Construction Law Update

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In the Australian courts

NEW SOUTH WALES

No end in Site? NSW's Sagrada Família

Morrison v Moss & Anor [2019] NSWDC 746

Andrew Hales | Phoebe Roberts | Adam Hanssen | Georgia Berriman

Key point and significance

Taking possession of works near completion may inadvertently trigger practical completion. If the date for practical completion is not stated in the contract and there is no amount of liquidated damages stated in the contract, this may also disentitle a party to damages for late completion.

Facts

Morrison (**owner**) and Moss (**builder**) entered into two separate contracts to construct a home in NSW. The first contract was entered into in 2013 and brought to an end in 2015, at which point the home had reached 'lock up' stage and about 75% to 80% of the work for the project had been completed.

The second contract was entered into in late 2015 for completing the remainder of the works. Relevantly, the second contract did not include a specified period for completion or a requirement for the builder to pay damages to the owner for failure to achieve completion within any such period. The contract also provided that completion would be:

- achieved when the works were complete except for minor omissions and defects which did not prevent the works from being reasonably fit for their intended use; or
- deemed to have been achieved when the owner took possession of the works without the builder's written consent. *'Entering into possession'* was defined in the contract and included the *'placement of furniture, use of any part of the works, denial of access of the Builder to the works or work site, or action by the Owner … which prevents the Builder undertaking work'*.

Progress on the works under the second contract stalled. In 2016, an occupation certificate inspection took place, but one was not issued as certain problems needed to be addressed. Despite this, the owner moved into the home before the completion of the works. Then the builder issued a notice of practical completion and submitted an invoice for the works attributable to practical completion. The owner refused to pay the builder because the works were incomplete and defective. The builder terminated the contract under a right to terminate for the owner's failure to pay the builder within the required timeframe.

The owner brought a claim for damages for defective work in breach of the statutory warranties implied by the *Home Building Act 1989* (NSW) (**HBA**). The builder cross-claimed seeking payment of outstanding invoices under both contracts.

Decision

The court held that the builder was entitled to all sums owing under the two contracts, subject to the set-offs that the owner could receive as compensation for the defective work performed by the builder in breach of the statutory warranties implied by the HBA, the quantification of which was referred out for determination. In deciding the case, Abadee J considered:

Was there an implied term for completion?

The absence of a specified date for completion meant that the owner had to establish an implied term. The court refused to imply a term on the facts concluding that the absence of a date for completion, and damages for failure to achieve completion by a certain date, indicated that the parties were indifferent to the matter. Despite this, his Honour found that the builder violated the statutory warranty in the HBA, that absent any time stipulation, the works must be performed within a reasonable period of time. However, the court considered that while the builder had breached this statutory warranty, it was not liable to pay the owner any damages because the contract specified no amount that would be payable by the builder for failure to achieve completion within a period of time.

Had practical completion been achieved?

Although the works had not attained the state of completion set out in the contract to satisfy the concept of practical completion, the court determined that the owner took possession as defined in the contract and that, upon taking possession, practical completion had been achieved, triggering provisions arising from achievement of practical completion (ie an entitlement to payment of remaining invoices).

Was the contract validly terminated?

His Honour held that upon achieving practical completion, the builder could issue its invoice for the works attributable to practical completion and to have it paid within 10 days, and that the owner's failure to pay the builder generated rights in the builder to suspend work and ultimately terminate the contract. The owner's possession also had the practical effect of barring the builder's access to the site and the owner's failure to comply with the builder's direction to allow access created a further entitlement to terminate the contract.

The court rejected the owner's claim that the builder's breach of the implied term for completion deprived the builder of the right to terminate the contract, holding that the restriction on the right to terminate under general law because of the terminating party's absence of readiness and willingness to perform did not extend to termination arising from the invocation of an express power.

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Ground control to Major Defect, take your 'likely' risk and put your helmet on

Stevenson v Ashton [2019] NSWSC 1689

Andrew Hales | Lachlan Williams | Jessica Orap

Key point and significance

A defect may be classified as a 'major defect' despite the consequences of the defect not currently being present in the works. This decision is the first time that the Supreme Court of New South Wales has considered the definition of 'major defect' under the *Home Building Act 1989* (NSW) (**HBA**).

Facts

In June 2013, Ashton obtained owner-builder development consent to carry out additions and alterations (**works**) to the property which she owned. A construction certificate was issued on 14 August 2013.

On 24 May 2016, a contract for the purchase of the property was settled and Stevenson became the registered proprietor of the property. In June 2016, there was a water leak in the property.

NCAT proceedings

In November 2016, Stevenson sued Ashton in the NSW Civil and Administrative Tribunal (**NCAT**) for breaches of the statutory warranties in section 18B of the HBA and claimed there were several 'major defects' within the meaning of section 18E(4) of the HBA, including defective balcony works and cladding.

Ashton denied that the building contained the alleged defects (with some exceptions) and contended that Stevenson was outside the two-year limitation period to make a claim for defects which were not 'major defects', because the works were completed in May 2014 for the purposes of ss 3B and 18E of the HBA.

NCAT found that practical completion occurred in May 2014 and major defects existed in relation to the balcony works and cladding. Ashton appealed and Stevenson cross-appealed to the NCAT Appeal Panel.

Appeal Panel

The Appeal Panel agreed that the works were completed in May 2014 but stated that Stevenson bore the onus of proving when the works achieved practical completion. The Appeal Panel also held, as relevant to the NSWSC decision, that establishing a defect as being a major defect requires:

- evidence from the homeowner to establish that a major defect exists;
- proven consequences for the habitation or use of a building, or to the integrity of the building;
- a proven or probable inability to inhabit or to use the building;
- probative evidence of the actual impact of a defect upon a building, or what it probably will be; and/or

- evidence of a real possibility of destruction.

The Appeal Panel held that the evidence presented did not satisfy these requirements and that the balcony works and cladding were not major defects. Stevenson appealed the Appeal Panel's decision based on four alleged errors of law.

Supreme Court decision

The court allowed the appeal and remitted the matter to NCAT for determination in accordance with law.

Regarding the limitation issue, the court held that the Appeal Panel had incorrectly revered the onus of proof as the onus lay with the respondent, Ashton, to establish an *'earlier date for practical completion'* than the dates presumed in section 3B(3)(a)-(d) of the HBA where no written contract existed for performance of the residential building work.

Regarding the requirements for proof of a 'major defect', the court set aside the Appeal Panel's decision and held that the definition of 'major defect' does not require:

- evidence from a homeowner to establish that a 'major defect' exists;
- any imminence to the damage; or
- the consequences to be manifested.

A defect in a major element of a building may be a major defect if it is established that it *'causes or is likely to cause'* the consequences contained in the definition in section 18E(4)(a)(i)-(iii) of the HBA.

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Builders beware – the EP&A Act statutory limitation period may not always be available

Sydney Capitol Hotels Pty Ltd v Bandelle Pty Ltd [2019] NSWSC 1825

Andrew Hales | Nicholas Grewal | David Bell | Jack McFadden

Key point and Significance

Section 6.20 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) will not apply to statute-bar a civil action arising out of or in connection with defective building work if a claim is brought by a plaintiff only accidentally, incidentally or indirectly affected by the defective building work. Rather, the statutory limitation period effected by section 6.20 is intended to apply narrowly rather than in accordance with its plain and grammatical meaning.

Facts

On 2 January 2017, a fire broke out on the ground floor of a building on George Street, Sydney. The fire activated the sprinkler system on level 5, which was occupied by Sydney Capital Hotels Pty Ltd (**tenant**), causing material damage and consequential loss to the tenant. The fire was said to have been caused by defective building work completed in 1997 by Bandelle Pty Ltd (**builder**) on the exhaust duct system which serviced the ground floor and passed through level 5.

The tenant and builder were never a party to a contract in relation to the building work. However, the tenant alleged that the builder owed it a duty of care in doing the work to avoid the risk of harm to it, that this duty was breached, and that damage was suffered as a consequence.

The builder pleaded that the tenant's claim was statute-barred because of section 6.20 of the EP&A Act, which provides that *'a civil action for loss of damage arising out of or in connection with defective building work … cannot be brought more than 10 years after the date of completion of the work'*.

Hammerschlag J determined that the key issue was whether, on the proper construction of the section, the loss or damage suffered by the tenant arose *'out of or in connection with defective building work'*.

The tenant argued that the section should be construed narrowly to only apply to protect a party who does defective building work from a claim by a person with whom that party contracted to do work.

Decision

Hammerschlag J determined that section 6.20 of the EP&A Act did not apply and that the tenant's claim was therefore not statute-barred by that section. His Honour followed the decision in *Dinov v Alliance Australia Insurance Limited* (2017) 96 NSWLR 98, which itself approved of the reasoning in *Australian Rail Track Corporation Ltd v Leighton Contractors Pty Ltd* [2003] VSC 189.

In Australian Rail, Bongiorno J considered a provision in a statute to the same general effect as section 6.20 of the EP&A Act and concluded that, despite the ordinary and grammatical meaning of the provision, it should not be construed to include claims brought by plaintiffs who are but accidentally, incidentally or indirectly affected by what might be described as defective building work. His Honour considered that the purpose of the provision was not to change the general law of tortious liability but to regulate liability of building owners and building practitioners. Therefore, giving the provision its ordinary and grammatical meaning would give it an operation obviously not intended having regard to relevant parliamentary materials.

This reasoning was referred to with approval in *Dinov* by the New South Wales Court of Appeal, which considered that the section imposes an absolute time bar for protecting those who otherwise would have some legal liability in damages for defective building work.

Despite acknowledging that he would have reached a different conclusion if deciding the matter afresh, Hammerschlag J felt bound to follow the Court of Appeal and concluded that section 6.20 of the EP&A Act should be given a restricted meaning to give effect to the purpose of the legislation. His Honour concluded that the loss and damage was caused by the defective building work in only an accidental, incidental or indirect sense and therefore the defence must be struck out.

It remains to be seen whether this decision will be appealed.

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Anshun estoppel – it's all or nothing

TWT Property Group Pty Ltd v Cenric Group Pty Ltd [2020] NSWSC 72

Andrew Hales | Jessica Nesbit | Lauren Topper

Key point and significance

A builder's failure to pursue a claim for payment in earlier proceedings was unreasonable so it was prevented by an Anshun estoppel from making the same claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**). A party may not make a claim for payment under the Act regarding the same facts and issues that were the subject of earlier court proceedings.

Facts

TWT Property Group Pty Ltd (**developer**) contracted with Cenric Group Pty Ltd (**builder**) for the demolition of a structure and excavation of a site. The developer excluded the builder from the site on 19 March 2018 and contracted with the builder's subcontractor to complete the excavation works. The builder commenced proceedings (**2018 Proceedings**) against the developer and the subcontractor for damages arising from the exclusion. The court held that the builder should not have been excluded from the site, but that it had not proved any damages.

Relevantly, the builder had raised a claim for work performed up to 19 March 2018 as a set-off to the developer's cross-claim in the 2018 Proceedings but led no evidence in support of the claim and withdrew the claimed set-off in closing submissions.

On 14 December 2018, the builder served a payment claim on the developer for $444,726 for work done before its exclusion from site (**December Claim**). The developer served a payment schedule in the amount of $Nil. The builder made an adjudication application regarding which the adjudicator found that:

- it was 'common ground' that the only work undertaken during the 12 months preceding the payment claim was excavation of the sandstone and the December Claim included no amount for excavation of sandstone;
- the payment claim was not served within 12 months after the construction work to which the claim related was last carried out, and therefore the payment claim did not comply with section13(4)(b) of the Act;

- the adjudicator therefore had no jurisdiction to determine the matter; and
- the builder was not entitled to a progress payment.

The builder purported to withdraw its first adjudication application and made a further adjudication application (also regarding the December Claim). The developer commenced proceedings to challenge the December Claim or uphold the first adjudication.

The court was asked to consider two questions:

- whether it was an abuse of process of the Act for the builder to make the December Claim by reason of an Anshun estoppel arising from the builder's failure to pursue in the 2018 Proceedings a claim for work done before its exclusion from site; and
- if there is no Anshun estoppel, whether the adjudicator's decision was amenable to challenge because, as a matter of objective fact, the December Claim related to work carried out within 12 months of service of the December Claim.

Decision

The court made orders restraining the builder from proceeding with the second adjudication.

The Anshun Question

Stevenson J held that the December Claim arose from the same facts as those considered in the 2018 Proceedings and that it was *'unreasonable, indeed inexplicable'* that the builder did not include the December Claim in the 2018 Proceedings. In these circumstances, the builder was estopped from bringing such a claim in later proceedings, including by way of adjudication under the Act.

The builder had argued that a letter from the builder's solicitor to the developer's solicitor on the eve of the hearing of the 2018 Proceedings indicated an agreement to hold a separate inquiry into amounts owing to the builder (and therefore address the December Claim) and this justified the builder's failure to pursue a claim for payment in the 2018 Proceedings. Stevenson J rejected that argument by finding the builder's interpretation of the letter unconvincing.

The first adjudication – was there a breach of natural justice?

Stevenson J stated, in obiter, that the December Claim related to work carried out by the builder within 12 months of service of the December Claim.

In coming to that conclusion, Stevenson J decided that compliance with section 13(4)(b) of the Act raises a jurisdictional fact as to when the work was carried out, but an error by an adjudicator in determining that fact is not one that is reviewable by the court. However, had the court been required to determine the issue, his Honour would have found that the adjudication determination was void because in coming to the finding on what was 'common ground' between the parties, the adjudicator must have failed to consider the builder's submission that the excavation works the subject of the December Claim did relate to sandstone excavation. His Honour stated that such a failure breached natural justice.

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QUEENSLAND

Contract Disputes 101 – know who you are entitled to sue

Benjamin v KMV Constructions Pty Ltd & Ors [2020] QDC 3

Andrew Orford | Matt Hammond | Chris Nliam

Key point and significance

A director of a company will not be a party to a contract its company enters into unless they do so in their personal capacity.

Facts

Ms Benjamin contracted with KMV Constructions Pty Ltd (**KMV**) to construct a residential property. Mr Vincent and Ms Vincent (**KMV Directors**) were directors of KMV at the time the contract was executed. There was no evidence that the KMV Directors had entered into the contract in their personal capacity, nor did Ms Benjamin claim that the KMV Directors provided any guarantee to secure KMV's performance of its obligations under the contract.

A dispute arose about completing the contract and Ms Benjamin commenced an action for breach of contract against KMV and the KMV Directors. While the breach of contract proceeding was on foot, Ms Benjamin applied to the court for a freezing order under the *Uniform Civil Procedure Rules 1999* (Qld) to prevent Ms Vincent from selling a property she owned and was about to sell.

Counsel for KMV and the KMV Directors submitted that Ms Benjamin's application should be refused as Ms Benjamin's breach of contract claim was against KMV and not Ms Vincent in her personal capacity. Accordingly, there was no arguable case to grant a freezing order over Ms Vincent's property.

Decision

Judge Reid dismissed the application and ordered Ms Benjamin to pay Ms Vincent's costs of the application.

His Honour found that there was a strong argument that Ms Benjamin's breach of contract claim against the KMV Directors was 'misconceived' as Ms Benjamin had failed to establish that the KMV Directors were parties to the contract. His Honour determined that Ms Benjamin could not identify any arguable basis on which Ms Vincent could be held personally liable under the contract.

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To avoid costs going down the toilet, know when sewerage works are not 'building works'

Waterford PPG Pty Ltd v Civil Constructors (Aust) Pty Ltd [2020] QSC 8

Michael Creedon | Alexandria Hammerton | Jane Evelyn

Key point

Before claiming jurisdictional error in an adjudication decision on grounds that a party carried out 'building works' without the appropriate licence, be sure to properly understand what is (and what is not) captured by the provisions in the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**).

Facts

Waterford PPG Pty Ltd (**developer**) and Civil Constructors (Aust) Pty Ltd (**contractor**) entered into a contract for the contractor to carry out various works for developing a 51-lot subdivision, which included:

- the installation of a sewerage pump chamber in each private lot;
- the supply of branch connections from that pump chamber to the trunk infrastructure; and
- the connections of the sewerage pump chamber to the trunk infrastructure (together, **sewerage works**).

A dispute arose as to a payment claim submitted by the contractor for the sewerage works it stated it undertook under the contract. The contractor applied for an adjudication under the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIPA**) to resolve the payment dispute, which resulted in an adjudication determination in favour of the contractor. The developer applied to the court to seek declaratory relief regarding the adjudication determination, contending it was void from jurisdictional error.

The developer submitted that under section 42(1) of the QBCC Act, the contractor was prohibited from carrying out 'building work' as it did not hold a contractor's licence of the appropriate class for the sewerage works; its licence was limited to landscape works only. As the contractor was in breach of the QBCC Act, the contract was unenforceable, and therefore there was no entitlement to make a claim under the BCIPA.

However, the contractor submitted that section 42 of the QBCC Act did not apply to the sewerage works it undertook as they were not 'building work' for the purposes of the QBCC Act. The contractor relied on an exclusion to the definition set out in Schedule 1 of the QBCC Act, submitting that 'building work' did not capture sewerage systems other than for works connecting a particular building or proposed building.

Decision

Justice Boddice dismissed the developer's application, finding that:

- the sewerage works carried out by the contractor were not in breach of section 42(1) of the QBCC Act;
- the contractor had undertaken the sewerage works under the contract and could issue a dispute claim under the BCIPA; and
- the adjudication was properly made and it was within the jurisdiction of the adjudicator to make the adjudication decision.

His Honour found that while the sewerage works involved the construction of a sewerage system, the sewerage works were not connected to a *'particular building or a proposed building'* and were therefore captured by exception under the QBCC Act.

His Honour explained:

- First, the waste tanks were part of the sewerage system and did not themselves constitute a structure; the system required additional works yet to be undertaken *'to connect any building or proposed building to a main of the system'*.
- Second, when the sewerage works were undertaken, there were no proposed buildings as there were not yet any proposed subdivided lots. Accordingly, the contractor did not undertake to the sewerage works to connect a particular proposed building to a main.
- Finally, if 'building work' were to include the sewerage works, it would specifically defeat the express wording of the exception to 'building work' in Schedule 1 of the QBCC Act.

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