In paragraph 40 of its statement of claim, the subcontractor claimed that *'but for the* [contractor's] *Delays, in whole or in part, the* [subcontractor] *would have completed the Work'* by the agreed date. The contractor contended that the use of *'in whole or in part'* meant that the subcontractor pleaded alternative claims but failed to identify which *'part'* of the contractor's alleged delay the subcontractor was referring to. The contractor claimed that this unfairly required it to intuit what that *'part'* was.

Finally, the subcontractor claimed in paragraph 44 of its statement of claim that the contractor's delays were a breach of the subcontract resulting in loss and damage. In the particulars for that claim, the subcontractor referred to *'Consequential Delays'*. The contractor submitted that the reference to *'Consequential Delays'* in the particulars should be struck out because it had no connection to the pleaded allegation. The contractor also submitted that the subcontractor should be ordered to provide particulars about which specific operator was on standby on each day to support its claim for delay.

Decision

Her Honour Ryan J struck out all the paragraphs mentioned above on the basis that they involved global claims, with leave to re-plead them. Her Honour cited with approval the principle that the plaintiff in a civil matter must set out facts which *'lead to a reasonable inference that the acts complained of and the loss claimed stand to each other in the relation of cause and effect …'*. The plaintiff must also *'plead the necessary facts showing that causal link'.*

Her Honour cited authorities which permitted global claims where, through no conduct of the plaintiff, it is impossible or impracticable for a plaintiff to disentangle parts of the loss that can be attributed to each claim. An example was a case where a party's inability to state the precise scope of the delay claimed was held to be *'readily explicable'* because that party was not a party to the relevant subcontract to which its claim related nor was it privy to all the events that occurred in that subcontract. This exception was not applicable in this case.

With regard to paragraphs 36 to 38, her Honour accepted that the subcontractor did not identify which of the alleged delays it asserted caused which plant to be stood-by. Her Honour found that it was necessary for the subcontractor to make this connection in its pleadings or otherwise plead that it was either impossible or impracticable to do so.

Her Honour accepted that the phrase *'in part'* in paragraph 40 required clarification because it introduced an alternative claim. Her Honour agreed with the contractor that procedural fairness required the subcontractor to plead with precision, the *'part'* upon which it relied and the necessary facts demonstrating the causal nexus between that *'part'* and the alleged standbys.

Finally, her Honour struck out paragraph 44 on the basis that the subcontractor did not plead the causal link between the delays it alleged and the *'Consequential Delays'* in the particulars.

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Another claim of charge bites the dust for failing to comply with the Subbies' Charges Act

All Systems Pty Ltd v MAW Group (Aust) Pty Ltd & Anor [2019] QDC 211

Andrew Orford | James Knell | Jane Evelyn

Key point and significance

When relying on the *Subcontractors' Charges Act 1974* (Qld) (now Chapter 4 of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld)) (**Act**), parties must ensure their statement of claim sufficiently details the works to which the claim of charge relates, and must strictly comply with the timeframes set out in the Act for enforcing a charge.

The interpretation of descriptions of work allowed under QBCC licences is open to considerable debate, which may not be resolved by ordinary dictionary definitions and may require expert opinion.

Facts

The Bundaberg Regional Council entered into a contract with MAW Group (Aust) Pty Ltd (**contractor**) to construct a sporting complex in Bundaberg. All Systems Pty Ltd (**subcontractor**) was engaged by the contractor by way of a subcontract to carry out metal roofing and wall cladding works.

The subcontractor claimed that the subcontract was varied, resulting in the contractor owing the subcontractor $189,602.13. The subcontractor gave two notices of claim of charge under the Act to the contractor. The first claim of charge was dated 6 February 2017 and claimed $140,811.65 (**February Charge**). However, the notice of charge was never the subject of a proceeding to enforce the charge and was not pressed by the subcontractor as a valid charge. The second notice of claim of charge was also in respect of the subcontract and was delivered on 17 March 2017 for $48,691.97 (**March Charge**). On 4 April 2017, the subcontractor commenced proceedings in which it attempted to plead the claim of charge in respect of both the February Charge and the March Charge.

The contractor brought an application for summary judgement against the subcontractor on two grounds.

First, it was submitted there was no entitlement to payment under the contract and therefore no subcontractor's charge existed as the subcontractor had carried out works without the appropriate licence authorised under the *Queensland Building and Construction Commission Regulation 2018* (Qld) (**QBCC Regulation**). The contractor claimed that the subcontractor held a low-rise builder's licence, which did not give authorisation to carry out 'structural' works such as works that required the resistance of lateral forces or works that had load-bearing characteristics. In other words, the subcontract was unenforceable because the works were unlawful under section 42(1) of the *Queensland Building and Construction Commission Act 1991* (Qld).

Second, the contractor submitted that the March Charge was invalid because the subcontractor's statement of claim of charge had failed to articulate the basis in contract for the entitlement to the sum of the subject charge. As the statement of claim was not effective, the contractor claimed the subcontractor could not bring a proceeding to enforce the charge under the Act.

The contractor sought a declaration that the subcontractor was not entitled to either of the charges and that the subcontractor's charges were invalid for payment out of the money remaining in court which had been paid in by the contractor.

Decision

Porter J disposed of the application for summary judgement to the extent it relied on the subcontractor's unlicensed work. In reaching this decision, his Honour found there was considerable debate as to what the word 'structural' means in the context of the prohibition on structural works under the subcontractor's particular licence. His Honour found that relying on the ordinary meaning of 'structural' was insufficient as the construction of the QBCC Regulation that identifies licence categories was *'replete with words that ordinary people would not understand and whose meaning can only be understood in the context of the building industry'*. Not only would an expert's opinion be required to interpret the meaning of 'structural', determining whether the subcontractor's particular works were or were not 'structural' would also need to be the subject of expert opinion. In disposing of the summary judgement application for the reason of unlawful works, his Honour stated that it would be very difficult to be sure what the correct result was in these types of cases without the time for analysis and the understanding of the evidence that comes with a trial.

However, his Honour agreed that the payments allegedly due under the subcontract were not secured by a charge under the Act, and therefore the monies, which had been paid into the court in respect of that charge, should be paid back to the contractor.

His Honour referred to sections 10 and 15 of the Act to determine that the commencement of a proceeding to enforce a charge is only valid if:

- the notice of claim of the charge gives rise to a charge for a 'specific sum' in respect of the 'identified work'; and
- a proceeding is commenced within one month of the delivery of the statement of claim of charge.

His Honour determined that the subcontractor's statement of claim, as originally filed, failed to be on its face a proceeding to enforce either charge as at the date of the pleading as:

- the February Charge was invalid as the proceeding had not commenced within the Act's timeframe;

- the subcontractor had failed to assert the items of work in the March Charge that remained outstanding; and
- the subcontractor had not asserted that the sum of $48,691.97 claimed in respect of that March Charge remained due and owing.

His Honour held that, as a consequence of the invalid charges, the remaining sum held in court should be paid to the contractor.

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The winner does not always take it all – cost orders when both parties have been successful

National Management Group Pty Ltd v Biriel Industries Pty Ltd trading as Master Steel & Ors (No 2) [2019] QSC 276

Andrew Orford | Sarah Ferrett | Jane Evelyn

Key point and significance

The general rule that 'costs follow the event' may be departed from in circumstances where both parties have enjoyed a measure of success.

Facts

National Management Group Pty Ltd (**NMG**) and Biriel Industries Pty Ltd trading as Master Steel & Ors (**Biriel**) entered into an agreement whereby Biriel fabricated, supplied and installed structural steel for two separate projects.

In December 2018, Biriel issued two payment claims in respect of the first project and then two weeks later issued two more payment claims – a replacement for a previous payment claim for the first project and a claim in relation to the second project. NMG did not provide payment schedules for the payment claims, which caused Biriel to apply for an adjudication under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**). Biriel was successful in both of its adjudication applications.

NMG applied to the Supreme Court of Queensland to set aside both decisions for jurisdictional error on various bases and ultimately the court accepted that:

- in relation to the first adjudication, the replacement payment claim was invalid under the BIF Act and the purported decision was set aside; and
- in relation to the second adjudication, the adjudicator's refusal to allow NMG to make jurisdictional submissions constituted an error but did not invalidate the decision.

Justice Wilson requested submissions on the question of costs.

NMG contended that Biriel should pay its costs as:

- it was successful in relation to the largest claim, being the first project; and
- NMG had been wrongly prevented by the adjudicator from making submissions about jurisdiction regarding the validity of service in relation to the second project,

or, in the alternative, Biriel should pay a proportion of NMG's costs as its arguments were largely successful and it was entirely successful in relation to the larger claim.

In contrast, Biriel sought an order that NMG pay 50% or a portion of Biriel's costs of the proceeding on the basis that:

- NMG was only partially successful on the issues it raised;
- there were five separate issues in the proceeding and NMG was only successful on two narrow legal points;

- issues that were relevant to the decision to dismiss NMG's application to set aside the adjudication decision for the works carried out on the second project occupied a significant part of the hearing; and
- the quantum of the payment claims was not a factor that affected the incursion of time and legal fees,

or, in the alternative, no order as to costs should be made or the parties should bear their own costs as each party had received a measure of success.

Decision

Wilson J stated the exercise of the court's discretion to depart from the general rule was warranted (as each party had had a measure of success) and ordered that each party bear its own costs in favour of undertaking a complicated assessment of costs based on separate events or questions decided in the application.

In exercising the discretion to depart from the general costs rule, Wilson J took into consideration that the quantum of payment claims in this case was unlikely to have been a factor that affected the incursion of time and legal fees, the failure to allow NMG to make submissions about jurisdiction did not impact the ultimate conclusion and the majority of the proceeding had been taken up with the invalidity of service issue that was unsuccessfully submitted by NMG.

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VICTORIA

Be aware – Settlement agreements can put your right to further claims at risk

Valeo Construction v Tiling Expert [2019] VSC 291

Nikki Miller | Tom Johnstone | Harry Frith

Key point

This decision affirms that parties to a construction contract are not to be taken to have contracted out of the *Building and Construction Industry (Security of Payment) Act 2002* (Vic) (**Act**) if they enter into a settlement agreement in a genuine final resolution of the parties' disputes. A subsequent breach by one party cannot render the resolution disingenuous retrospectively. As a result, the Act is not a back-door to recover unpaid settlement amounts or other claims that were the subject of a valid settlement agreement.

Facts

Background

Tiling Expert (Vic) Pty Ltd (**contractor**) carried out work for Valeo Construction Pty Ltd (**Valeo**) and reached practical completion on 21 December 2017. In February 2018, the parties reached a settlement agreement to resolve a number of matters in dispute. As part of the settlement Valeo agreed to pay the contractor $120,000 in instalments. Under the settlement agreement the contractor waived any current and future claims against Valeo.

The first instalment of $60,000 was paid to the contractor in March 2018; however, Valeo failed to pay the remaining four monthly instalments of $15,000.

On 4 July 2018, the contractor submitted a further progress claim for the rectification of defects. The contractor argued they were entitled to make this claim because Valeo breached the settlement agreement by failing to pay the remaining balance. They also argued Valeo's breach of the settlement agreement inferred Valeo did not enter into a genuine final resolution.

The adjudicator determined that the settlement agreement was not a genuine attempt to resolve the parties' disputes and the contractor was entitled to claim costs under the Act for the rectification of defects.

Issue on appeal

The central issue on appeal was whether the adjudicator committed a jurisdictional error in finding that the settlement agreement was not a genuine attempt to resolve the parties' dispute.

Decision

The court allowed Valeo's appeal and set aside the adjudicator's determination. It was held that there was a genuine final resolution of the parties' dispute, which precluded the contractor from making any future progress claims under the Act or otherwise.

Digby J emphasised that whether the resolution is genuine must be assessed at the time of entering into the settlement agreement. The court considered the terms of the agreement, the parties' negotiations and the relatively contemporaneous communications between the parties. In this case, the circumstances showed that the parties intended to settle any rights or entitlements by the terms of the settlement agreement. Therefore, the fact Valeo subsequently did not honour the settlement agreement did not revive the contractor's right to an additional progress claim. Digby J noted that if there was disingenuousness at the time of making the agreement, that may render it void by reason of section 48 of the Act.

The settlement agreement was also held not to have restricted the operation of the Act. This was because it resolved and removed any pre-existing or potential claims by the contractor. Digby J stated that Parliament did not intend for section 48 of the Act to impede the settlement of disputes even where the construction contract is regulated by Security of Payment legislation. The rights of the contractor to sue Valeo for breach of the settlement agreement was not affected as a consequence of this decision, only the contractor's attempt to utilise the Act was found to be invalid.

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WESTERN AUSTRALIA

Be prepared to properly plead global claims

Built Environs WA Pty Ltd v Perth Airport Pty Ltd [No 3] [2019] WASC 399

Tom French | Penny Bond | Conor McCavana

Key point

Global claims will not be permitted to be used as a trojan horse for poorly pleaded claims.

This decision provides a reminder that, even in factually complex construction disputes, the court will expect plaintiffs to properly plead and particularise claims from the outset.

Facts

The case follows on from an earlier case, *Built Environs WA Pty Ltd v Perth Airport Pty Ltd [No 2]* [2019] WASC 76, in which the court held that paragraphs of the plaintiff contractor's statement of claim (**SoC**) be struck out as legally embarrassing and gave the plaintiff permission to seek leave to replead the paragraphs. We discussed that case in in our *March 2019 Construction Law Update*.

In this case, Built Environs WA Pty Ltd (**contractor**), sought to replead the paragraphs. The paragraphs dealt with alleged deficiencies in the defendant's design drawings, which the contractor claimed caused it losses due to additional work.

Decision

The court refused the contractor's application to replead the offending paragraphs of the claim.

The court considered the contractor's amended SoC, noting that the alleged design deficiencies had still not been linked to additional hours worked or costs incurred.

The court was highly critical of the contractor's approach, stating that the detail lacking from the SoC:

> *'is the kind of preparatory detail that ought to have been assembled for a claim like this before the writ was issued in this action … in order for a plaintiff to … hold a reasonable basis for commencing and pursuing a breach of contract damages action, in the first place'.*

While the court acknowledged the evidence about the scale of work done in preparing the amended SoC, the court was ultimately of the view that, in light of details of the alleged general drawing deficiencies 'emerging in piecemeal fashion', the global manhours pleaded was *'not an acceptable, or workable regime of sufficient clarity to viably engage with, or to conduct a trial upon'*.

In other words, the court will be unwilling to permit global claims to be used as a trojan horse for poorly pleaded claims.

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A reminder that CC Act adjudication is a 'pay now, argue later' system

Sandvik Mining and Construction Australia Pty Ltd v Fisher [2019] WASC 352

Tom French | Penny Bond | Conor McCavana

Key point

The court will be unwilling to prevent enforcement of a *Construction Contracts Act 2004* (WA) (**CC Act**) determination unless it is in the balance of convenience to prevent payment.

Facts

The decision is part of a payment claim dispute between the plaintiff contractor, Sandvik Mining and Construction Australia Pty Ltd (**contractor**), and the other defendant subcontractor, Civmec Construction & Engineering Pty Ltd (**subcontractor**).

The subcontractor issued a notice of dispute in relation to a payment claim and applied for adjudication under the CC Act (**First Application**). The appointed adjudicator determined that the contractor was liable to pay the subcontractor $4.9M (**First Determination**), which the contractor subsequently paid. In March 2019, the subcontractor made a second application in relation to the same payment claim (**Second Application**). The adjudicator determined that the contractor was liable to pay the subcontractor $1.6M (**Second Determination**).

The contractor sought judicial review of the Second Determination on the basis that the payment dispute was determined in the First Determination and sought an injunction to prevent enforcement of the Second Determination pending the outcome of that review.

Decision

The court reapplied the two-part test as set out in *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2016] WASCA 105 for whether an injunction should be ordered, being:

- did the contractor have a prima facie case in the challenge proceedings; and
- what is the balance of inconvenience to the contractor and the subcontractor if the injunction were ordered?

Prima Facie Case

The court considered the strength of the contractor's case in challenging the Second Determination. While it was satisfied that the contractor had a prima facie case that the First Determination did determine the unchallenged assumed items, the court said it was not a strong case because the subcontractor's First Application expressly stated that it only concerned five of the disputed items.

Balance of inconvenience

The court then considered who would be more inconvenienced if the injunction was ordered. The court reiterated that the purpose of the CC Act is to keep the money flowing.

The contractor argued the only inconvenience to the subcontractor would be delayed payment; however, the court was unconvinced, particularly given the purpose of the CC Act.

The contractor also argued that there was an actual risk that, if the Second Determination was enforced, the subcontractor would not be able to repay if its challenge was successful. The court considered evidence, including the subcontractor's financial statement for Financial Year 2019 and determined that risk was of little weight.

The court affirmed previous CC Act decisions, including *Easy Stay and Re Anstee-Brook; Ex parte Karara Mining Ltd* [2012] WASC 129 and confirmed that the CC Act is a *'pay now, argue later'* system.

The court refused to order the injunction on the basis that, while the contractor's challenge case had a chance of success, the subcontractor would be more inconvenienced if the injunction had been ordered.

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