Construction Law Update

April 2020

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Legislative update

NEW SOUTH WALES

NSW Electronic Transactions Regulation permits electronic execution

Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020

Background

On 22 April 2020, *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* commenced. The regulation now allows signatures in documents such as deeds, agreements, powers of attorney, affidavits and statutory declarations to be witnessed by audio visual link. The witnessing must be done in real time, and the witness section of the execution block must specify the method used to witness the execution. It must also include a statement that the document was witnessed in accordance with the regulation. For example, *'Execution was witnessed over audio visual link in accordance with clause 2 of Schedule 1 of the Electronic Transactions Regulation 2017 (NSW)'*.

Key points

The regulation will impact you in the following ways:

- the regulation introduces a new Schedule 1 to the *Electronic Transactions Regulation 2017*;
- under section 17 of the *Electronic Transactions Act 2000*, this amendment expires six months after it commences, or such earlier day as Parliament decides. Otherwise, it will need to be renewed;
- despite any other Act or law, the witnessing of signatures and attestation of documents can be via audio-visual technology (such as video-conferencing);
- the term 'audio visual link' is defined as technology that enables continuous and contemporaneous audio and visual communication between persons at different places and includes video conferencing. In practice, this includes video conferencing platforms, such as Zoom and Skype;
- documents which may be witnessed include deeds, wills, powers of attorney and statutory declarations;
- a witness must comply with the following requirements:
  - observe the signatory signing the document in real time;
  - attest or otherwise confirm that the signature was witnessed by actually signing the document (or a copy of that document);
  - be reasonably satisfied that the document the witness signs is the same document (or a copy of that document); and
  - endorse the document (or copy of the document) with a statement that:
    - specifies the method used to witness the signature of the signatory; and
    - the document was witnessed in accordance with the regulations;
- the regulation expressly provides that a witness can confirm the signature was witnessed by either signing a counterpart of the document as soon as practicable after witnessing the signing of that document, or countersigning a copy of the signed document that has been scanned and sent to the witness by the signatory; and
- other arrangements in relation to witnessing signatures by audio visual link include certification of matters required by law, confirming or verifying the identity of the signatory to a document or seeing the face of the signatory.

Next Steps

The change brings much needed direction at a time of uncertainty. Even with the guidance, it is critical that parties follow the procedures outlined correctly and ensure that any technology intended to be used to witness signatures, and the method by which that witnessing is performed and recorded, is considered on a case-by-case basis to determine whether or not it complies with the requirements of these new amendments.

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Extended hours for the NSW construction industry

Environmental Planning and Assessment (COVID-19 Development – Construction Work Days) Order 2020 and *Environmental Planning and Assessment (COVID-19 Development – Infrastructure Construction Work Days) Order 2020*

Key points

Under new rules introduced by the *Environmental Planning and Assessment (COVID-19 Development – Construction Work Days) Order 2020*, construction sites are permitted to operate on weekends and public holidays in NSW under the same operating hour requirements applicable to sites on weekdays.

The new orders promote greater flexibility for projects to progress on schedule by allowing building work to be spread across more days of the week, which may help counter delay and disruption arising from the implementation of health and safety measures to reduce the risk of the spread of COVID-19.

The order applies to developments that are the subject of a development consent under Part 4 of the *Environmental Planning and Assessment Act 1979* (NSW) (**Act**).

This initial position was subsequently expanded under the *Environmental Planning and Assessment (COVID-19 Development – Infrastructure Construction Work Days) Order 2020* to provide similar relief to public infrastructure projects under Part 5 of the Act.

Next steps

The change may insulate some construction projects from the effects of delay and disruption caused by COVID-19. However, the implementation of extended weekend and public holiday working hours will come at a cost to contractors and that will have to be balanced with any positive effects from an increase in production to decide whether extending hours is commercially beneficial.

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Amended prescription of a 'major defect' for external cladding in NSW

Home Building Amendment (Miscellaneous) Regulation 2020 (NSW)

Key points

On 1 May 2020, the *Home Building Amendment (Miscellaneous) Regulation 2020* (NSW) commenced. The amendments primarily concern clause 69A of the *Home Building Regulation 2014* (NSW) in relation to matters which constitute a major defect in section 18E(4)(b) of the *Home Building Act 1989* (NSW) (**Act**).

The amended clause 69A applies to:

- buildings with a rise in storeys of more than 2; and
- in respect of which a breach of statutory warranty occurred in either of the following circumstances:
  - the warranty period for the breach started on or after 20 April 2018; or
  - the warranty period for the breach started before 20 April 2018 and the period in which proceedings could be commenced for the breach of statutory warranty had not already expired before 20 April 2018.

The amended clause 69A prescribes as a major defect, the *'failure of external cladding of a building to comply with the performance requirements of the National Construction Code for fire resistance and fire safety for that building'*.

As a major defect, this will attract the operation of the six-year warranty period under the Act. This will only be applicable if the period in which proceedings could be commenced for the breach of statutory warranty had not already expired before 20 April 2018.

The Regulation also:

- declares the types of work that are refrigeration work or air-conditioning work for:
  - the offence of doing refrigeration work or air-conditioning work without the appropriate qualifications or supervision under section 15 of the Act; and
  - the purposes of the definition of specialist work under the Act; and
- omits certain categories of specialist work that were prescribed by the *Fair Trading Legislation Amendment (Reform) Act 2018* (NSW).

Next steps

Owners, developers and contractors in the residential building market may need to consider whether this amendment to clause 69A applies to buildings they own or have developed or built.

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In the Australian courts

AUSTRALIAN CAPITAL TERRITORY

Stop, Owners Corp what's that sound? Structural expansion and contraction noise is a nuisance

De Gruchy v The Owners – Units Plan No. 3989 [2020] ACTSC 65

Andrew Hales | *Ben Fuller* | *Andrew Black* | *Emily Hill*

Key point and significance

An owners corporation was found liable to an owner for damages for nuisance arising from excessive noise caused by expansion and contraction of the roof and walls of an apartment building.

Owners corporations need to take care to ensure that they action noise complaints within a reasonable time, especially where expert reports recommend taking action. It will not be sufficient for owners corporations to merely defer issues to the relevant developer or builder if excessive noise persists. Executive committees must also ensure they follow and implement the decisions of the owners made at an AGM.

Builders and developers may not be able to assume that compliance with applicable standards is sufficient where actual nuisance is caused to occupiers.

Facts

Ms Rayne de Gruchy (**owner**) purchased an apartment located on the top two floors of the Nishi Residential Building in Canberra to live in with her family in August 2014. After moving into the apartment, the owner discovered that the expansion and contraction of the roof and walls of the apartment building created significant noise. The expansion and contraction resulted from excessive thermal load on the roof, because the roof was only fitted with a layer of bitumen (not with insulated metal panelling or solar panels as were shown in approved plans).

The noise was described as *'intrusive, impulsive and intermittent'*, varying from cracking and gunshot-like to deeper shuddering and canon-like and was significant enough to be heard during the day and to disrupt the owner's sleep at night. Eventually, in July 2015, the owner moved out of the apartment because the noise had become unbearable.

In November 2014, the owner notified the Owners Corporation (as owner of the common property comprising the roof and walls) of the noise. The Owners Corporation took a number of preparatory actions in response but ultimately did not pursue any remedies to address the noise. The owner brought an action in tort for nuisance against the Owners Corporation in the ACT Supreme Court, seeking damages and an injunction.

There were three key issues to be resolved in the case:

- Was there a nuisance actionable by the owner?
- Had the Owners Corporation continued or adopted the nuisance?
- To what remedy was the owner entitled?

Decision

The court upheld the owner's claim and granted injunctions restraining the Owners Corporation from continuing to permit the noise to cause a nuisance to the owner and to take measures necessary to prevent future noise occurring. These injunctions were stayed for 12 months to allow the Owners Corporation to design and implement a solution to reduce the thermal load on the roof with the assistance of structural engineers.

The court also compensated the owner for close to 12 months of poor sleep, distress and health associated with the noise to the value of $15,000 plus reimbursement for custom ear plugs, preparing a potential contract of sale for the apartment, marketing and removalist costs, and an expert noise report.

Was there a nuisance actionable by the owner?

The court held that the noise was an unreasonable interference with the owner's quiet enjoyment of the apartment and therefore constituted an actionable nuisance. The noise went beyond what would be experienced and tolerated in an apartment dwelling and at levels significantly above the World Health Organisation criterion for being woken at night, even when the traffic noise from a major road outside the apartment was considered.

The Owners Corporation argued that the owner did not have title to sue because she had moved out of the apartment (and was therefore no longer affected by the noise). The court dismissed this argument because if the owner moved back into the apartment, she would again suffer from the noise as a 'permanent feature' of the building.

Had the Owners Corporation continued or adopted the nuisance?

The Owners Corporation (not having built the building) could not be said to have created the nuisance. As a result, to succeed in her action, the owner had to show that the Owners Corporation had *'continued the nuisance'*. A party is taken to continue a nuisance if, with knowledge or presumed knowledge of its existence, it fails to take any reasonable means to bring the nuisance to an end within ample time.

The court found the noise had been continued by the Owners Corporation as it had failed to abate the noise, despite knowing about it from November 2014. Importantly, the court held that it was knowledge of the noise occurring, not knowledge of the cause of the noise, which was relevant.

The court found the actions taken by the Owners Corporation to be unsatisfactory and were aimed at avoiding the issue rather than genuinely seeking to resolve it. It was noted that the Owners Corporation showed a 'fundamental misunderstanding' of its obligation to investigate and remedy the noise. In particular, the court noted that:

- the Owners Corporation had the benefit of a number of reports from engineers and other experts suggesting solutions, none of which were implemented;
- it was no answer to say that the building was designed and constructed according to relevant standards;
- the Owners Corporation's actions were 'coloured' by legal advice that suggested that no nuisance arose, however, this legal advice had been prepared using a report commissioned by the developer for the purposes of showing that the developer had complied with existing noise standards;
- the Owners Corporation spent at least a year attempting to have the builder or developer take responsibility for the works and seeking legal advice to this effect;
- the Executive Committee of the Owners Corporation did not obtain quotes for addressing the noise following a resolution at the 2015 AGM, and again did not follow a resolution of the 2016 AGM to proceed with grouting works to address the noise;
- whilst the Owners Corporation did participate in an arbitration process with the owner, the Executive Committee disputed the arbitrator's findings and even sought to have the arbitrator's report peer reviewed; and
- no member of the Executive Committee visited the owner's apartment to hear the noise firsthand.

The financial capacity of the Owners Corporation was also considered in determining whether the Owners Corporation had taken any 'reasonable means' to bring the nuisance to an end. While the court agreed that financial capacity was a relevant factor, it held that the Owners Corporation had the ability to raise funds (either through levies or borrowing) and had not taken *'even the most inexpensive steps towards abating noise'*.

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NEW SOUTH WALES

Reference dates – not yet a thing of the past

Brolton Group Pty Ltd v Hanson Construction Materials Pty Ltd [2020] NSWCA 63

Andrew Hales | Adriaan van der Merwe | Brianna Smith

Key points and significance

For contracts entered into before 21 October 2019, once a reference date has been objectively determined under section 8(1) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**), it is not open to adjudicators to select a different date when performing their functions under section 22(1) of the Act.

Each party to an adjudication must be afforded natural justice or procedural fairness, which requires the parties to be given an opportunity to be heard, including prior notice of the issues to be addressed, the opportunity to make submissions and the right to have those submissions considered by the adjudicator.

The Court of Appeal declined to make a decision on the correctness of obiter comments of the primary judge which suggested that a payment claim can include a claim for work performed after an available reference date.

Facts

This case was an appeal from a decision of the Supreme Court of NSW, which we considered in our November and December 2019 Construction Law Update available *here*.

Hanson Construction Materials Pty Ltd (**principal**) engaged Brolton Group Pty Ltd (**contractor**) under a construction contract in relation to the construction of a quarry processing plant. Under the contract, monthly progress payments were payable with a reference date of the last Tuesday of each month. The principal terminated the contract on 3 October 2018.

On 28 August 2019, the contractor served *'Progress claim No: September 2018'* for work performed *'up to September 2018'* but which also included a claim for work performed between 25 September 2018 and 10 October 2018, as well as interest up until 28 August 2019 (**Payment Claim**). The principal responded with a payment schedule with an adjudicated amount of '$nil'.

In submissions made in a subsequent adjudication, each party had assumed that the reference date for the Payment Claim was 25 September 2018. The adjudicator adopted a reference date of 23 October 2018 and found in favour of the contractor.

The principal commenced proceedings in the Supreme Court of New South Wales, in which the primary judge found that the adjudicator's determination was void as:

- the adjudicator determined the Payment Claim based on the reference date of 23 October 2018 and in doing so he did not embark on the task he was required to perform under section 22(1) of the Act; and
- the adjudicator's determination involved a denial of natural justice, as the adjudicator determined the dispute on a basis for which neither party contended without giving the parties an opportunity to make submissions on the matter.

The contractor appealed the decision. The principal filed a notice of contention submitting that the contractor's payment claim was not a valid claim for a progress payment on or from a reference date of 25 September 2018, because it included amounts not referable to any entitlement to a progress payment

that the contractor had (or purported to have) on that date. This was a reference to subcontractors' invoices for work performed in the period 25 September 2018 to 10 October 2018, and the claim for interest to August 2019.

Decision

The NSW Court of Appeal dismissed the appeal and declined to make a decision on the notice of contention as that was unnecessary given its primary findings.

Reference dates (pre 21 October 2019)

Once an available reference date is objectively ascertained by the parties, the adjudicator must address that specific reference date when making a determination under section 22(1) of the Act. It is not open to the adjudicator to select another reference date, as this would go beyond the adjudicator's statutory power under section 22(1), giving rise to jurisdictional error.

In this case, it was agreed between the parties that the reference date was 25 September 2018 (as was objectively apparent from the payment claim, payment schedule, adjudication application and adjudication response). However, in the adjudication determination, the adjudicator did not address that specific reference date, but rather chose an alternative reference date of 23 October 2018 (which in any event was not an available reference date). The adjudication determination was void due to jurisdictional error.

The court also held that the contractor could not seek to uphold the validity of the adjudicator's determination by arguing that the 25 September 2018 reference date was available. The adjudicator had not made the determination on the basis of that reference date.

Natural Justice

The court reaffirmed the longstanding principle that each party must be afforded natural justice or procedural fairness. In this case, the adjudicator's determination involved a denial of natural justice or procedural fairness because the adjudicator determined the dispute on a basis for which neither party had contended, without giving the parties an opportunity to make submissions on the matter.

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You can't disguise the contents of a payment claim

Grocon (Belgrave St) Developer Pty Ltd v Construction Profile Pty Ltd [2020] NSWSC 409

Andrew Hales | Kate Morrison | Devpaal Singh

Key point and significance

If a bank guarantee is validly called on by a principal under a contract, a contractor cannot seek to reclaim the amounts called through a payment claim, even if the payment claim is expressed as the net of the value of the works undertaken less the amount the contractor has been paid. The payment claim will be void.

Facts

Grocon (Belgrave St) Developer Pty Ltd (**developer**) entered into a contract with Construction Profile Pty Ltd (**contractor**) on 24 May 2017 for the contractor to construct the Telstra Exchange residential development in Manly. The contractor provided two bank guarantees each in the amount of $498,911 as security for performance of its obligations under the contract.

On 10 January 2020, the contractor served Payment Claim No 32 in the amount of $3,220,377. The developer responded with a payment schedule indicating that the amount due to the contractor was -$1,360,307 and that therefore the scheduled amount was nil. This was calculated by deducting from the value of the work performed an amount of $1,655,624 for liquidated damages in respect of delay in reaching practical completion. On the same day the developer issued a tax invoice for payment of the liquidated damages. The contractor disputed the claim for liquidated damages and at adjudication it was determined that the amount payable by the developer in respect of Payment Claim No 32 was $1,241,238. The adjudicator determined that the contractor was entitled to extensions of time which extended the date for

practical completion beyond the date of practical completion (thus the value of the developer's claim for liquidated damages was nil). The developer paid the adjudicated amount.

The developer then called on the two bank guarantees (relying on the tax invoice it had issued and its contractual entitlement to call on security in the event that the contractor became indebted to the developer and the developer remained unpaid after 5 business days since issue of an invoice to the contractor). The contractor did not challenge the developer's right to call on the bank guarantees.

On 17 March 2020, the contractor served Payment Claim No 33 in the amount of $1,054,386. The claim was for the net balance of the total amount claimed under the contract against the amount said to have been already paid. The amount said to have been paid included two negative amounts each for $498,911 which were described as amounts *'to cover LDs under the contract'*.

In response, the developer sought a declaration in the Supreme Court of New South Wales that Payment Claim No 33 was void and of no effect under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**). The developer also sought an injunction restraining the contractor from seeking an adjudication determination under the Act on the grounds that Payment Claim No 33 was for repayment of the amounts paid under the bank guarantees, and was not a claim for performance of construction work or supply of related goods or services under the Act.

The court was asked to determine:

- whether the question of whether the claim fell under the Act was a question that could only be determined by the adjudicator;
- whether Payment Claim No 33 was a claim for construction work because the payment claim included the value of the whole of the work undertaken less the amount the contractor had been paid; and
- whether the developer's right to set-off under the contract was rendered void by section 34 of the Act.

Decision

The developer was successful in its application. The court determined that Payment Claim No 33 was void and of no effect under the Act and granted an injunction restraining the contractor from seeking an adjudication under the Act in respect of that payment claim.

Ball J relied on High Court authority in *Southern Han Breakfast Point Pty Ltd (In Liquidation) v Lewence Construction Pty Ltd* (2016) 260 CLR 340 to find that while jurisdiction of an adjudicator is determined by the Act, it is ultimately a question for the court to determine whether adjudicators have jurisdiction to determine a particular claim. Ball J also clarified that there was no general principle in relation to courts being reluctant to grant injunctions to restrain purported payment claims from being referred to adjudication.

In relation to the second point, Ball J referred to section 13 of the Act which requires that a payment claim identify the *'construction work (or related goods and services)'* to which it relates. These expressions are defined in sections 5 and 6 of the Act. On review of the materials, Ball J could not find that the claim for the two negative amounts of $498,911 could be described as claims for construction work or for related goods and services. Framing a payment claim as being for the whole of the work done less amounts paid was not sufficient to alter the character of the amounts in question. Ball J decided that Payment Claim No 33 was not a valid payment claim under the Act, irrespective of the fact that other smaller amounts were also claimed in that payment claim.

Finally, in relation to the third contention, section 34 of the Act provides that provisions of contracts which seek to exclude, modify restrict or deter action under the Act will be void. Ball J did not determine this issue as the contractor did not challenge the validity of the developer's right to call on the guarantees. Ball J did however make comments in obiter that questioned the correctness of previous obiter comments made in respect of an application to injunct a call on security following an adjudication determination and the question of whether any contractual entitlement to call on the guarantees in those circumstances was rendered void by section 34 of the Act.

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Contract rates to serve as upper limit for non-contractual variations claimed in quantum meruit

Paraiso v CBS Build Pty Ltd [2020] NSWSC 190

Andrew Hales | Michelle Knight | Caitlin Ford

Significance

The requirements for residential building contracts in the *Home Building Act 1989* (NSW) (**Act**) are paramount. If variations are not documented in writing and signed by the owner as required under clause 1(2) of Part 1 of Schedule 2 of the Act, a builder may not be able to recover under the contract for the additional work performed. However, the builder may be entitled to a claim in quantum meruit for the reasonable costs of the work performed with the contract rates serving as an upper limit in the valuation of such claims.

Facts

Rica Paraiso (**owner**) entered into a written contract with CBS Build Pty Limited (**builder**) for the construction of two dwellings at Bray Street Dundas for a price of $630,000 (**contract**). By mid-2017, the owner had paid $719,267 to the builder; approximately $90,000 over the contract price. The amount paid included a number of variations which had not been signed by the owner.

The builder filed an application in the NSW Civil and Administrative Tribunal (NCAT) claiming additional amounts for variations and provisional sums. The owner denied liability for certain variations and the provisional sums and claimed $300,000 in amounts overpaid to the builder.

At first instance, the NCAT Senior Member ordered the owner to pay the builder $94,381. The owner appealed and the appeal was dismissed by the NCAT Appeal Panel. The owner then sought leave to appeal in the Supreme Court of New South Wales on a number of grounds, including the proper construction of the variation clause in the contract, whether quantum meruit was available to the builder, the appropriate valuation of any such quantum meruit claim and whether the plaintiff was denied procedural fairness by the Senior Member at first instance.

Decision

Variation clause

The court found that the Senior Member erred in the construction of clause 14 of the contract in finding that the builder was entitled under the contract to recover the costs of complying with an oral instruction to perform work. On a proper construction, a variation was not contractually binding on the parties unless documented in writing and signed by the parties. The Senior Member's construction was also contrary to clause 1(2) of Schedule 2 of the Act which requires any agreement to vary the contract to be in writing and signed by the parties.

Quantum Meruit

The court agreed that the builder was entitled to claim in quantum meruit as the owner:

- had requested the additional work;
- knew it was being undertaken by the builder in the expectation of being paid for it; and
- had accepted the benefit of the additional work.

However, the owner further argued that the tribunal erred in its assessment of the builder's quantum meruit claim on the basis of reasonable costs rather than the actual costs incurred. In reaching its decision on this issue, the court applied *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 (***Mann v Paterson***) (which had been handed down following the Senior Member's decision). In *Mann v Paterson*, the High Court held that contract rates are a ceiling upon reasonable remuneration where a builder's quantum meruit claim arises from termination of a contract through fault of the owner. The court held that it must follow that contract rates will similarly be an upper limit on a quantum meruit claim that has arisen due to the fault of both parties in not signing written details of each variation as required by the contract. The tribunal should have determined the

price of each variation by applying the contract rates and 15% margin specified in Schedule 2. Accordingly, the court granted leave to appeal and remitted the matter to NCAT for re-determination.

Procedural Fairness

Interestingly, the court was highly critical of the Senior Member's approach in not permitting cross-examination of an expert witness and taking it upon himself to cross-examine the owner's witness in a *'vigorous, critical and at times unfair manner'* which, the court found, gave rise to a *'manifestation of pre-judgment, being a form of actual bias'*. The court upheld this ground of appeal and remitted the issue to NCAT for rehearing.

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QUEENSLAND

The bus stops here for unlicensed contractors and untimely adjudicators!

Galaxy Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd t/a CCA Winslow & Ors [2020] QSC 51

Andrew Orford | Matt Hammond | Danielle le Poidevin

Key points

Contractors must ensure that they are licensed to perform all works (however small or discrete), as a failure to do so may render an entire contract void.

Strict compliance with the statutory timeframes imposed by the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**) is required from all parties involved in an adjudication, including the adjudicator. An adjudicator's failure to make an adjudication decision by the deadline prescribed by the BIF Act will render a late decision void and unenforceable. Similarly, an adjudicator may not be paid fees and expenses related to the late adjudication decision.

Facts

On 29 October 2019, Mr Thomas Jones (**adjudicator**) delivered an adjudication decision (backdated to 24 October 2019) under the BIF Act which required Galaxy Developments Pty Ltd (**developer**) to pay $1.3 million to Civil Contractors (Aust) Pty Ltd (**contractor**). The contract was for civil works, a minor part of which included widening a road. In widening the road, the contractor removed a bus seat, bus shelter, bus sign and bike rack before undertaking paving, retaining wall and fencing work. The contractor then re-fixed the bus stop seat, bus shelter and bike rack to the new concrete paving created (**bus stop works**).

In delivering his decision, the adjudicator failed to comply with the timeframes prescribed by sections 84, 85 and 86 of the BIF Act.

The developer brought an application to have the adjudicator's decision declared void because:

- the building contract under which the contractor claimed payment was void owing to the fact that the contractor was not appropriately licensed; and
- the adjudicator's decision was delivered after the maximum period prescribed by the BIF Act.

In relation to the first ground, the developer argued that:

- the bus stop works (as structures fixed to the land) were buildings within the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**);
- unless the contractor could show that its *'builder restricted to structural landscaping licence'* was appropriate, or that the work it performed was exempt under a regulation, section 42 of the QBCC Act dictated that the contractor could not recover under the contract; and
- the adjudicator made a jurisdictional error in determining that the contractor could recover under the contract.

In relation to the second ground, the question was whether the BIF Act should be interpreted as showing legislative intention that an adjudicator's decision delivered outside the maximum time prescribed by the statute is void. The developer argued that:

- the deliberate use of mandatory ('must') and permissive ('may') language in Chapter 3 of the BIF Act shows that the purpose of the legislature was to achieve a rapid extra-curial determination of disputes about progress claims;
- the courts have recognised that non-compliance with time limits set by mandatory language is fatal to the validity of actions taken by parties to a claim; and
- the statutory purpose in ensuring speedy resolutions of claims must mean that the same result occurs when there is a failure to meet statutory deadlines by the adjudicator.

Decision

Did the contractor hold the appropriate licence?

The Supreme Court of Queensland held that the contractor was not appropriately licensed to perform the bus stop works. Dalton J concluded:

- that a bus stop shelter is, in essence, a shed and therefore its removal and return fell within the definition of work pertaining to 'prefabricated sheds'. This was within the scope of works permitted under the contractor's landscaping license (as described in Schedule 2 Part 10 to the *Queensland Building and Construction Commission Regulation 2018* (Qld) (**QBCC Regulations**);
- however, the remaining bus stop works (relating to the bus seat and bike rack) did not fall within the works permitted by the contractor's landscaping licence and were not exempt under the QBCC Regulations.

Accordingly, the contractor was not licensed to perform the bus stop works and, by virtue of section 42 of the QBCC Act, cannot be paid for work under the $1.3 million contract.

In arriving at this decision, Dalton J observed that her conclusion was the result of the 'stochastic' and 'illogical' provisions in the schedules to the QBCC Regulations and produced a result that, while correct in law, was 'absurd in reality' where the contractor could remove and re-fix the bus shelter, but not the smaller structures of the bus seat and bike rack and as a result was denied fair remuneration. Her Honour invited the renewed attention of the legislature on this issue.

Time for delivery of adjudication decision

The court held that the adjudicator's decision was void because it was delivered after the statutory time limit imposed by sections 85(1) and 86(2)(a) of the BIF Act. Further, having regard to section 95(6), it was held that because the adjudicator's decision was delivered out of time, he could not have payment of his fees.

In delivering her decision, Dalton J distinguished previous decisions of the Victorian Court of Appeal and Supreme Court of New South Wales which had held that an adjudicator's decision was not invalidated by being late. Her Honour found that the language of the Victorian and NSW legislation is sufficiently different, and the Queensland legislation has taken a deliberately different approach. Her Honour noted that the purpose of the BIF Act is not to guarantee payment but to ensure a speedy extra-curial determination of a claimant's progress claim. The late delivery of an adjudicator's decision deprives a claimant of the opportunity of a speedy determination. The same approach should be taken where mandatory language is used in relation to an adjudicator's obligations as it is used in relation to the obligations of claimants and respondents.

Regarding the question of fees, Dalton J concluded that it seemed fair that, if a right arises under section 94(2) of the BIF Act (that is, an original adjudication has feasibly ended because no decision has been produced), an adjudicator is not entitled to his or her fee.

Dalton J clarified that the adjudicator was not relieved by section 96(8) (which provides that an adjudicator may have fees in circumstances where a court has found an adjudicator's decision void) because the adjudicator had not acted with 'good faith'. Instead, the adjudicator had represented that he had decided within time, on 24 October 2019, when that was not the case. It was Her Honour's view that section 95(8) was intended for a situation where an adjudicator delivers a decision in time but the decision is void because he or she has made some other jurisdictional error.

Am I really an engineer?

Shelley v Board of Professional Engineers Queensland [2020] QSC 38

Michael Creedon | Luke Trimarchi | Alicia Beggs

Key point and significance

This case explores the powers and authority of the Board of Professional Engineers (**Board**) to re-exercise its power to grant or refuse an application for registration. The court found that even if the Board had authority to re-exercise its power to grant or refuse an application, it does not have any discretion to impose stricter requirements on applicants beyond those required under the *Professional Engineers Act 2002* (Qld) (**Act**).

Facts

The applicant, Mr Jonathan Shelley (**Shelley**), is a highly qualified and experienced fire engineer, obtaining his Fire Engineering Degree from the University of Canterbury in New Zealand. Having migrated to Australia in 2007, Shelley applied for registration to practice as a professional engineer in Queensland in the area of fire engineering in 2017. This was done with the view of starting his own business.

The Act provides for many application assessment schemes, subject to Minister approval, which are utilised to evaluate applicants seeking registration as a professional engineer. Due to the variety of specialist areas in engineering, the assessment of qualifications and competencies of applicants is delegated to different expert entities in their respective areas, who each follow their own assessment scheme.

The Board's website states a recognised pathway to obtain registration is to hold Chartered Engineer status with the Engineering Council of the United Kingdom, which Shelley obtained on 5 August 2019. Shelley then submitted an application to the Institute of Fire Engineers (**IFE**), the approved assessing entity for fire engineering, for assessment of his qualifications and competencies. IFE determined in accordance with the approved fire engineering assessment scheme that Shelley had the required qualifications. As such, and with IFE's endorsement, Shelley applied to the Board for registration. Shelley's application was granted by the Board in September 2019, and he was soon after added to the register in the area of fire engineering.

In October 2019, the Board retrospectively questioned Shelley's ability to hold registration due to not having a 'Washington Accord' degree. The Board alleged a Washington Accord degree was a requirement of registration and therefore wanted to re-evaluate its granting of registration on the basis Shelley had misled them.

The court set out to determine three substantial issues:

- Does the Board have authority to re-exercise its power to grant or refuse to grant an application for registration?
- If the Board has authority to re-exercise its power to grant or refuse an application, can the Board overrule IFE's assessment of Shelley's qualifications and competencies under the assessment scheme for its own assessment?
- If the Board is able to substitute its own assessment, is its discretion confined to considering whether Shelley has the qualifications and competencies provided for under the assessment scheme?

Decision

Any discretion which the Board may possess in evaluating an applicant does not allow it to impose stricter qualification requirements. Assessment schemes which are utilised under the Act are consistent with national and international standards, including procedures for assessment and the employment of competent people to evaluate applications. Due to the specialist expertise these assessing entity's hold, the Board must have regard to its evaluation of an applicant but is not necessarily bound by it. However, it was held that the Board does not have 'free rein' to impose stricter requirements for the qualifications needed for registration, especially when these requirements differ to those provided for under the relevant assessment scheme.

In this case, the Board did not intend to exercise any power it may have to satisfy itself of Shelley's qualifications under the applicable assessment scheme; Shelley undoubtedly had the required qualifications. Rather, the Board sought to investigate whether Shelley's qualifications were equivalent to that of a Washington Accord degree. It was determined that even if the Board had a power to reconsider an application and overrule the IFE's assessment, its inability to impose stricter requirements than that of the assessment scheme (such as needing a Washington Accord degree) limits its discretion, such that the Board has no power to require Shelley to hold a Washington Accord degree.

As a result of this limited discretion, the court deemed it unnecessary to concretely determine whether the Board had the ability to re-exercise its power to refuse or grant an application. That is, even if the Board had a power to revisit an application, it had no evidentiary basis to suggest Shelley should not have been registered. The court highlighted that the significance of being granted registration is reflected in the Act's provisions, whereby registration may only be cancelled on specific grounds and through following a certain process. This express power to cancel registration only for certain reasons, the Court pointed out, strongly suggests the Act did not intend for the Board to be able to repeal a decision to grant registration.

Further, it is for the Minister, not the Board, to approve an assessment scheme. Therefore, it would be contrary to the scheme of the Act to permit the Board to, in effect, alter the content of qualifications required in an approved assessment scheme. As a matter of policy, the Board may wish to persuade the Minister to require every applicant in the future to hold a Washington Accord degree. This could be achieved through revised guidelines for entities applying for approval, renewal or variation of an assessment scheme. However, this was an entirely different matter which did not concern the registration of Shelley.

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NORTHERN TERRITORY

When you wish upon an expert

Northern Territory of Australia v Dover Investments Pty Ltd and Ors [2020] NTSC 3

Julie Whitehead | Alexandria Hammerton | Cameron Gee

Key point and significance

Determination by an independent expert will not be an appropriate method to resolve a dispute where the issues are legally and factually complex, despite an agreement providing otherwise.

Facts

These proceedings arose over a dispute under the terms of a Development Agreement, Letter of Offer and Works Deed for a development known as 'Bayview - The Boulevard' (**Bayview**). Due to the change in the Northern Territory Government (**NT**) in 2016, the Bayview development never went ahead and the NT sought to terminate the agreements. The NT commenced proceedings against Dover Investments Pty Ltd (**Dover**) for a declaration that the Development Agreement was validly terminated and for damages against Austcorp Property Group Pty Limited and Austcorp International Pty Limited (together, the **Austcorp Companies**) in respect of the Works Deed.

Dover and the Austcorp Companies sought to stay the proceedings on the basis that the dispute should be resolved pursuant to the relevant clauses in the Development Agreement and Works Deed which both provided for the appointment of an independent expert. Dover and the Austcorp Companies contended that the Development Agreement and Works Deed were part of the same transaction, and the same independent expert, a retired judge, could be appointed to resolve the disputes under both. The NT on the other hand argued that the agreements were two separate documents and had to be resolved with separate experts. In addition to this, several other legal and factual questions had to be determined.

The question for the court was whether it was appropriate for the proceedings to be stayed and for an independent expert to instead resolve the dispute.

Decision

The court has discretion to stay proceedings where an agreement provides the procedure for which the parties are to follow to resolve a dispute. In this case, however, the court found that the issues were legally and factually complex and it would be unreasonable to hold the NT to the independent expert procedure in a dispute of this magnitude.

The court held that determination by an independent expert was not appropriate for this dispute because:

- no expert, including a retired judge, could fairly determine the dispute within the procedures and 30-day timeline provided for under the agreements;
- it is unlikely any expert would be appropriately qualified to decide on both the legal and factual issues; and
- in the event that the disputes could not be determined by the same independent expert, there would have been multiple proceedings which could arrive at different outcomes.

On these grounds, the court dismissed the stay application.

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WESTERN AUSTRALIA

Course of conduct: how does it impact contractual terms and purported repudiation?

Armada Balnaves Pte Ltd v Woodside Energy Julimar Pty Ltd (No 2) [2020] WASC 14

Tom French | Penny Bond and Zubayr Abrahams | Kajal Parmar

Key point and significance

Where Party A seeks to rely on the conduct of Party B to show repudiation of a contract arising from the delayed exercise of a right to terminate, Party A must show that:

- Party B was confronted with a choice to continue or to terminate the contract;
- Party B lost the right to terminate the contract due to delay; or
- Party B unequivocally communicated an abandonment of the right to terminate.

Election by conduct will be factually unique and needs to be evaluated on a case-by-case basis considering the parties' obligations under the contract and their performance.

Facts

This case involved a contract between Armada Balnaves Pte Ltd (**AB**) and Woodside Energy Julimar Pty Ltd (**WEJ**). The contract was initially between AB and Apache Energy Limited (**Apache**) but was novated to WEJ in April 2015. The contract was for the remuneration of offshore oil extraction services by use of a converted floating production, storage and offload (**FPSO**) vessel.

Under the contract, AB was obliged to complete acceptance tests to demonstrate that the facility could perform the services required under the contract within six months, ending 9 February 2015. AB failed to complete the acceptance tests which entitled WEJ to terminate the contract. In March 2016, WEJ issued a notice advising AB that the contract was being terminated following AB's failure to complete the acceptance tests within the contractual timeframe.

AB claimed that the purported termination was wholly unjustified contractually and that the termination amounted to repudiatory breach of the contract entitling AB to damages. AB commenced an action against WEJ claiming loss of bargain damages by reason of WEJ's alleged repudiatory conduct.

Decision

The court dismissed AB's claim finding that AB's argument seeking to show a loss of WEJ's contractual right to terminate the contract and WEJ's breach of the contract by reason of issuing the termination notice was not sustainable.

AB contended that the contractual right to terminate for cause had been lost by reason of WEJ's conduct post 9 February 2015, ie the end of the contractual timeframe to complete the acceptance tests. AB was required to establish from the conduct it relied on, that WEJ:

- had been confronted with and needed to make a choice as between inconsistent positions under the contract (ie continuing with the contract or terminating for cause);
- had lost, by reason of delay, its right to terminate for cause under the contract; or
- had, by its conduct, communicated to AB an abandonment of the contractual right to terminate for cause.

The court concluded that the expiry of the six-month period did not then require Apache to immediately decide to end or continue the existing contract. In fact, considering the contextual environment of the contract, the court found that it was reasonable for Apache and WEJ to wait and see what would eventuate with respect to the FPSO presenting for the acceptance tests within a reasonable time frame. AB sought, and did not complain, about being given extra time. Hence there was no the need to make a choice between continuing or terminating the contract.

The court found there was no relevant delay by Apache or WEJ in not issuing the notice of termination until March 2016. The 13-month delay between the deadline to perform the acceptance tests and the issuing of the notice of termination was found to be reasonable considering events 'on the ground'. AB was striving to have its FPSO facility present to perform the relevant operational tests and acceptance tests. Hence the court found that the 13- month delay in issuing the notice of termination was not unreasonable.

The case law is clear in requiring unequivocal communication of an election by the electing party between two inconsistent rights. However, the court found that there was no express or implied communications from Apache or WEJ to AB demonstrating that they had abandoned their rights to terminate the contract.

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Two birds, one stone: the criteria for simultaneous adjudication

Salini-Impregilo S.P.A v Francis [2020] WASC 72

Tom French | Penny Bond | Kajal Parmar

Key point and significance

Where a claimant pursues multiple adjudications at the same time, it is important to consider whether the adjudications are being conducted simultaneously and, if so, if the criteria in the *Construction Contracts Act 2004* (WA) (**Act**) has been satisfied, being:

- if the parties consent (**Consent Criteria**); or
- if the adjudicator is satisfied that it will not adversely affect their ability to adjudicate fairly, quickly, informally and inexpensively (**Object Criteria**).

A failure to satisfy the criteria will amount to jurisdictional error, which will invalidate the determination.

Facts

Geodata Engineering Pty Ltd (**consultant**) was engaged by Salini-Impregilo (**contractor**) under a construction contract for the provision of services for the Forrestfield Airport Link Project.

A dispute arose between the contractor and the consultant in respect of two interim payment claims. The consultant applied for adjudication under the Act to resolve the disputes and, subsequently, applied to have the disputes determined simultaneously under the Act.

Following the adjudicator's determination, the contractor commenced judicial review proceedings on several grounds. This update focuses on the contractor's allegation that the adjudicator made a jurisdictional error by adjudicating two applications simultaneously.

Decision

The court dismissed the contractor's application for judicial review. While the court was not satisfied that the adjudicator adjudicated the applications simultaneously, the decision contains important commentary on simultaneous adjudications nonetheless.

The Act permits simultaneous adjudications if the Consent Criteria or Object Criteria are met. Failing to meet at least one of these criteria will result in a jurisdictional error.

The court noted that, to determine if adjudications were simultaneously conducted, it is necessary to determine when the adjudication began. Adjudication was held to begin when the adjudicator commenced evaluative work regarding the merits of the dispute and ended when the adjudicator stopped evaluating the merits and made a determination. Accordingly, simultaneous adjudication of two disputes will occur when there is a temporal overlap in the period of adjudication between the two disputes.

The court found that there was no evidence that the adjudicator engaged in any evaluation work on the merits of the second application before the first application was dismissed. The court was not satisfied of any temporal overlap in the periods of adjudication of the two disputes.

Despite the finding that there was no simultaneous adjudication, the court went on to consider whether, if there had been simultaneous adjudication, the adjudicator complied with the necessary criteria in the Act.

As the parties did not consent to simultaneous adjudication, the adjudicator would have been required to satisfy the Object Criteria. The court was not satisfied the Object Criteria was met as this would have required some investigation on the adjudicator's behalf, which was not undertaken. Therefore, if there had been simultaneous adjudication, the adjudicator would not have had the power to do so and this would have resulted in a jurisdictional error.

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Challenging arbitration awards – 'fresh' disputes

The State of Western Australia v Mineralogy [2020] WASC 58

Tom French | Penny Bond and Zubayr Abrahams | Kajal Parmar

Key point and significance

Challenging arbitration awards under the wider scope of the *Commercial Arbitration Act 1985* (WA) (**1985 Act**) or the narrower review regime of the *Commercial Arbitration Act 2012* (WA) (**2012 Act**) requires a factual consideration of when the dispute arose and when it was properly constituted, ie when the arbitrator communicated acceptance to arbitrate the dispute.

An arbitrator cannot determine the jurisdiction of a court to review or set aside an award.

Facts

Mineralogy Pty Ltd and International Minerals Pty Ltd (**respondents**) applied for the summary dismissal of the State's proceedings seeking leave to challenge an arbitral award made by the Hon Michael McHugh AC QC on 11 October 2019 (**2019 Award**). In commencing those proceedings, the State sought to rely on the wider appeal and review regime contained in the 1985 Act. The respondents claimed that the narrow review regime in the 2012 Act should apply and that the proceedings were so fundamentally misconceived that they ought to be dismissed.

Decision

The court found in favour of the respondents and dismissed the State's proceedings. The court concluded that the 2019 Award was subject to the 2012 Act as there was no proper constitution of the dispute prior to the commencement of the 2012 Act.

The court paid special attention to the transitional provisions of the 2012 Act, specifically section 43. The effect of section 43 was that if the arbitration had commenced and was properly constituted before the commencement of the 2012 Act (ie before 7 August 2013), then the 1985 Act would apply.

Mr McHugh arbitrated an earlier dispute between the same parties and under the same agreement resulting in an award in 2014 (**2014 Award**). Once the determination of the 2014 Award was made, Mr McHugh was functus officio; his authority to arbitrate the dispute the subject of the 2014 Award had ended.

The court agreed with the respondents and found that the issues determined by the arbitrator in the 2019 Award all arose after the delivery of the 2014 Award. This was illustrated by the fact that there would have been no dispute fit for referral to arbitration at least until after the existence of the 2014 Award. The dispute being the subject of the 2019 Award was a 'fresh' dispute and, as it arose after 7 August 2013, the regime of the 2012 Act was applicable. The court agreed with the respondents that for an arbitral tribunal to be 'properly constituted', the arbitrator must have communicated to the parties his acceptance of the nomination. In this case, Mr McHugh did not express his acceptance of appointment as arbitrator for the dispute the subject of the 2019 Award until 20 December 2018.

Further, the court reiterated that it is only for the court, not for the arbitrator, to decide the applicable legislative regime conferring any appeal or review rights as against an arbitral award.

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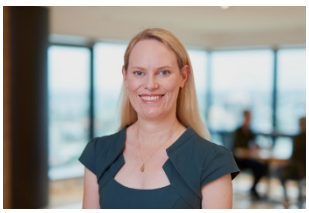

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