Construction Law Update

November 2020 to January 2021

Contents

VICTORIA

Limitations of Certiorari – no legal consequences, no remedy
Bald Hills Wind Farm Pty Ltd v South Gippsland Shire Council [2020] VSC 512

Accord and satisfaction agreements can extinguish a principal's liability under SOPA, if valid
Citi – Con (Vic) Pty Ltd v 8-10 New Street Richmond Pty Ltd [2020] VCC 1161

Emailed payment claims and reference dates?
Pelligra Build Pty Ltd v Australian Crane & Machinery Pty Ltd [2020] VCC 545

Linked claim regimes – are they valid?
Transurban WGT Project Co v CPB Contractors Pty Limited [2020] VSC 476

In the Australian courts

COMMONWEALTH OF AUSTRALIA

Defects liability period: ensure you are insured

Icon Co (NSW) Pty Ltd v Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets [2020] FCA 1493

Peter Wood | Christian Camilleri | Hanh Vi Nguyen

Key point

This case reiterates the importance of ensuring commercial building insurance covers projects that begin construction during the policy period, right up until the construction and its defects liability period is completed. It is best practice to expressly address this in the insurance policy.

Facts

Background

Icon Co (NSW) Pty Ltd (**builder**) was the contractor for the residential and commercial development known as the Opal Tower at Sydney Olympic Park (**Opal Tower**). The builder commenced building on 16 November 2015, achieved practical completion on 8 August 2018 and the project entered a 12-month defect liability period.

On 24 December 2018, within the defects liability period, major cracks were observed at the Opal Tower, forcing residents to evacuate (**the Incident**). The builder re-entered the site and undertook rectification works. In July 2019, a class action by the residents of Opal Tower was commenced against the Sydney Olympic Park Authority who in turn filed a cross-claim against the builder. As a result of the Incident, as at 28 February 2020, the builder had paid out in excess of $31 million, including $17 million in property rectification and $8.5 million in alternative accommodation.

The builder sought declarations against two insurers, the first respondent (**Liberty**) and the second respondent (**QBE**), with which it placed third party liability insurance policies through its broker in September 2015 and September 2018 respectively. Each party contracted with the other through agents – Austbrokers Countrywide on behalf of the builder (**builder's agent**) and Chase Underwriting Pty Ltd on behalf of the insurers (**insurers' agent**).

The 2015/16 Liberty policy (**Liberty Policy**) was current at the time of the commencement of the Opal Tower contract. The builder's agent had requested that the Liberty Policy extend to the defect liability period but through an apparent breakdown in communication, the insurers' agent issued a policy expiring on practical completion.

The QBE policy covered the period from 20 September 2018 to 31 December 2018 (**QBE Policy**).

Both insurers denied the builder indemnity for the Incident and, as a result, the builder sought declarations designed to progress its claims for indemnity against both insurers.

Decision

The court found in favour of the builder under each of the policies of insurance but on different grounds.

Claims against Liberty

The court upheld the claim that the Liberty Policy be rectified by including an endorsement extending the period of coverage of the Liberty Policy that would entitle the builder to coverage for the Incident.

In making its determination, the court considered that the parties had formed a common intention that the Liberty Policy would provide cover for the Opal Tower project until works were completed plus the relevant defects liability period.

The court observed that the common intention did not have to be expressly stated between the parties. Rather, the subjective intentions of the parties, viewed objectively from their conduct, could amount to this common intention. Here, as neither the builder nor the builder's agent dealt directly with Liberty, the court contemplated the conduct between the builder's agent and the insurers' agent. The court found that the parties' dealings disclosed a common intention by each of the agents that the Liberty Policy operate as a 'contract commencing' rather than a 'turnover' policy, thereby extending coverage for the defect liability period for projects commencing in the relevant insurance period.

The court also had regard to witness evidence which resoundingly confirmed that it was common knowledge among insurance brokers and underwriters in the construction industry that commercial building projects had a construction period and a defects liability period, and that builders were required to maintain third party liability insurance during the defects liability period.

Claim against QBE

The court held that the QBE policy extended to the Incident at Opal Tower, because the building was a 'Product' within the meaning of that term in the QBE Policy.

In denying indemnity, QBE had sought to rely on the ordinary meaning of 'product' and that, in its normal ordinary usage, a building, such as the Opal Tower, was not a product or a moveable thing that could be transferred from one person to another. The court disagreed on the following basis:

- as a construction company, the builder erected buildings which they supplied to their clients which was in accordance with 'Product' as defined under the QBE Policy;
- the Opal Tower fell within the ordinary meaning of 'product', being a thing produced by any action or operation, or by labour; and
- QBE's construction of the policy would produce an odd result, contrary to the parties' intention, that there would be no cover for projects that had been completed and handed over to the principal, but for which the maintenance/defects liability periods had not expired.

The judgment is the subject of an appeal.

| back to *Contents*

NEW SOUTH WALES

The liability web: contractual interpretation, duty of care and the Civil Liability Act

ADH Plumbing Pty Ltd v Glenashka Pty Ltd [2020] NSWDC 593

Andrew Hales | Amy Ryan | Devpaal Singh

Key points and significance

The all-too-common practice in the construction industry of constituting agreements through emails and verbal arrangements creates a fertile breeding ground for contractual interpretation issues. When parties are not clear on the scope of their engagement, issues can arise as to the level of performance required. Parties need to ensure that their agreements are fully reflected in comprehensive written contracts to provide certainty and prevent performance gaps.

There is a concurrent liability in tort and contract of a professional person in providing services to their client. However, the scope of a professional's duty of care to a client usually depends on the terms of and limits imposed by the retainer. These principles must be applied in the context of the provisions of the *Civil Liability Act 2002* (NSW) for claims made under that legislation.

Facts

The plaintiff, ADH Plumbing Pty Ltd (**subcontractor**), entered into a contract with Richard Crookes Constructions Pty Ltd (**head contractor**) for the construction of roads and parking areas at the Parkes District Hospital. The subcontractor engaged Glenashka Pty Ltd as trustee of the Colin Henry Wilson Trading Trust t/a Wilsons Betamix Goonumbla Quarry and Wilsons Betamix Concrete (**Glenashka**) to provide the road base material and K&H Geotechnical Services Pty Ltd (**consultant**) to provide geotechnical and soil testing services.

After undertaking testing of the road constructed by the subcontractor, the consultant provided a report which concluded that materials used in the construction did not meet the required standards. Following receipt of the consultant's report, the head contractor directed the subcontractor to undertake remediation works. The subcontractor completed the remediation works. The head contractor subsequently terminated the contract.

The subcontractor commenced proceedings against Glenashka and the consultant. The proceedings against Glenashka were resolved before the final hearing. As against the consultant, the subcontractor claimed that:

- the consultant was contracted to provide 'level 1 services' (rather than only 'ad hoc' geotechnical inspection and testing services, as and when requested by the subcontractor); and
- the consultant breached its contract and its duty of care owed to the subcontractor by performing testing negligently.

The consultant submitted that in respect of any liability it had to the subcontractor, Glenashka was a concurrent wrongdoer, such that the consultant's liability should be limited to an amount reflecting the proportion of the loss claimed that the court considers just having regard to the extent of the consultant's responsibility for the loss.

Decision

The court found that the consultant was not liable, and dismissed the subcontractor's claim.

The court considered post-contractual conduct of the parties to determine the terms of the contract and the level of services required. By reference to circumstances including invoices omitting references to 'level 1 services', the lack of full-time attendance on site by the consultant (which is a requirement for contractors performing 'level 1 services') and the nature of the business interactions between the parties, the court was not satisfied that the subcontractor had accepted the consultant's initial offer to provide 'level 1 services'.

The court also rejected that subcontractor's assertion that there was an implied term in the contract for the provision of 'level 1 services' on the basis that such a term would contradict the express terms of the contract.

The court found that the consultant had a duty to perform its services with due care and diligence, and to the standard of care and skill that could reasonably be expected of a professional geotechnician. However, the duty of care was limited by the scope of the retainer and did not include 'level 1 services'. For this reason, the court found there was no breach of the consultant's duty of care.

The court rejected the consultant's claim that Glenashka would have been a concurrent wrongdoer as it was not satisfied that the consultant had established that there was any breach of duty of care by Glenashka. However, the court did find that the subcontractor's failure to obtain further professional geotechnical testing amounted to contributory negligence and, as a result, if a breach of duty had been established, damages awarded would have been reduced by 30%.

| back to *Contents*

Ashton v Stevenson; Stevenson v Ashton [2020] NSWCATAP 233

Andrew Hales | Maciej Getta | Ashleigh Blumor

Key points

A defect may be classified as a 'major defect' under the *Home Building Act 1989* (NSW) (**HBA**) even if it is only 'likely to cause' the inability to inhabit or use the building, the destruction of the building or a threat of collapse of the building. There does not need to be actual or imminent damage. In addition to expert evidence, lay evidence, including observations and photographs may be used to determine whether the 'defect' is major.

Facts

These appeals arose out of orders made by the Supreme Court of New South Wales on 6 December 2019 to remit the proceedings for determination by the NCAT Appeal Panel according to law (**SC Decision**). The details of the SC Decision are in our *January/February 2020* issue of the Construction Law Update.

In summary, the Supreme Court held that the definition of 'major defect' does not require:

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

The Supreme Court held that a defect in a 'major element' of a building may be a major defect if it is established that it *'has caused or is likely to cause'* the consequences set out in section 18E(4)(a)(i)-(iii) of the HBA.

Decision

This particular decision focused on whether defects in the property (including defects in the balcony, roofing, plumbing and cladding) were part of the waterproofing of the premises, being a 'major element' of the building.

The Appeal Panel reasoned that lay evidence may be persuasive in *'rationally affecting the determination'* as to whether the defect is likely to cause an inability to inhabit the building or cause destruction (whereas the SC Decision indicated a preference for expert evidence). In that regard, the Appeal Panel held that *'evidence of observations such as the absence of relevant elements of the work, the location of staining, the fact of water ingress during a rain or flooding event, photographs or other observations about which a non-expert could give'* can assist in determining what is likely to occur in the future.

When evaluating whether the roofing defects were 'major', the Appeal Panel noted that the expert evidence was that *'the roof water permitted to enter into the building through the defective roof membrane system will eventually lead to decay of the wooden framing systems and decay and deterioration of wall and ceiling linings'*. However, there was no actual evidence of any water ingress in consequence of the defects. The expert had also noted that he did not know whether the stains occurred one off or a couple of years ago and had not taken moisture readings of the areas of the ceiling showing signs of staining. No other evidence, including observations during rain events or testing to show the nature and extent of the possible water ingress arising from the defects, was provided.

Accordingly, the Appeal Panel held (upholding the tribunal's original decision) that there was no evidence that the defective roof membrane system would likely lead to decay of the framing systems and deterioration of the wall and ceiling lining and refused leave to appeal the roofing defect issue.

In addition, noting that the design life of the structure and the material used may be relevant considerations, the Appeal Panel recommended that the defects be considered in the context of:

- how long the defect had existed; and
- whether the defect has resulted in any damage that might indicate the likelihood the premises will become uninhabitable or be destroyed.

| back to *Contents*

SOP mining exclusion – not so exclusive?

Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd [2020] NSWSC 1588

Andrew Hales | Nick Grewal | Jack McFadden

Key points and significance

This case has potentially wide-reaching implications for all participants in the mining industry and is the first case in New South Wales construing the so-called 'mining exception' under section 5(2)(b) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**).

The case demonstrates that the 'mining exception' is to be construed narrowly to only include work that has a close and proximate connection to the very process of the extraction of minerals, rather than work preparatory to the ultimate and later extraction of minerals. Therefore, any construction contract other than a contract for, or with a very close and proximate connection to, the extraction of minerals will not fall within the 'mining exception' and may well be subject to security of payment legislation.

Additionally, if a contract contains a single undertaking to do 'construction work' under section 5 of the Act, it is a 'construction contract' to which the Act will apply, notwithstanding that any other undertaking to do work under the contract may be excluded. A contract scope of work would have to be very carefully drafted for all work to fall within the mining exception so as to exclude the operation of the Act.

This case will likely also apply to Queensland, Victoria, ACT, Tasmania and South Australia given that the definition of construction work and the mining exclusion in their respective security of payment legislation is identical or substantially the same as the NSW Act considered by this case.

Facts

Cadia Holdings Pty Ltd (**owner**) entered into a contract with Downer EDI Mining Pty Ltd (**contractor**) for the provision of lateral development works relating to a new 'panel cave', roughly 1,500 metres below the surface, at the Cadia East mine near Orange. The contractor's works involved creating tunnels in order to access the ore body where further tunnelling and ultimately extraction will commence in 2022, as well as establishing infrastructure and installing key services for the eventual extraction of the minerals.

The contractor successfully pursued payment for works performed by adjudication under the Act. The owner sought to have the adjudicator's determination set aside, arguing that the adjudicator had made jurisdictional errors on two grounds:

- the work under the contract was not 'construction work' within the meaning of the Act as it fell within the mining exception in section 5(2)(b) of the Act; and
- there was no relevant reference date for the payment claim in accordance with the Act.

Decision

The court decided that the owner's challenge to the adjudication failed on both grounds.

Construction Contract

A 'construction contract' under the Act is a contract under which one party undertakes to carry out 'construction work' for another. Construction work is defined in section 5(1) and the exceptions to construction work are set out in section 5(2).

The court held that the effect of what is referred to as the mining exception in section 5(2)(b) was to exclude the following from the definition of 'construction work':

- extraction (whether by underground or surface working) of minerals;
- tunnelling or boring for the purpose of extraction (whether by underground or surface working) of minerals; and
- constructing underground works for the purpose of extraction (whether by underground or surface working) of minerals.

The questions the court sought to answer were:

- was the tunnelling or boring or constructing of underground works called for by the contract for the 'purpose of' the extraction of minerals; and
- did the contract also call on the contractor to undertake work beyond tunnelling or boring or constructing underground works which was construction work under section 5(1) (or the supply of related goods and services under section 6(1))?

Were the works 'for the purpose' of extraction?

The owner argued that it was sufficient if the tunnelling, boring or construction of underground work is for the 'ultimate purpose' of extraction of minerals. Conversely, the contractor argued that a 'close and proximate' connection between the tunnelling, boring and construction of underground works and the extraction of minerals was required, such that it is necessary that these activities be for the 'very process of extraction'.

The court preferred the contractor's construction for a number of reasons, including:

- the 'mining exception' should be construed narrowly as the Act is remedial and beneficial to contractors;
- the extension of the usual meaning of 'extraction' by including tunnelling, boring or constructing underground works for that purpose suggests the need for there to be a close proximity between the works and their purpose;
- a number of cases in Queensland held that 'extraction' does not include work 'associated with' or 'preparatory to' extraction. As such, it is hard to see why tunnelling, boring or constructing underground works, which is in anticipation of the ultimate extraction on minerals, should be deemed 'for the purpose of' extraction; and
- the Act specifies where a less proximate connection is required, for example, section 5(1)(e) includes as construction work, work that is 'preparatory' to such work. This suggests a legislative intention that the purpose of extracting minerals must be for the actual purpose of extracting minerals.

The court ultimately concluded that the work under the contract comprising tunnelling, boring and constructing underground works, by reference to what a reasonable person in the position of the parties would conclude as to the object of the work under the contract, was not 'for the purpose of' the extraction of minerals but was rather work preparatory to and in anticipation of the ultimate and later extraction of minerals.

Were any works not caught by the mining exception?

The court found that even if the 'mining exception' had been engaged in respect of tunnelling, boring and construction of underground works under the contract, the contract was still a construction contract because it contained undertakings to complete 'construction work' which was not tunnelling, boring or construction of underground works.

The court accepted the contractor's submission that a number of undertakings in the contract which were 'construction work' under section 5(1) would not be within the 'mining exception' even assuming a wide interpretation of the 'mining exception' was accepted, such as:

- haulage of excavated material to the nominated dumping point;
- establishing and disestablishing facilities; and
- site clean-up.

Reference date

The owner argued that the contractor's payment claim did not have a valid reference date in accordance with the contract and the Act as it was served on 8 May 2020, rather than 15 May 2020.

The court accepted that at the time the contractor served its 8 May 2020 payment claim, there was an available reference date being 15 April 2020, as this had not been used or extinguished, and that the contractor was entitled to claim again for unpaid amounts the subject of a previous payment claim.

MinterEllison acted for Downer EDI Mining Pty Ltd in these proceedings.

| back to *Contents*

Be aware of a fine line between a notice acting as a reminder or giving rise to a variation

CPB Contractors Pty Limited v Heyday5 Pty Limited [2020] NSWSC 1625

Andrew Hales | Emily Miers | Tom Lawler

Key point

Contractors need to exercise extreme caution when issuing correspondence to any subcontractors regarding compliance with their existing obligations so as to avoid a subcontractor claiming a variation under a construction contract.

Facts

On 9 July 2018, CPB Contractors Pty Ltd, Dragados Australia Pty Ltd and Samsung C & T Corporation (operating as a joint venture, **CDSJV**) engaged Heyday5 Pty Ltd (**subcontractor**) to do electrical installation works as part of Sydney's WestConnex New M5 project (**contract**).

The contract gave CDSJV the right to direct the subcontractor to increase, decrease or omit any part of the work under the contract. The contract also required the subcontractor to maintain and progressively provide to CDSJV safe work method statements (**SWMS**) before the commencement of work (or portion of work) to be performed.

The subcontractor used mobile elevated work platforms (**MEWPs**) to perform its work. The subcontractor submitted to CDSJV two SWMS for the use of MEWPs. The first SWMS submitted on 2 July 2018 required the driver of a MEWP to maintain visual contact with the spotter. The 12 December 2018 iteration had different drafting.

In light of a newly published South Australian work and safety report, on 25 January 2019, CDSJV issued to all subcontractors engaged by it in connection with the WestConnex project (including the subcontractor) a direction which stated that when MEWPs were being used, spotters were required to be within sight and verbal communication distance of the MEWPs. The subcontractor claimed that the direction constituted a variation under the contract.

Despite CDSJV submitting that its direction was not a variation because the subcontractor was obligated under the contract and work health and safety legislation to provide spotters to eliminate risks arising from the use of MEWPs, an adjudicator determined that CDSJV's direction constituted a variation and that the subcontractor was entitled to the recovery of additional costs incurred.

CDSJV sought to set aside the adjudication determination on two grounds:

- the determination of the spotters claim was 'unintelligible'; and
- the spotters claim was determined on a basis on which neither party made submissions in the adjudication application or response.

Decision

The court upheld the adjudicator's determination.

The court acknowledged that the first sentence of the adjudicator's determination in relation to the spotters claim when read literally was unintelligible, but it was only unintelligible because it contained a typographical error. The other passages referred to by CDSJV were not unintelligible. When read as a whole, the court found a fair and common sense reading of the determination showed the spotters claim was plainly in play and appropriately dealt with by the adjudicator.

With respect to CDSJV's second ground of appeal, the court found it was CDSJV's burden to identify documentation stating that the subcontractor was required to have spotters with visual contact of MEWPs. The court held that CDSJV had every opportunity to do that as part of its adjudication response.

The court was hesitant to scrutinise the procedural behaviour of the adjudicator in circumstances where the subcontractor served 33 lever-arch folders comprising the adjudication application and the adjudicator was required to determine the issues within tight time limits imposed by the Act.

MinterEllison acted for CDSJV in these proceedings. Interlocutory proceedings relating to this case were covered in our Construction Law Update of October 2020.

| back to *Contents*

(W)hole in one? Allowing extrinsic evidence when determining exclusions to scope

Jabbcorp (NSW) Pty Limited v Strathfield Golf Club [2020] NSWSC 1317

Andrew Hales | Adriaan van der Merwe | Naomi Graham

Key points and significance

Qualifications, departures or exclusions from the scope of work need to be clearly recorded to avoid disputes.

The effect of an entire agreement clause is to ensure the contract is contained wholly within its written terms. However, even if the purpose of an entire agreement clause is to exclude extrinsic evidence to prove terms additional to or different from the written contract or to construe the contract in a way different from the meaning to be inferred solely from its terms, it still leaves open the possibility of considering extrinsic material where the meaning of words in the contract cannot be inferred solely from its terms because those terms are ambiguous.

Facts

Jabbcorp (NSW) Pty Limited (**builder**) entered into a contract on 23 December 2016 (**contract**) with the defendant, Strathfield Golf Club (**golf club**), to design and construct a new clubhouse, access road and associated works for a total price of $23,400,730.

Before entering the contact, the builder prepared and submitted three tenders for various contract amounts, each revised to include a number of cost reductions and qualifications to help meet the project budget. The builder then entered into a four-week exclusive period with the golf club to negotiate a guaranteed maximum price (**GMP**) for the contract. The project budget of $22,250,000 was of critical importance and the fixed price contract would not be awarded unless the tenderer could achieve the necessary cost savings.

There were two key qualifications to the builder's tender:

- all utility works required have been allowed for within the construction boundary only, with the exception of the electrical substation; and
- it excluded any works required on the golf course and outside the construction boundary that may be a requirement of the DA consent.

Two further revised tenders were submitted following this period. The first of these provided a tender price of $23,050,000 which included an amount for service mains, among other things, and retained the exclusions.

The builder's final tender was accepted with a GMP of $22,250,000 and did not include an amount or stated qualification regarding the inclusion of service mains. Instead, the balance of the contract sum included a nominated amount to engage external contractors and an amount payable for the supply and installation of external gas, water and sewer infrastructure.

In the proceedings the builder sought payment for variations and a bank guarantee fee and to recover amounts withheld for back-charges and liquidated damages. The work the subject of the variations and back-charges was outside the footprint of the clubhouse and access road. The issues for determination included:

- whether the work the subject of the variation claims was included in the contract sum;
- whether the work to which the back-charges related was excluded under the contract; and
- whether the golf club was entitled to liquidated damages or whether the builder was entitled to an extension of time for delay was caused by the principal certifying authority.

Decision

The court dismissed the builder's claim, holding that the work the subject of the variations was part of the contract work. The builder was not entitled to claim variations or recover amounts withheld for back-charges and liquidated damages.

Variations and back-charges

The court rejected the builder's argument that the phrase 'construction boundary' in the definition of Excluded Works was determinative of whether works the subject of the variations were within scope and would therefore create an entitlement. The builder relied on tender documentation and negotiations to argue that any work performed outside the footprint of the clubhouse was excluded.

The court considered the definition of Excluded Works and whether supporting evidence of external circumstances was required for its interpretation. Various legal principles relating to the interpretation of commercial contracts were examined, resulting in a conclusion that no regard was to be had to the pre-tender negotiations and that the focus on the definition of Excluded Works was misplaced. Instead, the exclusion was to be read in the context of the contract as a whole, and various terms of the contract made it plain that the contract included work outside the footprint of the clubhouse and the access road, based on both general terms and the principal's project requirements. Therefore, any claim by the builder for works outside the footprint of the clubhouse and access road, on the basis that they were Excluded Works, could not be supported.

Further, the builder warranted that it would execute and complete the work under contract in accordance with the design documents so that the works, when completed, shall be fit for their stated purpose. The work the subject of the claimed variations that was said to be excluded was work necessary in order for the clubhouse to operate and therefore could not be excluded.

For the same reasons, it was held that the back-charges related to work within the builder's scope and the golf club was entitled to retain the amounts charged.

Entire agreement clause

In addition to the general principles of contract interpretation, the court also considered the entire agreement clause in determining whether it was appropriate to consider extrinsic material. The court noted that, despite the purpose of such a clause being to exclude any evidence of terms additional to or different from a written instrument, it still leaves open the possibility of considering materials where the meaning of the words in the contract cannot be inferred from its terms because the terms are ambiguous.

Liquidated damages

The court did not accept that the builder was entitled to an extension of time for the delay by the principal certifying authority. The contract outlined circumstances entitling the builder to an extension of time, not including this, and provided that the builder bears all risks for all causes of delay other than those specified. The golf club was entitled to retain an uncontested amount as liquidated damages.

| back to *Contents*

Tribunals and Tribulations: NCAT jurisdiction in absence of Fair Trading NSW investigation

Maygood Australia Pty Ltd v The Owners – Strata Plan No 85338 [2020] NSWCATAP 237

Andrew Hales | Michelle Knight | Julia Prieston

Significance

The NSW Civil and Administrative Tribunal has jurisdiction to determine an application which has been accepted despite the absence of an investigation by Fair Trading NSW or a direction by the President.

Facts

Maygood Australia Pty Ltd (**developer**) was the developer of a building which became Strata Plan 85338. In the tribunal's decision at first instance, it was found that The Owners – Strata Plan No 85338 (**Owners**) were entitled to enforce the statutory warranties under the *Home Building Act 1989* (NSW) (**HBA**) against the developer for defective works.

Section 48J of the HBA, which is in Part 3A, provides:

> *'48J Certain applications to be rejected*

The principal registrar of the Tribunal must reject any application to the Tribunal for the determination of a building claim unless—

(a) the principal registrar is satisfied that the subject-matter of the building claim has been investigated under Division 2, or

(b) the President of the Tribunal directs that the building claim be accepted without such an investigation having been made.'

It was common ground that, before the application was made to the tribunal, there had been no investigation by Fair Trading NSW under Division 2 of Part 3A of the HBA and that the President had not directed that the building claim could be accepted without an investigation having been made.

The developer appealed the tribunal's decision on six grounds. For the purposes of this note, we focus on Ground 1: that the tribunal did not have jurisdiction to hear and determine the application as the Owners did not comply with section 48J of the HBA as there had been no investigation by Fair Trading NSW.

Decision

In respect of Ground 1, the Appeal Panel determined that compliance with the requirements of section 48J is not a pre-condition to the exercise of jurisdiction by the tribunal.

The Appeal Panel contrasted the terms of section 48J with the requirements of section 48K of the HBA which specifically provides, in sub-sections (3), (4), (6), (7) and (8), that *'the Tribunal does not have jurisdiction'* in respect of various classes of building claim after the specified time periods; whereas section 48J does not state that the tribunal *'does not have jurisdiction'* to determine a claim unless there has been an investigation or the President has made a direction.

Sections 48I(1) and 48K(1) of the HBA confer jurisdiction upon the tribunal with respect to 'building claims' and the jurisdiction of the tribunal under the *Civil and Administrative Tribunal Act 2013* (NSW) is enlivened by the filing of an application.

The Appeal Panel found that if the Principal Registrar had rejected the application filed by the Owners, the tribunal would have had no jurisdiction because there would have been no application before it. However, the Principal Registrar not having rejected the Owners' application, there was an application before the tribunal and the tribunal had jurisdiction to determine it.

| back to *Contents*

To divide a hailstorm – one or more deductibles?

Rawson Homes Pty Ltd v Allianz Australia Insurance Limited [2020] NSWSC 1654

Andrew Hales | Amy Ryan | David Bell

Key point and significance

Whether a deductible under an insurance policy is to be applied once to an overall claim or individually in respect of each incidence of damage under the overall claim will depend on the terms of the policy.

In this case, a deductible was to only apply once to the builder's overall claim, where a contract works insurance policy responded to an indemnity claim after a hailstorm damaged 122 homes.

Facts

On 18 February 2017, a severe hailstorm passed through Sydney causing damage to parts of a residential development that was being constructed by the plaintiff building company, Rawson Homes (**builder**). The claim principally related to replacing the tiled roofs of 122 partially constructed houses. The builder sought orders for the defendant insurer, Allianz (**insurer**), to fully indemnify it for the losses sustained from the hailstorm under an Allianz Construction Annual Policy issued to the builder in 2016 (**policy**).

The primary issue in dispute involved a question of construction of the terms of the policy which related to the application of the deductible. The builder claimed that only one $10,000 deductible was payable as its claim under the policy, in respect of damage to 122 houses, arose from a single hailstorm event. The insurer contended that a $10,000 deductible applied to the sum insured for each of the 122 damaged houses.

The builder's argument relied on a clause which set out the way in which the deductible was to be applied (the application of deductible clause). The application of deductible clause referred to the deductible being subtracted from the amount payable by the insurer *'for each event giving rise to a claim'*. The definition of 'deductible' in the policy provided that the deductible was the first payment for all claims arising out of one event or occurrence.

The insurer relied on a reading of the policy as a whole to support its claim that the deductible applied for each of the 122 damaged houses. The insurer's argument relied on a reading of various clauses in the policy which expressly referred to an 'insured contract' to support its contention that the definition of 'deductible' should similarly be read to only apply to an insured contract.

Separately, the builder claimed interest on the amount payable under the policy pursuant to section 57 of the *Insurance Contracts Act 1984* (Cth) (**Act**) under which the insurer was liable to pay interest on the amount payable under the policy from the date on which it was unreasonable for it to have withheld payment.

Decision

The court found in favour of the builder on the deductible issue, preferring the builder's interpretation that the policy required only one deductible to be paid for all claims in relation to any one event.

The court held that:

- by its definition, 'deductible' meant an amount of money that the builder had to contribute as the first payment for all claims (irrespective of the number of claims made) under the policy if all of the claims arise out of the one event or occurrence;
- the application of deductible clause put focus on an 'event' and a 'claim', providing that the amount of the deductible is subtracted from the amount payable for 'each event giving rise to a claim'; and
- the reference to a 'single event' in the application of deductible clause was intended to capture the aggregate of losses arising from an event – with the single deductable applied notwithstanding that the builder may be able to recover for more than one benefit.

The court noted that the terms 'event', 'one event', 'claim' and 'any one event' were not defined in the policy, and as a consequence they were to be construed according to their ordinary and natural meaning in the context of the policy.

In reaching a decision, the court acknowledged that there was some ambiguity in the policy terms. However, referring to the High Court's decision in *McCann v Switzerland Insurance Australia Limited* (2000) 203 CLR 579, the court held that to the extent there is ambiguity between the drafting of the terms dealing with the deductible and the other terms in the policy, it is reasonable to resolve that ambiguity in favour of the builder because an insurer is usually in the superior position to add a word or a clause clarifying the promise of insurance which it is offering.

On this basis, the court found that under the terms of the policy a claim in respect of the aggregate losses arising from the hailstorm were to be treated as losses arising from a single event, and accordingly the deductible was to be payable once for all damage claims arising from the hailstorm.

On the interest issue, the court held that it was unreasonable for the insurer to have withheld payment of the amount under the policy from 28 March 2018 as the insurer had an objectively reasonable time to have investigated and assessed the builder's claim. Accordingly, the insurer was liable to pay interest from 29 March 2018.

| back to *Contents*

Express yourself – payment claim reference dates must be an express 'term of the contract'

Waco Kwikform Ltd v Complete Access Scaffolding (NSW) Pty Ltd [2020] NSWSC 1702

Andrew Hales | Adriaan van der Merwe | Nick Meyer

Key point and significance

Payment clauses in construction contracts should make express reference to the date on which a payment claim can be made, or risk potential disputes over the legitimacy of a payment claim. A contract must

expressly nominate the day on which a progress payment may be claimed in order for that date to be considered a valid reference date under section 8 of the pre-21 October 2019 version of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**).

The definition of 'reference date' was removed from the Act on 21 October 2019. However, section 13(1B) of the Act (as amended) provides that if the construction contract makes provision for an earlier 'date' for the serving of a payment claim in any particular named month, the claim may be served on and from that date instead of on and from the last day of that month. It is likely that the principles arising from this case will apply to section 13(1B) and will call into question contractual provisions that allow claims to be made 'by' a particular date, not 'on' that date.

Facts

Waco Kwikform Ltd (**respondent**) sought to challenge an adjudication determination made under the Act that it pay Complete Access Scaffolding (NSW) Pty Ltd (**claimant**) $301,856. The basis of the challenge was that the payment claim was not a valid claim as there was no reference date.

Section 8(2)(a) of the pre-21 October 2019 version of the Act defined a reference date as:

> *'a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract.'*

The issue for the court to decide was whether or not the construction contract made 'express provision' with respect to 'the date on which a claim for a progress payment may be made' for the purpose of section 8(2)(a) of the Act as it then stood.

Waco submitted that this express provision was at clause 4.1:

> *'4.1 Claims submitted by the 20th day of the month will, if approved by Waco Kwikform, be paid by the end of the following month. If any part of a claim is not approved then such part will not be paid and the Subcontractor will be provided with the reasons for the non-payment.'*

Decision

The court dismissed the respondent's challenge to the adjudication determination.

The court held that in order for a term to be a term of the contract for the purpose of section 8(2)(a), the term must be one where a date can be identified from the terms of the contract itself as being *'the date on which a claim for a progress payment may be made'*. The provision in the contract must, by its own terms, determine the date by which the payment claim can be made.

Clause 4.1 was not a term of the contract having the effect contemplated by section 8(2)(a) of the Act. It did not require the claimant to make any claim. Rather, clause 4.1 gave the claimant discretion to decide on which day to make a progress claim, and the claimant could theoretically make any number of claims in the days leading up to the 20th day of the month. That day chosen by the claimant would not be determined *'by or in accordance'* with the *'terms of the contract'* and clause 4.1 in particular; but by the claimant itself.

As such the reference date was determined under clause 8(2)(b) of the Act, being the last day of the month in which construction work was first carried out under the contract and the last day of each subsequent month.

| back to *Contents*

No good deed goes unpunished - warranties in multi-party deed aren't necessarily for all parties

White Constructions Pty Ltd v PBS Holdings Pty Ltd [2020] NSWCA 277

Andrew Hales | Kate Morrison | Ashley Murtha

Key point and significance

The simple fact that a deed contains multiple parties does not, in and of itself, mean that every warranty given by one party to the deed is given to all others. Determining who has the benefit of the warranties requires consideration of both the context and language of the deed.

Facts

This was an appeal of White Constructions Pty Ltd v PBS Holdings Pty Ltd [2019] NSWSC 1166. You can read about that case in the September 2019 issue of the Construction Law Update.

In summary, White Constructions Pty Ltd (**developer**) was developing a 100 lot subdivision known as Cedar Grove in Kiama NSW. The developer engaged a sewer designer, Illawarra Water & Sewer Design Pty Ltd, and a water servicing coordinator, PBS Holdings Pty Ltd (together, the **consultants**) to prepare and submit a satisfactory sewer design for approval by Sydney Water.

The developer and the consultants entered into a developer works deed with Sydney Water. Under the deed the consultants gave various warranties in respect of preparing the design of the sewer and obtaining Sydney Water's approval.

The consultants initially prepared a design which was unsatisfactory to Sydney Water. After a period of significant delay the consultants submitted a revised design which was approved.

The developer alleged that the consultants failed to prepare a satisfactory sewer design within a reasonable time and therefore failed to discharge their obligations under the deed. The developer argued that it had suffered loss and damage as a result of the delay.

The primary judge rejected the developer's contention that the consultants breached the warranties given under the deed, instead holding that the warranties were made to Sydney Water only.

A number of issues were raised on appeal. With respect to the deed, the developer contended that the primary judge had erred in his construction of it and his conclusion that it did not contain any warranties given by the consultants to the developer. The developer claimed:

- it is a party to the deed and prima facie a beneficiary of covenants under it; and
- the language of relevant provisions is expressed to be, and apparently are intended to be, in favour of all parties.

The consultants submitted that the primary judge was correct to find that the consultants did not make any warranties to the developer under the deed. This was because the deed was a multi-party document with the central aim of satisfying the statutory imperative within the *Sydney Water Act 1994* (NSW) that sewer assets constructed by private enterprises vest in Sydney Water.

Decision

The court rejected the developer's arguments and held that the primary judge did not err in his construction of the deed and in his conclusion that it did not contain any warranties given by the consultants to the developer.

This was because:

- the fact that a deed contains multiple parties does not, in and of itself, mean that every warranty given by one party to the deed is given to all others;
- in the context by which the deed came into existence it made sense for the warranties contained in the deed to be only for Sydney Water's benefit;
- a pre-existing contractual relationship existed between the developer and the consultants and that is where one would expect to find the obligations owed by the consultants to the developer;
- the language of the deed did not support the developer's construction of it; and
- only Sydney Water was given remedies under the deed for non-compliance by another party with its obligations under it.

| back to *Contents*

NORTHERN TERRITORY

Consumer guarantee disputes – do courts have jurisdiction?

Phillis v J Anderson Constructions Pty Ltd & Ors; Stephan & Anor v J Anderson Constructions Pty Ltd & Ors [2020] NTSC 70

Lachlan Drew | Petrina Macpherson | Craig Halangoda

Significance

Courts do not have jurisdiction to hear proceedings relating to a 'consumer guarantee dispute' under Part 5A of the *Building Act 1993 Act* (NT) (**Act**). Instead, these proceedings must be brought before the Commissioner of Residential Building Disputes.

Facts

This case relates to a development in Alice Springs, involving the conversion of a motel site into residential townhouses. The relevant parties in the proceeding were the first defendant, J Anderson Constructions Pty Ltd (**builder**), the builder of the townhouses and the plaintiffs, Dwain Phillis, Anna Stephan & Matthew Graham Cowie (**purchasers**), who each bought one of the residential townhouses off the plan.

After the building works were completed and it was certified that the premises were fit for occupation, each purchaser settled on their contract and took possession. Numerous defects in each of the townhouses were later identified. Those defects are the subject matter of the various claims made by the purchasers.

There was no contractual relationship between the purchasers and the builder. The purchasers' claims against the builder were based on the consumer protection scheme of statutory warranties (referred to as 'consumer guarantees') under Part 5A of the Act. Under the scheme, a builder is accountable to an owner for meeting the consumer guarantees, irrespective of whether there is a contractual relationship between them. The purchasers commenced proceedings against the builder in the Supreme Court for breach of the consumer guarantees. The purchasers also made claims against the builder in negligence and under the *Australian Consumer Law 2010* (Cth).

After the statement of claim was filed, the builder brought an application to strike out the purchasers' claim and the purchasers cross-applied for leave to amend their statement of claim. The builder's strike out application was based on a jurisdictional question, that is whether the court had the jurisdiction to hear a claim under Part 5A of the Act. The relevant section of the Act provided that a current owner of a residential building could *'apply to the Commissioner for a decision about a consumer guarantee dispute'* but made no mention of the court. The builder's counsel contended that where legislation creates a right and also specifies a remedy or an enforcement process, the remedy or enforcement process is exclusive and the right may not be enforced in any other manner. Where appropriate, this operates as an ouster of the jurisdiction of any court not provided for in the specified enforcement process.

On behalf of the purchasers it was argued that the legislative intention of Part 5A of the Act was not to create an exclusive remedy and jurisdiction.

Decision

The court found that it did not have jurisdiction to hear a *'consumer guarantee dispute'* and struck out those parts of the statement of claim which pleaded a claim under Part 5A of the Act. The court gave the purchasers permission to file and serve an amended statement of claim.

The court concluded the purchasers' arguments that the legislative intention of Part 5A of the Act was not to create an exclusive jurisdiction or remedy were effectively countered by the builder and that there were several strong indicators within the Act, that parliament intended the enforcement process to be exclusive to the Commissioner and to oust the jurisdiction of the courts.

Consumer Guarantee Dispute

The purchasers pleaded their case as being in respect of 'consumer guarantees', and not in respect of a 'consumer guarantee dispute'. It was only the builder, out of all parties in the proceedings, that pleaded it as

a 'consumer guarantee dispute'. The purchasers argued that because they pleaded their case in respect of 'consumer guarantees', the purchasers should be able to bring the proceedings in court as only a 'consumer guarantee dispute' must be heard by the Commissioner.

The court found that whether the claim is or is not a 'consumer guarantee dispute' is a matter of law to be determined by the interpretation of the relevant statutory provisions. The determination of whether the dispute falls within that definition is not solely a matter of pleading. The fact that only the builder has pleaded that the dispute was a 'consumer guarantee dispute' was not determinative. It was found that the proceeding was in relation to a 'consumer guarantee dispute' as it met all of the requirements in the Act, irrespective of how the purchasers pleaded their case.

Multiplicity of proceedings

The purchasers argued that because the Commissioner could only hear matters between the owner and the builder (no other parties), in proceedings where other parties are involved, a multiplicity of proceedings will result. As this is generally undesirable, if parliament had intended this, it would have specifically expressed that intention in the legislation.

The court found merit in this argument, agreeing that the avoidance of multiplicity of proceedings is desirable and that the possibility of multiple proceedings can be a factor relevant to determining the legislative intent. However, if parliament intended exclusivity, then parliament would likely have had regard to, and accepted, the possibility of multiplicity of proceedings when devising the legislative scheme. This is demonstrated by the duality of jurisdiction in the scheme, as parliament has decided to deny the Commissioner jurisdiction in cases where there is a contractual relationship between an owner and a builder, as this would not be considered a 'consumer guarantee dispute'. In that event, proceedings in a court are required to enforce the consumer guarantees.

Jurisdiction limitation

The purchasers also argued that as the Regulations limit the Commissioner's jurisdiction to $100,000, if the Commissioner's jurisdiction was exclusive, that would mean that for claims in excess of $100,000 an applicant would first have to engage the Commissioner and then take separate proceedings in respect of the excess. However, the court found that the Regulations specifically provide that where a claim is assessed in excess of $100,000 then the dispute must be referred to the Northern Territory Civil and Administrative Tribunal, which does not have an upper limit. Additionally, the existence of the tribunal, with no limits and jurisdiction to hear appeals of decisions of the Commissioner, was found to be a factor in favour of exclusive jurisdiction.

'May'

The purchasers also argued that the use of the word 'may' in the section of the Act which provides for an owner's right to seek a decision from the Commissioner, indicates that proceedings before the Commissioner are permissive and not mandatory. Conversely, the builder argued that the use of the word 'may' does not denote an optional forum for the purchasers, rather it is confirmatory of the right of an owner, if there is a dispute, to proceed with an application before the Commissioner. The court thought there was merit in this argument but found that the use of the word 'may' was not determinative in construing the legislative intent.

| back to *Contents*

QUEENSLAND

Road authorities and potholes – make sure to secure warning signs

Goondiwindi Regional Council v Tait [2020] QCA 119

Michael Creedon | Alexandria Hammerton | Craig Halangoda

Significance

If a road authority is aware of developing potholes in a road which it cannot fix immediately, it must erect adequate and properly secured warning signs at the site to caution road users.

Additionally, where there are existing or developing potholes in a road and an authority is aware of this, it will not gain the protection from liability under section 37 of the *Civil Liability Act 2003* (Qld) (**Act**), even if it did not have actual knowledge of the particular pothole causing injury.

Facts

On 25 September 2016, Ms Tait (**Tait**) was riding her motorcycle along the Leichhardt Highway through the Mittengang Creek Floodway, where she struck a large pothole and sustained injuries. The Goondiwindi Regional Council (**Council**) was the road authority that was required to maintain the Leichhardt Highway, pursuant to a Road Maintenance Performance Contract (**RMPC**) with the State of Queensland.

Between 13 and 20 September 2016, there was considerable rainfall which caused widespread flooding, including to the area of the floodway. This was notified by the Council's road maintenance patching crew on 19 September, and on 21 September the Council's technical officer notified various other Council employees that there were significant potholes in various locations on the highway. On 22 September the Council's technical officer and engineer noted that the sealed surface of the roadway at the Mittengang Floodway had begun to strip and potholes were beginning to develop. Later on that same day, it was decided that signs would be erected stating 'ROUGH SURFACE' and 'REDUCE SPEED'. It was standard Council procedure to secure temporary signs with sandbags, however, in this instance the signs were freestanding and not secured as the Council had exhausted its supply of sandbags. On 24 September the Council's patching crew again visited the floodway and noted it needed patching as it looked dangerous to road users but determined that this work could not be done at the time due to water on the surface. The Council was otherwise generally aware of a couple 'football sized potholes' on the floodway.

On 25 September 2016, Tait hit a pothole that was 20 centimetres deep, 30 centimetres wide and one metre long. Tait gave evidence, which was accepted at trial, that there were no visible signs warning of the rough surface at the time of the accident and that the signs had fallen over sometime between the morning of 24 September and 2:30pm 25 September.

Section 37(1) of the Act states that a public or other authority is not liable in any legal proceeding in relation to any function it has as a road authority to repair a road or to keep a road in repair. However, section 37(2) states that this does not apply if, at the time of the alleged failure, the authority had actual knowledge of the particular risk, the materialisation of which resulted in the harm.

The Council contended that the 'particular risk' was the presence of the particular pothole in the floodway that Tait hit on 25 September 2016. Consequently, as the Council did not have actual knowledge of the pothole which was 20 centimetres deep, 30 centimetres wide and one metre long, it did not have actual knowledge of the particular risk and was protected from liability under section 37. Conversely, Tait contended that the 'particular risk' was the risk to road users from the deteriorating state of the road, rather than the particular pothole.

In the District Court it was found that the Council owed a duty of care, *'to fix … defects deemed to be a safety hazard in a timely and efficient manner and to maintain the road network to a safe standard for the travelling public'.* This included ensuring adequate signage was present to warn of the unsafe conditions where works could not be carried out.

The Council appealed the District Court decision. It contended that section 37 of the Act applied so as to absolve it of liability. Further, the Council argued there was no finding concerning the existence and content

of the 'duty to warn' that underpinned Tait's case, which was not based on a failure to repair and inspect the road but rather based on the Council's failure, knowing of the deteriorating surface of the road, to properly place the temporary signage. The Council also contended that there was no finding as to whether the duty to warn was limited by the terms of the RMPC or a freestanding duty arising independently of that contract.

Decision

Section 37 of the Act

The court found that section 37 did not apply in this case. It determined that the erection of temporary signage was part of the Council's maintenance work once it had determined that the road surface was damaged and likely to be a danger to road users. It found that section 37(1) did not apply if, when the temporary signage was erected (and not properly fixed in place), the Council knew of the particular risk that a road user could be injured by hitting an existing or developing pothole. It held the Council knew, via its workers, of that risk at the time they erected the freestanding signage.

Duty of care

The court found that to frame the duty as a simple 'duty to warn' was to unduly confine its nature and scope. The content of the duty included physical maintenance work, which at the relevant time (25 September) was not possible. Nevertheless, the duty encompassed taking necessary steps to perform the maintenance obligation by the erection of temporary signage to warn of the rough surface and to caution road users to reduce their speed. Having identified that there was a danger to motorists from potholes in the floodway, or even just the rough surface, the duty was to take the first steps in the maintenance process by properly erecting warning signs. The court did not accept the lack of available sandbags as a defence for the failure to secure the signs, stating that the use of sandbags was not the only way in which the signs could have been kept upright.

Accordingly, the court upheld the finding of the trial judge in relation to the duty of care but expressed it in slightly different terms, stating that the Council *'was to take reasonable care in carrying out maintenance work on the roadway, including installation of warning signage, so as not to create a foreseeable risk of harm to users of the roadway from developing potholes'.*

| back to *Contents*

Does the QBCC have unlimited power to impose conditions on a building licence?

Queensland Building and Construction Commission v Groupline Constructions Pty Ltd [2020] QCA 245

David Pearce | Matthew Hammond | Isabella Impiazzi

Key point

The Queensland Building and Construction Commission (**QBCC**) does not have unlimited power to impose conditions on a building licence. Achieving the broad objectives of the *Queensland Building and Construction Commission Act 1991* (Qld) (**Act**) is not a licence to act inconsistently with specific powers provided by the Act. A contractor may be successful in overturning licence conditions imposed by the QBCC if it can show the QBCC has acted beyond its powers.

Facts

Background to the appeal

This case concerned QBCC's power to impose conditions on a building licence. Groupline Constructions Pty Ltd (**Groupline**) had held a building licence since January 2018, which allowed it to undertake building work on all classes of buildings and to prepare plans and specifications for use in its building work. After issues arose on a design and construct project being undertaken by Groupline (which involved alleged damage to an adjacent property), the QBCC imposed conditions on Groupline's building licence which, in effect, prohibited it from carrying out any further work on the site until certain steps had been taken. The conditions

included a requirement to engage an RPEQ engineer to determine and report on the corrective action required to make safe the damaged property.

Groupline commenced taking the actions required by the QBCC. The QBCC subsequently imposed an additional condition that no further make safe works were to be continued until a building consultant appointed by the insurer of the adjacent property had consulted the RPEQ engineer. The effect of this condition was that Groupline could not continue with any work on the building site.

Goupline filed an originating application seeking a finding that the conditions were void or an order setting the conditions aside. The primary judge declared the appellant's conditions void and of no effect and ordered QBCC to remove any references to the conditions from the registrar. The QBCC appealed this decision.

QBCC's power to impose conditions

Section 36 of the Act gives the QBCC a general power to impose conditions for the purpose of regulating and controlling those who perform building work in Queensland. In order to exercise this power, the QBCC must have a proper ground for imposing the conditions and be satisfied that each condition is appropriate. Where it is anticipated that a licensee has contravened or is likely to contravene a prescribed provision, a stop work notice may be issued in accordance with section 108AI. Moreover, Part 6 of the Act empowers the QBCC to issue a direction to rectify works to a licensee. It is important to note that the power does not extend to instructing a licensed builder as to how they should comply with the notice in order to remedy the consequential damage because contractors should use their own judgement, qualifications and expertise when carrying out rectification work on a particular project.

Decision

The court dismissed the QBCC's appeal on the basis that the QBCC overstepped its authority when imposing the conditions and crossed into the realm of supervising the rectification work. The court upheld the primary judge's conclusion that it was impermissible for the QBCC to impose conditions on a licence that have the effect of either enlarging its powers or circumventing the limitations in the Act.

A significant issue on appeal was the construction of section 36 and the extent of the QBCC's power under this provision. The QBCC contended that it has *'broad and overlapping powers'* enabling it to select the most calibrated and appropriate combination of conditions to promote the legislative purpose. Here, the QBCC contended that section 36 overlaps and accumulates with the powers in section 108AI and Part 6 so that the QBCC can uphold and enforce the broad objects of the Act.

In rejecting this argument, the court held that the QBCC's general discretionary power to achieve the Act's objectives must not be construed in a way which overrides or is inconsistent with the requirements of specific sections regulating QBCC's powers. The court held that Parliament's identification of the broad objectives does not confer unlimited power on QBCC to pursue the objectives in any way it sees fit and in a manner which is inconsistent with its specified powers. Rather, section 36 is merely one of a suite of powers conferred on QBCC to better secure the purpose or objects of the Act.

| back to *Contents*

Directors liable to repay approved QBIC claim

Queensland Building and Insurance Commission v Pierce & Anor [2020] QMC 16

Michael Creedon | Megan Sharkey | Craig Halangoda

Significance

If a builder wishes to review a claim approved by the Queensland Building and Insurance Commission (**QBIC**) under its statutory insurance scheme, then it should promptly engage with the internal merits review under sections 86 and 87 of the *Queensland Building and Construction Commission Act 1991* (Qld) (**Act**) and the *Judicial Review Act 1991* (Qld) (**JR Act**).

The courts have shown that they will not interfere with an administrative decision made by the QBIC in approving a claim and confirmed that directors of building companies can and will be held liable to repay amounts subject to an approved claim.

Facts

A homeowner engaged Waterfern Pty Ltd (**Waterfern**) to undertake residential construction work. The defendants, Mr Pierce and Ms Pierce (**Directors**), were the directors of Waterfern during the relevant time.

The homeowner took possession of the property in 2015 and subsequently made a complaint to the Queensland Building and Construction Commission (**QBCC**) in March 2016. In response, the QBIC issued a Direction to Rectify/Complete on Waterfern in May 2016. Some months later in November 2016, Waterfern was de-registered and no action was taken to rectify the works.

Accordingly, the QBIC approved a claim under its statutory insurance scheme to rectify the works at a cost of $98,151, which it sought to recover under section 71(1) of the Act. As Waterfern was de-registered, the QBIC sought to recover the amount directly from the Directors, pursuant to section 111C of the Act.

The QBIC brought proceedings against the Directors to recover the debt, and subsequently applied for summary judgement under rule 292 of the Uniform Civil Procedure Rules 1999 (Qld). The Directors cross applied for summary judgement. Both parties argued that the matter turned on a discrete issue of whether the Directors could challenge the QBIC's decisions to accept and then approve the claim.

The questions to be determined by the court were:

- whether directors who are liable under section 111C of the Act can go behind the QBIC's decision as a statutory insurer to approve a claim; and
- whether the court has jurisdiction to review the QBIC's decision to approve the claim.

Decision

The court found in favour of the QBIC for the sum of $98,151.

In circumstances such as the present case, strict liability for debt accrues against directors under the Act. The debt arising under section 71(1) of the Act could only be challenged through an internal merits review pursuant to sections 86 and 87 of the Act and the JR Act. The availability of the merits review was regarded by the court as a powerful indication that steps on the part of the QBCC/QBIC antecedent to payment and recovery, are not justiciable in the courts. The court stated that it would be contrary to the legislative regime set out under the Act for the court to allow the proceedings to be used to conduct a quasi-review of the administrative decisions that underpin a director's liability or to otherwise subvert the time limits imposed by the JR Act. Accordingly, the Directors could not challenge the decision of the QBIC in the courts, and as they were the directors of Waterfern at the relevant time, they were liable under section 111C of the Act.

| back to *Contents*

Assume and you make an ass out of you and me!

Santos Limited v Fluor Australia Pty Ltd & Anor [2020] QCA 254

Andrew Orford | Alexandria Hammerton | Isabella Impiazzi

Significance

This case serves as a reminder that a pleaded allegation must be properly grounded and not merely the product of a contracting party surmising or assuming a particular state of affairs. In this instance, an application for further disclosure must be used as a tool to uncover further documents in a genuine and sound case rather than a tool to determine whether there is even a case to begin with.

Facts

Background to the dispute

Santos Limited (**Santos**) contracted with Fluor Australia Pty Ltd (**Fluor**) to carry out engineering and construction work on a coal seam gas project. The parties agreed that payment for labour costs would be made according to a set of agreed rates which included wages, annual leave, pensions, insurance and other specific types of payments.

A dispute arose between the parties as to the scope of the agreed rates. Fluor's position was that the rates did not account for all costs incurred as a consequence of its personnel performing work under the contract such as project legal overheads and corporate general and administrative overheads. Santos argued that the agreed rates were a reimbursement for costs incurred by Fluor when carrying out the work without any allowance for fee or profit, meaning Fluor was not entitled to recover any fee or profit as part of the agreed hourly rates. Santos alleged that amounts charged by Fluor were in excess of the amount required to reimburse Fluor for the work and therefore, in breach of the contract, Fluor must have included a quantum for fee or profit.

The disclosure protocol

The parties agreed to a disclosure protocol which included the disclosure of certain documents and expenditure records on Fluor's accounting software. Pursuant to the protocol, Fluor had to provide access only to documents and records that were coded 'G2NG' which was the code assigned to some expenditure items associated with Santos's project. All G2NG items were extracted and listed in a document entitled 'CJI3'.

Fluor's accounting system

Evidence given by Fluor's employees illustrated that all costs incurred in relation to the project were recorded on accounting software for Fluor's own internal purposes, even if those costs were not chargeable to Santos. Some of these costs, chargeable or otherwise, were assigned with different codes and therefore were not included in CJI3 because they were not coded with G2NG. On the basis of inspecting CJI3, and therefore only the G2NG coded items, Santos assumed that Fluor had overcharged due to the discrepancy between the sum of the items in CJI3 and the amount charged by Fluor.

Consequentially, Santos applied for an order seeking further disclosure of documents from Fluor's accounting software to investigate the issue. The court at first instance dismissed Santos's application and Santos appealed against the court's order.

Decision

The Court of Appeal dismissed the appeal. In doing so, it was critical of Santos embarking on a 'fishing expedition' for a case that had only a fragile factual and legal foundation. CJI3 did not contain all labour costs incurred on the project so Santos's mere 'understanding' that Fluor was overcharging was unjustified unless further information was obtained. Here, the court relied on expert evidence which concluded that Santos required access to the additional documents to form a view as to whether the pleaded allegation was correct or not. Therefore, the alleged inclusion of a fee or profit was not grounded in actual knowledge but was merely based on an inference drawn from an assumed state of facts and limited information.

The court upheld the primary judge's conclusion that the request for further disclosure was to determine whether Santos's inference drawn from inspecting CJI3 was correct rather than proving a case it was confident already existed. While it is difficult to properly define the extent of information that must be obtained before an allegation can be pleaded, it was evident in this instance that the documents being sought were required to determine whether there was even a case to begin with rather than proving an already sound case.

The court also briefly discussed the nature of an appellate court's power to review a discretionary order pertaining to practice and procedure. In order to overrule a previous decision, there must be an error of fact or principle, or a demonstratable injustice which is the basis of the appeal. Santos failed to demonstrate any of these issues on appeal.

| back to *Contents*

Keeping it commercial: a delay notice is not required in all circumstances

Santos Limited v Fluor Australia Pty Ltd & Anor (No 1) [2020] QSC 372

Andrew Orford | Matt Hammond | Isabella Impiazzi

Key point

A court will favour a contractual interpretation that serves a commercial purpose and produces a commercial outcome, particularly when the parties to the agreement are well-informed and experienced in the area of large construction contracts.

Facts

Background

Santos Limited (**Santos**) and Fluor Australia Pty Ltd (**Fluor**) entered an agreement under which Fluor was to engineer, procure and construct facilities for a coal seam gas project being developed by Santos (**Agreement**). Fluor failed to achieve Mechanical Completion by the Date for Mechanical Completion under the Agreement, but continue to receive payments from Santos beyond this date (referred to as MC Delay Costs).

After the completion of the project, Santos exercised its right to inspect Fluor's records and concluded that Fluor had been overpaid. It commenced proceedings claiming in excess of $1.4 billion, including $475 million of allegedly overpaid MC Delay Costs. Santos argued that the MC Delay Costs were the time related overhead costs incurred by Fluor after the Date for Mechanical Completion. As Fluor had not submitted a Delay Notice (**Notice**) or made an Extension of Time Claim (**EOT Claim**) for work done after the Date for Mechanical Completion, it was not entitled to those costs.

The Agreement

Clause 23 of the Agreement provided that:

- Fluor was to promptly give Santos a Notice if it considered that it *'is or will likely be delayed in achieving Mechanical Completion'* by the relevant Date for Mechanical Completion;
- If a Delay Event occurred causing Fluor to be delayed in achieving Mechanical Completion, and Fluor submitted a Notice and EOT Claim within the prescribed periods, Fluor would be entitled to an extension to the Date for Mechanical Completion;
- If Fluor failed to submit a Notice or an EOT Claim, Santos would not be liable for any claim by Fluor, and Fluor would be deemed to have irrevocably waived its right to make a claim;
- The granting of the extension of time for any Delay Event would be Fluor's only remedy, but Fluor was entitled to be paid any Actual Costs incurred by reason of the Delay Event; and
- Fluor was not precluded from claiming its Actual Costs incurred after the Date for Mechanical Completion (including where mechanical completion was achieved after the Date for Mechanical Completion).

A Delay Event was defined to include a delay caused by Santos or other external factors, but excluded delays caused by Fluor. Actual Costs were defined to include costs incurred for performing the work but did not include profit, overheads and Excluded Costs. Excluded Costs were considered to be those incurred by Fluor due to its own act or omission, or breach of the Agreement.

If mechanical completion was not achieved by the Date for Mechanical Completion, Fluor would be liable to pay Santos liquidated damages capped at $15 million.

Santos' claim

Santos alleged that MC Delay Costs were an overpayment because Fluor did not submit a Notice or EOT Claim for some of the delayed work, and that they were Excluded Costs. Santos argued that, if Fluor was granted an extension of time, Santos should pay the Actual Costs so long as Fluor issued the relevant Notice and EOT Claim. However, Fluor failed to meet the Mechanical Completion dates, did not submit a Delay Notice or EOT Claim and continued to complete the work as required and make payment claims which Santos paid.

Santos claimed that clause 23 should be construed so that Fluor 'failed' to give the Notice or EOT Claim simply by not submitting any notice, even if the circumstances did not require such a notice to be given.

Fluor's application

Fluor applied for summary judgment against Santos for the part of its Statement of Claim that dealt with the recovery of the MC Delay Costs. Alternatively, Fluor sought an order striking out those parts of the Santos' pleading.

In considering Fluor's application for summary judgment, the court was primarily concerned with the construction of clause 23 of the Agreement.

Decision

The court rejected Santos' arguments and held that the proper construction of the Agreement meant that Fluor could claim an extension of time only if Fluor had been delayed by Santos or another external factor. Fluor was not required to provide notice whenever a delay occurred nor when Fluor itself had delayed progress of the work.

The court held that the purpose of clause 23 was to provide an early warning to Santos about a possible Delay Event and EOT Claim. Therefore, Fluor could only 'fail' to give a Notice or EOT Claim when the Agreement specifically required it, and the Agreement only required it when the delay was caused by some factor outside of Fluor's responsibility or control.

The court considered that Santos was effectively seeking a construction of clause 23 that meant:

- If Santos caused a delay and Fluor:
  - issued the Notice and EOT Claim, then Santos would be liable to pay Fluor for work performed during the delay; or
  - failed to issue both the Notice and EOT Claim, then Santos would be discharged from its liability to pay Fluor;
- If Fluor caused a delay and:
  - issued the Notice and EOT Claim, Santos would still have to pay the contract price as agreed but Fluor would not be entitled to more; or
  - failed to issue the Notice or EOT Claim, Santos would be discharged from its obligation to pay Fluor entirely for the work performed during the delay.

The court rejected that construction, finding that (in certain circumstances) the consequences of a failure by Fluor to give the Notice and EOT Claim was out of all proportion to the legitimate interest of Santos in the enforcement of Fluor's obligation to give a Notice and Fluor's right to claim an EOT. Further, the court said that such a construction might be unconscionable, because it imposed on Fluor a detriment for not giving a Notice or making an EOT Claim regardless of whether it was required to do so under the Agreement. This might have no other purpose but to punish Fluor.

The court concluded that large and experienced parties are less likely to include penalty provisions of this kind and that Santos' proposed construction was unreasonable, as it served no commercial purpose and did not produce a commercial outcome.

The court considered that the proper construction of clause 23 of the Agreement meant that:

- the remedial matters provided in clause 23 for an EOT or the payment of delay costs did not preclude Fluor from claiming its Actual Costs incurred after the Date of Mechanical Completion, including where mechanical completion was achieved after the date as extended by Santos;
- Fluor's entitlement to be paid Actual Costs was not affected by whether or not Fluor gave a Notice or an EOT Claim;
- the consequence of Fluor failing to achieve mechanical completion by the Date for Mechanical Completion was that Fluor might be liable to pay Santos liquidated damages;
- the parties agreed that liquidated damages were Fluor's sole liability and Santos' exclusive remedy for such a failure; and
- the failure by Fluor to achieve mechanical completion by the Date of Mechanical Completion did not affect its entitlement to be paid Actual Costs for any Work performed, including after the relevant date.

The court held that Santos had no real prospect of success on its MC Delay Costs claim because it was contrary to the construction of the Agreement. As a consequence, Fluor was granted summary judgment for this aspect of the claim and awarded costs.

Santos has filed a Notice of Appeal. We will report on the outcome of any appeal decision in future updates.

| back to *Contents*

Statutory insurance – practical completion and trust property

Seirlis & Ors v Queensland Building and Construction Commission [2020] QCA 283

Sarah Ferrett | James Knell | Craig Halangoda

Key points

This case raises two key points regarding the Queensland Building and Construction Commission (**QBCC**) statutory insurance scheme:

1. where the date of practical completion is used to determine the time limit for a claim, the definition of 'practical completion' depends on the construction of the insurance policy, but is likely to be the date on the certificate of practical completion; and
2. an insurance claim made in relation to land owned by a trust is considered trust property for the purpose of the claim.

Facts

Terry Seirlis, Ties Group Pty Ltd and UKL Pty Ltd (**Seirlis Companies**) applied for leave to appeal against the decision of the Queensland Civil and Administrative Tribunal (**tribunal**). The original proceedings sought a review of decisions by the QBCC to disallow two statutory insurance claims made in respect of defective residential construction work. The tribunal, at first instance, dismissed the applications and the appeal tribunal upheld that dismissal.

Mr Seirlis was the director of Terry Seirlis Constructions Pty Ltd (**TSC**) which, as trustee of the Terry Seirlis Family Trust, became the owner of 10 lots of land for a townhouse development. TSC entered into a building contract with CMC Brisbane Pty Ltd (**CMC**) to construct the 10 townhouses. On 4 October 2001, the QBCC issued 10 certificates of insurance for each lot to TSC under its statutory insurance scheme. On 27 October 2005, the trustee of the family trust was changed from TSC to TSPD Pty Ltd (**TSPD**), another company of which Mr Seirlis was a director.

On 23 January 2004, TSC submitted an insurance claim to the QBCC for defective residential construction work on two lots which was refused on 31 July 2007. Prior to the claims being determined, TSC sold the two lots in question to third parties on 30 January and 4 February 2005. TSC was subsequently wound up by the court on 31 July 2006.

On 11 October 2007, receivers and managers were appointed to TSPD which triggered a removal of TSPD as the trustee under the family trust deed. On 16 October 2007, UKL Pty Ltd (**UKL**) was appointed the new trustee of the family trust, another company which Mr Seirlis was a director. On 2 June 2008, Ties Group Pty Ltd (**Ties Group**) entered into a deed of assignment by which it purported to take from TSC (in liquidation) the benefits of any rights under the certificates of insurance (particularly the two insurance claims).

The Seirlis Companies sought before the tribunal and appeal tribunal the loss in value of each lot, which they assessed to be $200,000 and $160,000. The Seirlis Companies then appealed to the Supreme Court claiming that the tribunal and appeal tribunal made errors of law.

Decision

The court refused the application for leave to appeal. The two notable errors of law claimed were separated into a 'practical completion' category and a 'trust property' category.

Practical Completion

Under the statutory insurance scheme the time limit for making a claim, for the defects in question, was seven months from the date of practical completion. The definition of 'practical completion' in the policy was, *'unless the context suggests otherwise, is that stage, in the opinion of BSA, when the residential construction work becomes fit for intended use or occupation'*.

The Seirlis Companies claimed that the appeal tribunal did not make any finding in relation to the whether the work was *'fit for intended use or occupation'* in determining the date for practical completion, which in turn was relevant to whether the claim was made outside the time limit. The tribunal dealt with this issue and found that the time limit for the claim should commence from the date of practical competition as certified by the architect (ie the certificate of practical completion). The Seirlis Companies relied on expert evidence of their own which disputed that, however the tribunal found a number of deficiencies with the expert's evidence. The appeal tribunal interpreted this examination of the tribunal, as the tribunal implicitly preferring some evidence over another to determine when practical completion was reached and found that this was not an error. This was upheld by the court.

Additionally, the Seirlis Companies asserted there was another error of law when the appeal tribunal found that section 67(6) of the *Domestic Buildings Contract Act 2000* (Qld) (**DBCA**) did not apply to the definition of 'practical completion' in the insurance policy. TSC and CMC were involved in early litigation where it was found that the DBCA definition did apply to the construction contract. However, the court found that this did not necessarily mean that it applied to the insurance policy and was instead a matter of contractual construction. The court found that the context of the policy did not suggest that the definition contained in the DBCA should apply over the express definition contained in the policy. Therefore, it was not an error of law by the appeal tribunal.

Rights under the statutory policy as trust property

The Seirlis Companies' claim in the tribunal proceeded primarily on the basis that UKL was the appropriate claimant as current trustee of the family trust, and the benefit of the claim was the property of the family trust. Alternatively, the Seirlis Companies argued that the claim was a chose in action that was capable of being assigned.

Under the insurance policy the 'insured' was defined to mean the owner of the land and the 'owner' was defined to mean the registered owner of the land under the *Land Title Act 1994* (Qld).

The court found that the insurance claim was capable of forming trust property, namely because the claim was made by the owner of the land as trustee and the policy did not preclude the insured from being a trustee. The court stated that if the owner of the real property on which the relevant construction took place was the trustee of a trust at the time the claim was made, it follows the claimant must be the trustee from time to time of that trust. While the court did find in favour of the Seirlis Companies on this point, it nevertheless deemed that there was no consequence in this finding and it was not necessary to determine whether the appeal tribunal failed to consider this correctly.

| back to *Contents*

VICTORIA

Limitations of Certiorari – no legal consequences, no remedy

Bald Hills Wind Farm Pty Ltd v South Gippsland Shire Council [2020] VSC 512

Owen Cooper | Christian Camilleri

Key point

Relief through judicial review may not be available where a reviewable decision does not have a legal effect or consequence for the party seeking relief. An adverse effect on a party's reputation alone is not enough.

Facts

Bald Hills Wind Farm Pty Ltd (**operator**) owns and operates a 52-turbine wind farm in South Gippsland.

A group of residents who lived nearby complained to the South Gippsland Shire Council (**Council**) under section 62 of the *Public Health and Wellbeing Act 2008* (Vic) (**Act**) that the wind farm created an acoustic nuisance which adversely impacted on their personal comfort and wellbeing (**complainants**).

The Council conducted an investigation into the complaints and ultimately passed a resolution which recorded that:

- it was satisfied there existed a nuisance of the kind alleged by the complainants, albeit only intermittently; and
- the matter was better settled privately,

(**Resolution**). The Resolution and the Council's barrister's opinion on which the Resolution was based were made public.

In these proceedings, the operator sought:

- judicial review of the Council's decision to pass the Resolution on the grounds that the decision was affected by jurisdictional error; and
- an order:
  - in the nature of certiorari quashing the decision; or
  - that the Resolution is invalid and of no force or effect.

Decision

The court dismissed the proceedings. In reaching that decision, it concluded as follows.

- The operator had standing to seek judicial review as it had a special interest in the subject matter of the Resolution as the owner and operator of the wind farm and because the Resolution affected the operator's reputation.
- Although a nuisance was found to exist, the Council decided to take no action in respect of that nuisance and advised the complainants of various other actions they could take privately.
- On that basis, the Council's decision was not amenable to certiorari because it had no immediate legal effect or consequence for the operator. The adverse effect on its reputation, whilst acknowledged by the court, is not a legal effect that can be quashed by an order of the court.
- In any event, the Council did not err in performing its statutory task under section 62(3) of the Act in its investigation, and therefore the Council's decision was not affected by jurisdictional error, such that there was no basis for the court to overturn the decision.

| back to *Contents*

Accord and satisfaction agreements can extinguish a principal's liability under SOPA, if valid

Citi – Con (Vic) Pty Ltd v 8-10 New Street Richmond Pty Ltd [2020] VCC 1161

Jeanette Barbaro | Tom Johnstone | China Waters

Key point

An accord or satisfaction agreement (or settlement agreement) will not be found to restrict the operation of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) if the agreement has the requisite intention from both parties and is directed at the genuine resolution of a dispute.

Facts

8-10 New Street Richmond Pty Ltd (**owner**) engaged City-Con (Vic) Pty Ltd (**builder**) for the construction of apartments. The builder encountered delays during construction and claimed a number of extensions of time to the date for practical completion. The validity of the builder's claims for extensions of time was disputed, and the owner claimed $179,999 in liquidated damages for these delays.

Representatives of the parties met and resolved that the owner would not claim further damages if the builder reached practical completion by July 2019. The representatives then exchanged text messages

confirming this agreement and that the builder would pay the $179,999 owed in damages via GST deductions from payment claims. The owner, in reliance upon the text messages, withheld GST from six payment claims between April and November. The builder subsequently claimed the amount which had been withheld.

Decision

The owner conceded that it was indebted to the builder for the withheld GST payments but argued that the text conversation between the representatives established a valid agreement for accord and satisfaction which extinguished its liability to the builder under the payment claims.

The owner claimed that the builder's failure to complain about the withheld GST after the agreement showed acceptance to the agreement. In response, the builder claimed the text messages were merely preliminary discussions and there was no actual agreement. The builder also claimed that the accord and satisfaction agreement was invalid in that:

- it was a variation to the contract and did not comply with the contractual requirements for variations as it was not signed; and
- it breached section 48 of the Act as it excluded, modified or restricted the operation of the Act by preventing the builder from receiving money owed under a payment claim.

The court dismissed the proceeding and found in favour of the owner.

The court held that the text conversation constituted an accord and satisfaction agreement and the necessary requirements of a valid agreement were satisfied. Accord and satisfaction is an agreement between parties for the acceptance of something in place of a cause of action and its existence is a question of fact that turns upon the parties' intentions. Her Honour held that the builder's unequivocal text responses demonstrated the requisite intention to be bound by the agreement. Despite the informal nature of the agreement over text, the fact the parties were discussing significant sums of liquidated damages strongly indicated an intention to be bound, as did the builder's post agreement conduct by failing to pursue the owner for the withheld GST amounts.

The court rejected both the builder's arguments regarding the accord and satisfaction agreement being a variation to the contract and a breach of section 48 of the Act.

Accord and satisfaction agreements operate to create a new, entirely separate agreement to the existing contract. The accord and satisfaction agreement is not a variation to an existing contract, and therefore the provision requiring variations to be signed did not apply. Her Honour also held that even if that provision did apply, the builder would be estopped from denying the existence of the agreement because the owner relied to its detriment upon the assumption that it would not be liable if it failed to pay GST, which was induced by the builder.

With regard to section 48 of the Act, the court held that the text message conversation, on a literal interpretation of the section, did restrict the operation of the Act. However, her Honour held that section 48 did not exist to prevent a party from relying on an accord and satisfaction agreement, if such agreement was directed at the genuine resolution of a dispute, rather than the exclusion, modification or restriction of the operation of the Act. Her Honour held that the court should not deter parties from resolving disputes under the Act and rather further the purpose of the Act by facilitating the efficient resolution of payment disputes.

| back to *Contents*

Emailed payment claims and reference dates?

Pelligra Build Pty Ltd v Australian Crane & Machinery Pty Ltd [2020] VCC 545

Jeanette Barbaro | Tom Johnstone | China Waters

Key points

Parties should be wary that a contractor may have a right to serve a payment claim by email, despite the contract saying otherwise.

Parties should also be careful when using standard form contracts and ensure that the contract reflects their true intentions regarding how payments are to be made (whether on a milestone or regular basis).

A court will not need to undertake an assessment about whether the particular work for a milestone has been completed for a reference date to arise; a reference to a milestone in a payment claim is sufficient.

Facts

Pelligra Build Pty Ltd (**builder**) was a party to a Master Builders Association GCC-5 standard form contract with Australian Crane & Machinery Pty Ltd (**owner**). During the course of the works, the builder submitted numerous payment claims via email to the owner for works under the contract to which the owner failed to pay or provide payment schedules.

The owner argued that the invoices did not classify as payment claims because (among other things):

- service of notices via email was expressly prohibited under the contract; and
- no reference dates had arisen under the contract because the claims were not submitted in accordance with the milestone payments schedule.

The issue regarding reference dates arose because the contract had inconsistent payment terms in that the terms and conditions referred to payment every 10 days from the start of the works, but also included a 'progress payments schedule'. The builder relied on the terms and conditions to claim that the reference dates arose every 10 days from the start of the works while the owner argued that a reference date arose under the contract only when the works for each milestone had been completed.

Decision

Service by email

The court held that the *Electronic Transaction (Victoria) Act 2000* (Vic) (**ETA**), which permits service by email, does not of itself negate the express terms of the contract which prohibited service by email. This is because the owner had not consented to the information being given by means of electronic communication (which is a requirement under section 8(2)(b) of the ETA Act for that Act to apply).

Nonetheless, the court held that the payment claims had been validly served by email. The court came to the view that parliament would not have intended a standard form clause in a building contract to frustrate the rights given to contractors under the *Building and Construction Industry Security of Payment Act 2002* (Vic) in circumstances where the relevant payment claim had in fact come to the attention of the owner, even if not by an authorised means of service. The court echoed the reasoning in *Metacorp v Andeco Construction* [2010] VSC 199, where Vickery J stated that it would border on absurdity to allow a party, which was in fact able to respond to a claim, have it assessed and have a payment schedule prepared, to be in a position where the court may declare the claim invalid because of improper means of service.

Reference dates

The court held that, because the milestone schedule in the contract represented a more immediate expression of the parties' intentions than the standard form clauses, the reference dates should be determined by the completion of each milestone.

As to whether works under each milestone had in fact been completed, the court held that reference to the milestone in a payment claim was sufficient and that the court did not need to undertake an assessment about whether the particular work for that milestone had been completed for a reference date to arise.

| back to *Contents*

Linked claim regimes – are they valid?

Transurban WGT Project Co v CPB Contractors Pty Limited [2020] VSC 476

Owen Cooper | Tom Johnstone | Anna Stephenson

Key point

The validity of linked claims regimes typically included in PPP and other major project contracts has been called into question as a result of an arguable contravention of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**SOP Act**).

PPP and other major project contracts often contain linked claims regimes, under which a claim under one contract is contingent on the outcome of an equivalent claim being made under another contract. For example, in PPP projects the downstream D&C contract typically contains a linked claim regime which makes claims under the D&C contract contingent on the outcome of an equivalent claim being made under the upstream Project Deed. Similar arrangements are often used between head contracts and major subcontracts, and between building contracts and development agreements or agreements for lease.
In PPP projects linked claims regimes generally:

- require that at the time of making a claim, the downstream contractor is to notify Project Co of whether the claim is a linked claim;
- require Project Co to pursue the related claim upstream against the State pursuant to the upstream contract; and
- regulate the amount to which the contractor is entitled to recover from Project Co, by reference to the amount which Project Co was able to recover from the State upstream.

Although this case did not determine the issue directly, the case nevertheless shows that the fact that downstream relief in relation to linked claims is contingent upon the receipt and amount of upstream benefits arguably invalidates linked claims regimes as *'pay when paid'* provisions which are prohibited under the SOP Act.

Facts

Transurban WGT Project Co (**Project Co**) and CPB Contractors Pty Limited (**CPB Contractors**) are party to the D&C Contract for the Westgate Tunnel PPP Project. Following the discovery of PFAS contamination within and in the vicinity of the project area, CPB Contractors made a number of claims against Project Co in relation to that discovery and the inability to dispose of the PFAS contaminated soil to allow tunnel works to commence.

In accordance with the process for pursuing a dispute in relation to a linked claim under the D&C contract:

- CPB Contractors notified Project Co that it was making linked claims in relation to the PFAS contamination and ultimately initiated arbitral proceedings; and
- Project Co initiated upstream arbitral proceedings against the State in relation to those linked claims.

As typical under downstream PPP contracts, the linked claims regime under the D&C Contract contained a 'suspension clause' which provided that while a linked dispute was on foot, the linked dispute would not be progressed under the D&C Contract while the related dispute under the upstream project agreement was in progress.

Despite this provision being included in the D&C Contract, CPB Contractors sought to pursue the downstream arbitration whilst the upstream arbitration was still on foot, contending that the suspension clause, and the linked claims regime more generally, was invalid because it contravened section 13 of the SOP Act which renders ineffective *'pay when paid'* clauses in construction contracts.

This case involved an application from Project Co seeking:

- a declaration that the suspension clause was valid; and
- an injunction restraining CPB from commencing arbitral proceedings on the basis of the application of the suspension clause.

Decision

The court refused the application by Project Co finding that the subject matter of the proceeding fell within the scope of the arbitration agreement between the parties, reaffirming the position that the court's power to intervene in matters governed by the *Commercial Arbitration Act 2011* (Vic) is very limited. This means that the downstream arbitral tribunal will make a determination as to its jurisdiction to resolve the matter and, to the extent the tribunal finds that it has such jurisdiction, will make an award as to the enforceability of the suspension clause under the veil of confidentiality that arbitration affords disputing parties.

While no decision was made as to the validity of the suspension clause or the linked claims regime more generally, downstream contractors will now be alive to the argument that the commonly used linked claims regime under downstream PPP contracts contravenes section 13 of the SOP Act and are therefore invalid. This argument could be raised by downstream contractors in order to leverage a joinder of the upstream arbitral proceedings and garner enhanced control of the resolution of the dispute.

To the extent that the downstream arbitral tribunal finds in favour of Project Co and absent a joinder of the upstream and downstream arbitral proceedings, Project Co will be required to run two separate arbitrations in relation to the same subject matter, which will result in additional legal fees, additional internal costs, and a heightened risk of inconsistent arbitral awards being granted in each proceeding.

| back to *Contents*

Contributing partners

Email *firstname.lastname@minterellison.com*

Andrew Hales
Partner
T +61 2 9921 8708
M +61 470 315 319

Andrew Orford
Partner
T +61 7 3119 6404
M +61 400 784 981

Michael Creedon
Partner
T +61 7 3119 6146
M +61 402 453 199

David Pearce
Partner
T +61 7 3119 6386
M +61 422 659 642

Peter Wood
Partner
T +61 3 8608 2537
M +61 412 139 646

Owen Cooper
Partner
T +61 3 8608 2159
M +61 412 104 803

Jeanette Barbaro
Partner
T +61 3 8608 2515
M +61 413 427 265

Construction Law Update editor
Sophie Wallwork (Sydney)
T +61 2 9921 4039

ME_178606657