# Construction Law Update

Oct - Dec 2021

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# In the Australian courts

## COMMONWEALTH

### Australian court refuses to enforce foreign arbitration award

#### *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* [2021] FCAFC 110

*Andrew Orford | Chris Hey | Oliver Waddingham*

### Key point and significance

Under the *International Arbitration Act 1974* (Cth) (**Act**), Australian courts have discretion whether or not to enforce a foreign arbitral award. However, that discretion is not broad-ranging or unlimited.

A court may exercise this discretion by refusing to enforce a foreign award where the grounds for resisting enforcement specified in the Act are established. This may include circumstances where the arbitral tribunal has not been appointed in accordance with the processes agreed by the parties.

### Facts

#### Background

This case is an appeal of the decision of the Federal Court handed down on 5 August 2021*: Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd (No 2)* [2020] FCA 1116 (**Primary Judgement**).

The appellant Hub Street Equipment Pty Ltd (**Hub**) and the respondent Energy City Qatar Holding Company (**ECQ**) entered into a contract for Hub to supply and install street lighting and furniture in Doha, Qatar (**contract**). The contract required ECQ and Hub to refer disputes to an arbitration committee consisting of three members, one appointed by each of ECQ and Hub, within 45 days of receiving a written notice from the other to commence arbitration proceedings. The third member was to be mutually chosen by the two elected members, failing which the appointment of the third member was to be referred to the Qatari Courts.

In August 2011, ECQ made an advance payment to Hub in the sum of $820,322.16. ECQ subsequently decided not to proceed with the contract and demanded repayment which Hub ignored. ECQ did not issue Hub with a notice to commence arbitration proceedings as required by the contract. Instead, it filed a statement of claim in a Qatari court, seeking orders that the court appoint a tribunal of three arbitrators pursuant to the Qatari Civil Procedure Code. The Qatari Court appointed an arbitral tribunal (**Tribunal**). Hub did not participate in the court or arbitration proceedings. The Tribunal issued an award, in Arabic, directing Hub to repay ECQ the advance payment in addition to compensation and arbitration fees.

#### The proceedings

ECQ applied to enforce the Tribunal's as a foreign award in Australia under section 8(3) of the Act. The primary judge entered judgment for ECQ against Hub and ordered Hub pay the cost of the proceedings. Hub appealed the Primary Judgment.

### Decision

The Court of Appeal allowed Hub's appeal and set aside the Primary Judgement, replacing it with an order that ECQ's application to enforce the award of the Tribunal be dismissed.

The Court of Appeal began by considering whether the Tribunal was appointed in accordance with the parties' agreement. The Court of Appeal disagreed with the Qatari Court's finding that ECQ had sought to invoke the procedure for appointing a tribunal under the contract. Although the Court of Appeal could not overturn the Qatari Court's decision, it concluded that the court may refuse to enforce the award if the grounds to do so under the Act are made out. The Court of Appeal determined that Hub had demonstrated, on the balance of probabilities, that the Tribunal had not been appointed in accordance with the contract and therefore the ground for non-enforcement contained in section 8(5)(e) of the Act had been established.

As to the issue of the court's discretion to enforce a foreign award, the Court of Appeal noted that there was no authoritative statement in Australia as to the nature of the discretion; however, it accepted a discretion did

exist. The Court of Appeal did not define the discretion, however, noted that it is not broad-ranging or unlimited. With this in mind, the Court of Appeal determined that the fact the arbitral proceedings were conducted in Arabic and not in English did not prejudice Hub, as it received notices of the arbitration in English and had chosen not to participate. This could be contrasted to the question regarding the composition of the Tribunal, which had not been undertaken in accordance with the contract. The Court of Appeal considered this to be *'fundamental to the structural integrity of the arbitration'* and established a ground for non-enforcement under the Act.

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# NEW SOUTH WALES

## Pizza fight: stay applications and non-exclusive jurisdiction clauses

### *Joshan v Pizza Pan Group Pty Ltd [2021]* NSWCA 219

*Jeanette Barbaro | Tom Kearney | Xavier Vale*

#### Key point

A non-exclusive jurisdiction clause is not a significant factor in favour of granting stay applications under the Service and Execution of Process Act 1992 (Cth) (**Act**). A court may grant a stay application under the Act if, on the balance of probabilities, a defendant shows that a court in another state is the appropriate court.

#### Significance

If parties want to determine the jurisdiction of any dispute they should ensure agreements have exclusive jurisdiction clauses. It is harder for court to grant a stay application under the Act if parties agree to the exclusive jurisdiction of a particular state.

##### Legislation

Section 20 of the Act provides:

> *(3) The court may order that the proceeding be stayed if it is satisfied that a court of another State that has jurisdiction to determine all the matters in issue between the parties is the appropriate court to determine those matters.*
>
> *(4) The matters that the court is to take into account in determining whether that court of another State is the appropriate court for the proceeding include:…*
>
> *(d) any agreement between the parties about the court or place in which the proceeding should be instituted*

#### Facts

Pizza Pan Group (**franchisor**) and Joshan Transport (**franchisee**) entered into a franchise agreement on 14 June 2017 to operate a Pizza Hut restaurant in Salisbury, South Australia. Mr Ranjodh Joshan and Mrs Jasbir Joshan entered into a franchise guarantee in favour of the franchisor (**guarantors**).

The franchise agreement and franchise guarantee contained a clause providing that *'the parties agree to submit to the non-exclusive jurisdiction of the courts of New South Wales'*.

The business failed and the franchisor brought proceedings in NSW. The guarantors applied for a stay of the NSW proceedings under section 20(3) of the Act. The NSW District Court did not grant the stay application and the guarantors appealed to the NSW Court of Appeal.

#### Decision

The Court of Appeal granted the application to stay the NSW proceedings under section 20(3) of the Act, determining that the Supreme Court of South Australia was the appropriate court.

### Not exclusive jurisdiction clauses

The court found that the trial judge placed too much emphasis on the non-exclusive jurisdiction clauses. Unlike exclusive jurisdiction clauses, non-exclusive jurisdiction clauses do not prevent a party from bringing a case in another jurisdiction or force litigation in a particular jurisdiction. The court held that non-exclusive jurisdiction clauses are not an agreement within the meaning of section 20(4)(d) of the Act.

In those circumstances a court will consider the other factors in section 20(4) of the Act, including the places of residence of the parties and witnesses, place where the subject matter of the proceeding is situated and the law that would be most appropriate to apply in the proceeding.

### Level of proof: balance of probabilities

The trial judge held that the stay application required a *'clear and compelling'* basis.

The Court of Appeal rejected this and said that under the Act the guarantors only needed to prove their case on the balance of probabilities.

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## Specific Performance: historical breaches and hypotheticals do not cut it

### *Paolucci v Makedyn Pty Ltd* [2021] NSWCA 215

*Andrew Hales | Nicholas Grewal | Jonin Ngo*

### Key points

- Historical breaches (which have been cured) are not a basis for an order for specific performance or statutory damages under section 68 of the Supreme Court Act (known **as Lord Cairns' Act damages**).
- A court is not permitted to in effect rewrite or reshape the bargain entered into between the parties.
- An order for specific performance would not necessarily be granted even where the other party had misconstrued the interpretation of a contract.
- Statutory damages under section 68 of the Supreme Court Act are a discretionary award (cf where common law damages are as of right). Even if the preconditions to entitlement for these damages are satisfied, the award of these damages is at the discretion of the court.

### Facts

This case concerns an appeal regarding the availability of specific performance or Lord Cairns' Act damages under section 68 of the *Supreme Court Act 1970* (NSW), which had been rejected by the trial judge at first instance.

In 2015, the appellant, Mrs Paolucci, and the respondent, Makedyn Pty Ltd, entered into a series of contracts involving a parcel of land in western NSW pursuant to which the appellant agreed to transfer the land to the respondent on the condition that, after the land had been subdivided, two lots of the land be retransferred and the respondent would build a house and a 'duplex' on those lots. Under those contracts, the respondent also had to prepare layout plans for the house and the duplex (which were only provided to the appellant in October 2018).

The transfer and subdivision occurred but not the retransfer and the construction of the house and duplex. This was delayed partly due to the dispute between the parties as to the dimensions of the duplex.

The appellant's primary argument was that the respondent had failed to provide the layout plans for the duplex promptly and that, had the respondent done so, the dispute between the parties concerning the dimensions of the duplex would have crystallised and been resolved promptly, with the result that the respondent would have by the time of the trial built what it had promised to build. On this basis, the appellant says that she was entitled to an order for 'partial' specific performance, involving a transfer to her of the lots created by the subdivision, plus damages reflecting the difference in value of the vacant lots compared to the lots with residences constructed on them and lost rent, rather than an order for full performance of the entirety of the parties' bargain. The relief sought by the appellant was different to the original bargain between the parties.

There were many other factual issues raised by the appellant but these were not considered to be material by the trial judge to the relief sought by the appellant.

### Decision

The Court of Appeal dismissed the appeal and held that the appellant's primary submission, which hypothesises what would have happened had she been provided with the layout plans in a timely manner, is contrary to basic principles. Hypothesising may be deployed in questions of causation and damages at common law but not when seeking specific performance. If the appellant's submission was accepted, this would have triggered a claim for common law damages. However, this was not articulated in the trial at first instance nor sought on appeal.

#### Should specific performance be ordered?

The court held that there was no basis for specific performance because:

- the layout plans had already been provided (in 2018). No court in 2019 or 2020 would order the respondent to provide the layout plans which had already been provided. This is so even if the respondent had misconstrued the provisions of the contract regarding the dimensions of the duplex;
- even if there was an extant (ie continuing) breach (being that the respondent had not commenced construction of the house and duplex), it was reasonable for the respondent not to do so until the dispute between the parties as to the dimensions of the duplex was resolved;
- the relief sought by the appellant was quite different from what the parties had bargained for; and
- once the dispute between the parties as to the dimensions has been resolved, there is nothing to suggest that the respondent will be unready or unwilling to build the house and duplex.

#### Should Lord Cairns' Act damages be awarded?

The court held that there is no basis for an award of statutory damages because the precondition to the discretion for an order for these damages (that is either the court has power to grant an injunction or order specific performance) was not satisfied.

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## Less work than originally contemplated? Who bears the cost?

### Day v Quince's Quality Building Services Pty Ltd [2021] NSWCATAP 296

*Andrew Hales | Claire Laverick | Tony Issa*

### Key point & Significance

Where a contract provides for a reduction in the contract sum for omitted or decreased works, the relevant consideration is a common sense analysis of whether works have been omitted or decreased, and not whether work is done but in a different manner to achieve the same or a similar result.

This decision also confirms that contract rates are a ceiling for quantum meruit claims arising where parties do not document variations in writing.

### Facts

On 17 May 2017, Mr & Mrs Day (**owners**) entered into a Residential Building BC4 contract with Quince's Quality Building Services Pty Ltd (**builder**) for the construction of duplex dwellings.. Originally, the builder had contracted to supply and place two underground rainwater tanks and two 'Atlantis Flo' detention systems under the decks. The builder had allowed $56,500 for the cost of these works. However, at the builder's suggestion and with approval from the owners, the builder installed an above-ground rainwater tank at the side of the building at a cost of $40,480. In a similar way, the supply and installation of hardwood timber cladding and painting services originally agreed was later substituted with a different product that in turn required less labour. A dispute arose between the parties in respect of defects in the builder's work and adjustments to the contract sum.

On 18 October 2020 the owners commenced proceedings in the NSW Civil and Administrative Tribunal. The owners argued that in respect of the hydraulics, external cladding and painting, the 'works' were 'decreased'

or there were 'omissions' from those works, and so the contract price ought to be reduced. Reliance was placed on clause 14(f) of the contract which provided:

> *f) Where the **works are decreased or omissions from the works are made** the cost of the **work now not required** is to be **deducted from the contract price**. Cost in this case means the actual cost of labour, subcontractors or materials save* [sic] *by the Builder because the work is **now not required to be done**. No other deduction is required by reason of the work aspect of work being decreased or omitted.*

The builder argued that the clause ought to be read as a whole. The only savings or credits that arose under the clause were those works, being a decrease or omission from the work, 'now not required to be done'. The builder also noted that the clause makes clear that 'no other deduction is required by reason of the work or aspect of the work being decreased or omitted'.

At first instance, the Tribunal found for the builder. It determined that the owners had contracted for the supply of a rainwater system, they were provided with a rainwater system, albeit a system that was materially different to the 'works', and the builder was entitled to retain the difference in the costs between what was contracted for and what was in fact provided. The Tribunal applied the same rationale for the external cladding and painting. The Tribunal's decision was reached on the basis that:

- clause 14(f) of the contract was enlivened where work was not done, not the situation where work was done but in a different manner to achieve the same or a similar result;
- ultimately, the work itself was still done and therefore could not fit into the stipulation in clause 14(f) that the work was 'not required to be done'; and
- in a lump sum contract, both parties are at risk where work done is more expensive or cheaper than the allowance in the contract.

The owners appealed the Tribunal's decision on four grounds:

1. the Tribunal misconstrued clause 14 and should have found that where the works are decreased or omissions from the works are made, the cost of the work not now required is to be deducted from the contract price (**Ground One**);
2. the Tribunal failed to determine material issues raised by the owners, being a damages claim in respect of a 162 working day delay in completing the works (**Ground Two**);
3. the Tribunal erred in finding that the builder be remunerated on a quantum meruit basis and the basis on which that was to be calculated. Separately, the owners also asserted that the Tribunal did not turn its mind to the question of the reasonableness of the amounts claimed by the builder, and failed to determine that the contract rates provided the ceiling upon reasonable remuneration on a quantum meruit basis in circumstances where the parties did not sign written details of the variations as required by the contract (**Ground Three**); and
4. the Tribunal did not afford procedural fairness or conduct proceedings in accordance with the rules of natural justice (**Ground Four**).

## Decision

The Appeal Panel allowed the appeal, set aside the Tribunal's original decision and remitted the matter to the Tribunal for redetermination.

### Ground One: Construing clause 14(f)

The Appeal Panel found for the owners. The Tribunal had erred in its approach and construction, and it ought to have directed its attention to whether the works had decreased, or whether there were omissions from the works, such that there was 'work not now required' to be done. This construction made sense in the context of a building contract in which the parties have agreed that the scope of the 'works' may be varied. The owners were therefore entitled to a reduction in the contract sum.

The Appeal Panel observed that when undergoing the exercise of construing commercial contracts, a court or tribunal will apply a presumption that the parties did not intend the contract's terms to operate

unreasonably and a common sense approach must be taken. On this basis, the Appeal Panel found that clause 14(f) of the contract had to be read in conjunction with clauses 14(g), (h) and (i) which provided:

> *g) Where the work to be done is increased, the cost of the extra work is to be added to the contract price. The Builder can choose when and how often to claim payment for variation work and is not required to wait until the next stage claim.*
>
> *h) Where the price has not been previously agreed for variation work and the price to be paid for the work will be the cost as calculated in accordance with Sub-Clause (i) below, together with the allowance specified in Item 1 of Schedule 2 for overhead and profit.*
>
> *i) The cost referred to in Sub-Clause (h) above, unless otherwise agreed, will be calculated as follows:*
>
> > *i) for work by the builder's employees, the rates for such labour are those set out in Item 2 of Schedule 2. If no rates are shown, then the rates to be used are the rates published by the Master builders Association of NSW current at the time the variation is made; …*

Considering this, the Appeal Panel found that if the builder's interpretation was correct:

- clauses 14(h) and (i) would never have any work to do; and
- no party would ever agree on a variation price, as there would be windfall gains to a builder if the costs of the works decreased, and windfall gains to the homeowner if the costs increased.

#### Ground Two: Failure to determine damages claim

The Appeal Panel found for the owners. The Tribunal had identified the claim, but the Appeal Panel found it had failed to consider the issue.

#### Ground Three: Remuneration on a quantum meruit basis

The Appeal Panel found for the owners. The Appeal Panel applied *Paraiso v CBS Build Pty Ltd* [2020] NSWSC 190 (which itself had applied *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32), to find that contract rates are a ceiling for quantum meruit claims arising where parties do not document variations in writing. The Appeal Panel found that the Tribunal did not have regard to the upper limit imposed by clauses 14(h) and (i).

#### Ground Four: Procedural fairness

The Appeal Panel found for the builder. The owners' primary submission was that the Tribunal failed to allow the owners to cross-examine the builder's witnesses. The Appeal Panel found that the owners were given the opportunity to cross-examine the builder's witnesses on several occasions, but failed to do so, and could not see what more the Tribunal could have said on this issue.

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## Appeal up in flames as court orders Biowood combustible cladding be removed

### Taylor Construction Group Pty Ltd v Strata Plan 92888 t/as The Owners Strata Plan 92888 *[2021] NSWSC 1315*

*Andrew Hales | Karen Hanigan | Will Ryan*

### Key Point & Significance

In an Australian first, the NSW Supreme Court has looked at compliance of a combustible cladding product, other than aluminium composite cladding (ACP). Developers and builders must understand the risks of using combustible cladding, even if it is only used as an attachment and not an integral component of a building.

These proceedings demonstrate that the National Construction Code **NCC** (formerly Building Code of Australia **BCA**) is more onerous in respect of attached combustible cladding than often assumed. If attached combustible cladding fails to comply with the prescribed fire hazard properties of the NCC, then owners may look to developers and builders to bear the cost of rectification.

The appeal was dismissed and the NSW Supreme Court, upheld the decision of the Appeal Panel of the NSW Civil and Administrative Tribunal (**NCAT**). From a technical standpoint this confirms that AS/NZ 1530.3

testing is not the only relevant test for the purpose of the BCA proving fire safety compliance of attachments on external walls. Significantly, the court went so far as to suggest that AS/NZ 1530.3 testing may not even be applicable in these circumstances.

## Facts

Taylor Construction Group Pty Ltd (**builder**) and Frasers Putney Pty Ltd (**developer**) were the builder and developer of two-multi-story residential buildings in Ryde NSW (**buildings**). The defendant is the registered proprietor of the common property of strata plan 92888 and the buildings (**Owners Corporation**).

The Owner's Corporation applied to NCAT for an order that the builder and developer carry out works to rectify defects and non-complying works and/or pay the Owners Corporation damages for the cost of rectification. The Owner claimed that by using Biowood, which is a combustible wooden cladding material on external walls of the building as architectural attachments, the appellants failed to comply with clause 2.4 of Specification C1.1 of the 2014 version of the BCA and was, therefore, in breach of the statutory warranties in section 18B(1)(c) of the *Home Building Act 1989* (**HB Act**). The Owners Corporation also claimed that Biowood was not fit for purpose in breach of the statutory warranties in subsections 18B(1)(b) and (f) of the HB Act.

### The NCAT claim

In *The Owners Strata Plan No 92888 v Taylor Construction Group Pty Ltd and Frasers Putney Pty Ltd [2019] NSWCATCD 63*, the NCAT Senior Member found that the use of Biowood combustible cladding on parts of the external walls of the buildings:

- did not comply with the BCA, including because it constituted an undue risk of fire spread via the façade of the Buildings;
- breached statutory warranties implied into residential building contracts under section 18B(1) of the HB Act;
- Biowood is not fit for purpose and breached the statutory warranty when used an attachment to a non-combustible external wall, as it presents an undue risk of fire spread and diminishes the fire resistance of the external walls.
- The Senior Member relied upon the 'common sense test' in *Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property) [2019] VCAT 286*) (the **Lacrosse decision**).
- Type A Constructions like the buildings must have non-combustible external walls. A combustible material like Biowood may only be used as a finish or lining to a wall or roof (ie an attachment) where the material is exempted under C1.10 or complies with the fire hazard properties prescribed in Specification C1.10 and among other things, does not otherwise constitute an undue fire risk via the façade of the building (cl 2.4(a)(iii)) of Specification C1.1 of the BCA).

NCAT determined that Biowood was exempt, concluding that *'the specification of AS/NZS 1530.3 test for other materials is not relevant for attachments to buildings used as external wall finishes, lining or cladding'*. Relevantly, the Senior Member noted that the combustible material in the Lacrosse decision satisfied AS/NZS 1530.3, but still was dangerously inflammable when subject to a full scale façade test. Accordingly, although Biowood did satisfy AS/NZS 1530.3, it was not exempted under C1.10 because there was a risk that Biowood would support fire spread between floor levels along the façade of the building.

The NCAT Appeal Panel upheld the Senior member's decision. Biowood was deemed not fit for purpose and breached the statutory warranties in the HB Act.

## The Court of Appeal decision

The court granted leave to appeal on the basis that the appeal raised issues of principle that may have some broader application to other cladding cases, but nevertheless dismissed the appeal.

From a construction law view, the most relevant ground of appeal was whether the Appeal Panel erred in its formulation of the test when determining whether Biowood constituted an undue risk of fire spread via the façade of the buildings. After reviewing the decision-making process undertaken by the Appeal Panel, the court found that '*The Appeal Panel's approach clarifies that a material's compliance with Specification C1.10, such as by AS1530.3 and a low Spread of Flame Index, is not determinative of whether use of that material otherwise constitutes a risk of fire spread that is unwarranted or excessive.'*

Instead, the court considered that there were a range of factors relevant which included:

- the combustibility of Biowood;
- the ignitability of Biowood;
- the rate of flame spread of Biowood; and
- the gravity of the risk.

In light of the Lacrosse decision, the court went so far as to say that the AS/NZ1530.3 test is not necessarily relevant or applicable to attachments used as external wall cladding.

On this basis, the court confirmed NCAT's determination that Biowood is a combustible material, complies with the fire hazard properties prescribed by the BCA but there is a risk that Biowood will support fire spread between floor levels on the façade of the buildings.

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## Tell me why, ain't enough to say it's just a defect

### *The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)* [2021] NSWSC 1068

*Andrew Hales | Maciej Getta | Jenny Cohen*

### Key point and significance

It is not enough to say a defect exists to establish a breach of the statutory duty of care owed under the *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**). A claimant must inform the defendant precisely how they were negligent. For example, a party could prepare a 'Scott Schedule' which lists the relevant defects, and in relation to those defects, set out the risk which the builder was required to manage, and the precautions which the builder should have taken in relation to that risk.

### Facts

#### Procedural history and background

A body corporate (**owners**) commenced proceedings against the developer and builder (**respondents**) on the basis of alleged defects in a residential strata development in Paramatta. The owners based this claim upon alleged breaches of the statutory warranties implied by the *Home Building Act* 1989 (NSW) (**HBA**).

The owners filed a notice of motion seeking leave to amend its pleadings to claim an alleged breach of the statutory duty of care created by s 37 of the Design and *Building Practitioners Act* 2020 (NSW) (**DBP Act**). This issue was first listed before the court in November 2020. The court directed the owners to serve a draft of the amended list statement and to include a Scott Schedule that identifies the defects.

The owners served the Scott Schedule in September 2021, and also circulated its proposed amended list statement which made no reference to the Scott Schedule. The draft amended list statement referred to defective work by reference to various consultants' reports.

#### Current proceedings

The respondents oppose leave being granted to the owners to plead the statutory duty of care in the manner adopted by the owners. Alternatively, the owners' contends that it was sufficient for the draft amended pleadings to identify the defects and contend that those defects bespoke a breach of the statutory duty of care. The owners claimed that a defect constituting a breach of the HBA established that defect was the result of a breach of the statutory duty of care.

### Decision

The court refused to grant the respondents leave to amend the list statement in the draft form which it proposed. The court explained that breach of the duty of care is not established by the mere fact of a defect.

Rather a plaintiff must meet the other tests for negligence established under the common law and the *Civil Liability Act* 2002 (NSW), which includes addressing whether the risk was foreseeable, not insignificant, and what a reasonable person would have done.

The court concluded that to establish a breach of a duty of care, the plaintiff should identify the specific risks that the respondent should have managed and the precautions that should have been taken to manage those risks. In relation to these proceedings, the court suggested that this requisite degree of specificity could be achieved if the owner added columns in the Scott Schedule next to each defect, to identify the relevant risk that the builder was required to manage and what the respondent could have done in relation to each risk.

It is important for defendants to know what the plaintiff says that the defendant should have done, but did not do, to give rise to the defect alleged.

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## Security of Payment: 'Other arrangements' not required to be legally binding

### *Crown Green Square Pty Ltd v Transport for NSW* [2021] NSWSC 1557

*Andrew Hales | Tom Kearney | Isobel Carmody*

#### Significance

There is inconsistent authority in NSW as to whether an 'other arrangement' for the purposes of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) requires the existence of a legally binding obligation. In this case, Henry J opined (in arguably *obiter* comments ie comments not essential to the decision) that an 'other arrangement' does not necessarily need to involve legally binding obligations, but does require some element of reciprocity or acceptance of mutual rights and obligations relating to payment for works between the parties. By this reasoning, it is possible that even though a party may not have a legally enforceable right to payment, a party could, via the Act, obtain interim payment for construction work under an 'other arrangement'.

Henry J's comments are in contrast to the finding of Ball J in *Lendlease Engineering Pty Ltd v Timecon Pty Ltd* [2019] NSWSC 685 that the arrangement must give rise to a legally binding obligation, although that obligation need not be contractual in nature.

#### Legislation

Under s 8 of the Act a party has a right to progress payments if is engaged '*under a construction contract*'.

Under s 4 of the Act a construction contract means '*a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services*'.

#### Facts

Three of the plaintiffs and the defendants were parties to a development agreement for works relating to a development linked to a train station via an underground pedestrian tunnel. The fourth plaintiff (**Crown Construction**), who was not a party to the development agreement but was a related entity to the first three plaintiffs and who had carried out works to design and install certain electronic, mechanical and fire safety services as part of the development of the tunnel, issued an invoice for payment for some of that work to one of the defendants. The relevant defendant failed to provide a payment schedule in response to that payment claim, and Crown Construction sought judgment in the amount claimed in the payment claim under the Act for that failure to provide a payment schedule.

The defendants argued that there was no construction contract between Crown Construction and the relevant defendant and, therefore, the payment claim was not a payment claim that engaged the operation of the Act. The plaintiffs argued that there was an 'other arrangement' within the meaning of s 4(1) of the Act, which could support a valid payment claim that engaged the operation of the Act.

#### Decision

There was no 'other arrangement' between Crown Construction and the relevant defendant, and therefore the payment claim was not able to engage the operation of the Act. This was because the requirement to carry out the works arose only as part of and as required by the development agreement (to which Crown Construction was not a party), and there was no evidence to support the existence of an 'other arrangement' to which Crown Construction was a party.

### What is an 'other arrangement'?

The court said in *obiter* that:

- an 'arrangement' does not need to be legally enforceable in that it must give rise to legally binding obligations in order to be captured by the inclusion of the words 'other arrangement' in the Act; **but**

- an 'arrangement' for the purposes of the definition of 'construction contract' in the Act will involve some element of reciprocity or acceptance of mutual rights and obligations (whether legally enforceable or not). This would also typically require communication or dealing between the parties on the subject matter of payment for the works (most likely the final price) and a recognition or acceptance of some ultimate right to be paid.

### Claim in respect of two construction contracts

The court opined in *obiter* that, if a payment claim purports to be made and seeks payment under one construction contract but in fact relates to the works under two contracts, the payment claim is invalid and would not enliven the Act and an adjudicator's jurisdiction under the Act.

It is not a matter which simply gives rise to a valuation exercise to be undertaken by the adjudicator, but rather is a matter for a court to determine as it goes to an issue of validity and jurisdiction. The court suggested that there needs to be common identity of the parties to the payment claim and construction contracts in question for this principle to apply.

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# QUEENSLAND

## Payment claims for works under more than one construction contract

### Ausipile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd [2021] QCA 223

*Sarah Ferrett | Tom Kearney | Isobel Carmody*

**Significance: Queensland Court of Appeal indicates in obiter that multiple contract jurisdictional arguments must be raised in the payment schedule to be adjudicated upon.**

Although this was a matter dealing with an application for summary judgment under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**) and not judicial review of an adjudication determination made under that Act, **in obiter**, the Court of Appeal stated that:

- a payment claim made in good faith and purporting to be made under one construction contract is not rendered invalid simply because at a later time (during an adjudication or otherwise), it is determined that part of the claim was, in fact, a claim under a different construction contract; and
- an allegation that the work claimed has been misdescribed in a payment claim (ie where that work relates to a different construction contract to the one the payment claim is being made under) needs to be raised in a payment schedule and cannot be argued in an adjudication response for the first time.

#### Facts

This decision was an appeal from the decision of the *Queensland Supreme Court in Ausipile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd* [2021] QSC 39 – see our Construction Law Update *here*.

At first instance, Wilson J dismissed the application for judgment under the BIF Act on the basis that:

- where a payment claim concerns more than one contract, that will be fatal to its validity under the BIF Act;
- the claimant had included in its payment claim a claim for wet cranage which it described as a variation of the subcontract between the parties;
- the claim for wet cranage was not a variation to the subcontract but rather a separate contract to the subcontract;

- the subject payment claim contained claims under two separate contracts; and therefore the payment claim was invalid under the BIF Act.

The claimant appealed that decision.

### Decision

#### Two contracts issue

The Court of Appeal decided that the wet cranage work claimed was not the subject of a fresh contract between the parties but was really a variation to the written subcontract. Accordingly, the payment claim was not invalid for concerning more than one construction contract.

#### In obiter

In obiter, the Court of Appeal considered that an argument as to the invalidity of a payment claim for the purposes of the BIF Act on the basis that it dealt with work under more than one construction contract (where that payment claim purports to or appears on its face to claim for works under only one construction contract) should be raised in a payment schedule at first instance. The Court of Appeal suggested that a respondent cannot simply sit by and raise such a point later, if it is not put in a payment schedule, and that such an argument *'is a matter for adjudication after having been raised in a payment schedule'*. The Court of Appeal also considered in obiter that a payment claim which *'purports to be made under one contract is not rendered invalid simply because at a later time (whether during adjudication or otherwise) it is determined that part of the claim was, in fact, a claim under a different contract'*.

It is unclear how these comments might interact with the generally applicable position that, notwithstanding limitations in the BIF Act on raising new reasons why the claimed amount is not payable by a respondent in an adjudication response, jurisdictional arguments may be raised for the first time in an adjudication response even if they have not been raised in a prior payment schedule (see, eg *National Management Group Pty Ltd v Biriel Industries Pty Ltd* [2019] QSC 219, [200]; also in relation to analogous legislation in New South Wales, see *Acciona Infrastructure Pty Ltd v Holcim (Australia) Pty Ltd* [2020] NSWSC 1330, [11]). The Court of Appeal's judgment does not include express consideration of the cases that are authority for that proposition.

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## Is it a direction to undertake a variation or a notice to rectify defective work?

### *Built Qld Pty Ltd v Pro-Invest Australian Hospitality Opportunity (ST) Pty Ltd* [2021] QSC 224

*David Pearce | Megan Sharkey | Gemma Galloway*

### Key points

Whether correspondence can be properly characterised as a direction to undertake a variation or a notice to rectify defective work will depend on the performance requirements under a contract. These requirements must be closely examined and extrinsic material will only be admissible where there is ambiguity and the extrinsic material establishes an objective fact.

### Facts

The plaintiff Built Qld Pty Ltd (**Built**) was the contractor and the defendant Pro-Invest Australian Hospitality Opportunity (ST) Pty Ltd (**Pro-Invest**) was the principal in a design and construct contract for the development of a hotel located at 168-184 Wharf Street, Spring Hill (**Spring Hill Hotel**). Pro-Invest issued notices to Built dated 11 August 2016, 16 August 2016 and 17 September 2016, requiring Built to install an air-conditioning system (**Mechanical Services System**) which allowed mode control in each room.

The works under contract achieved practical completion on 3 March 2017. Following this, Built commenced proceedings against Pro-Invest for the costs of carrying out the work to the Mechanical Services System and seeking an extension of time, delay damages or the return of any liquidated damages set-off by Pro-Invest. In response, Pro-Invest counterclaimed for alleged defects, additional liquidated damages and alleged lost wages.

This case concerned a number of issues in relation to:

- the interpretation of the contractual documents, including when extrinsic material can be adduced to determine the objective requirements of the contract;
- alleged variations to the Mechanical Services System, bathroom design, back of house ceiling and bathroom light switches;
- alleged non-mechanical defects and Mechanical Services System defects; and
- liquidated damages.

### Mechanical Services System

The most significant issue in dispute concerned the Mechanical Services System.

### Contractor's key arguments

Built sought to adduce extrinsic material to determine the meaning of *"alternative proposal"* contained in the contract, including the invitation to tender response and pre-contractual negotiations. Built contended that the words *"alternative proposal"* used in the contract referred to a two pipe VRF heat pump system, which was unable to provide mode control (distinct from temperature control) to each guest room.

Therefore, in Built's view, on the proper construction of the contract, the Mechanical Services System was not required to provide for mode control in each individual room. Built claimed that the series of notices issued by Pro-Invest constituted a direction to undertake a variation to the Mechanical Services System under the contract. The variation caused a delay to the date for practical completion and Pro-Invest was liable to pay for the alleged variation works and delay damages.

### Principal's key arguments

Pro-Invest disputed this and contended that the notices required Built to install the Mechanical Services System in accordance with the contractual requirements. Pro-Invest argued that the contract required the Mechanical Services System to meet the performance requirements of the tender drawings and specification. A key requirement of the drawings and specification was that the Mechanical Services System be capable of mode control, enabling each guest to choose heating or cooling independently from other guests. Pro-Invest disputed that the notices amounted to a variation under the contract and argued that the notices required Built to comply with its contractual obligations.

### Defects counterclaim

Pro-Invest identified four non-mechanical related defects and 19 defects in relation to the Mechanical Services System and claimed the costs of rectifying these defects from Built.

### Liquidated damages

Pro-Invest sought payment from Built by way of additional liquidated damages calculated as a result of the correction of an error in calculating the date for practical completion. Pro-Invest contended that in calculating the adjusted date for practical completion, a five day work week was used instead of a six day work week. This meant that the period between the date for practical completion and the date of practical completion was 127 days not 113 days. Built argued that Pro-Invest could not assert that the date for practical completion was earlier once the works under contract had reached practical completion.

## Decision

The court held that the Mechanical Services System was required to include mode control. The notices issued by Pro-Invest to Built comprised a valid notice to rectify defective work and not a direction to undertake a variation. Built was required to rectify the defective Mechanical Services System at its own cost and was not entitled to the costs of carrying out that work, an extension of time, delay damages or the return of any liquidated damages set-off by Pro-Invest.

### Was the Mechanical Services System required to include mode control?

The court concluded that the extrinsic material adduced by Built was inadmissible as it went beyond the objective facts and the meaning of *"alternative proposal"* was unambiguous. The court considered the ordinary meaning of *"performance requirement"* in the context of the contract (including the tender drawings

and specification) and concluded that *"mode control"* was a performance requirement of the tender drawings and specification.

### Did the notice constitute a notice to rectify defective work or a direction for a variation?

The court considered the expert evidence at the trial that established the two-pipe VRF system that was being installed by Built was incapable of performing the mode control function. The court concluded that the notice was a valid notice to rectify defective work and that Built was required to rectify the defective system at its own cost.

### Defects counterclaim

The court approached Pro-Invest's defects counterclaim by:

- construing the contract in respect of the requirements for each item;
- considering whether each item was defective; and
- considering the cost of rectifying each defect using the rectification methods proposed by each expert.

The court held that Pro-Invest was entitled to the costs of the rectification work claimed in respect of the non-mechanical defects where Built failed to complete the work with due skill, care and diligence. The court allowed Pro-Invest's claim for rectification for 14 of the 19 Mechanical Services System defects.

### Liquidated damages issue

Pro-Invest's claim for additional liquidated damages was not made out because:

- the purported correction of the progress certificate did not correct the underlying certification of the amount of liquidated damages payable; and
- the contract did not include any provision for an adjustment in the amount of liquidated damages in these circumstances.

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## Adjudicator's further jurisdictional errors lose the battle for respondent

***Total Lifestyle Windows Pty Ltd v Aniko Constructions Pty Ltd (No 2)* [2021] QSC 231;**
***Total Lifestyle Windows Pty Ltd v Aniko Constructions Pty Ltd (No 3)* [2021] QSC 238**

*Sarah Ferrett | Hazal Gacka | Gemma Galloway*

### Key points

Courts will strictly apply the requirements of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**) in relation to adjudication applications. Where an adjudicator considers a new defence included in an adjudication response, which is not included in the payment schedule, this will result in jurisdictional error and lead to the decision being declared void.

Further, when exercising the discretion to remit the proceeding to a different adjudicator, courts will consider the dispute in the context of the parties' relationship and the purposes of the BIF Act.

### Facts

These cases concern two applications in relation to the contract between Total Lifestyle Windows Pty Ltd (**Total**) and Aniko Constructions Pty Ltd (**Aniko**) for supply and installation of windows and doors to an apartment building (**contract**). We reviewed a previous decision in relation to this contract in our June edition, which is available *here*.

Total issued several payment claims under the contract to Aniko. Aniko failed to pay Total and, consequently, Total suspended work. Aniko subsequently engaged a new contractor, Tweed Coast Glass Pty Ltd (**Tweed**), to complete Total's outstanding work.

An adjudication as to the outstanding payment claims resulted in the decision that Aniko was not required to make any payment to Total. Total challenged this decision and the court held that parts of the adjudication decision were invalid on the basis of jurisdictional error. As a result, the adjudication application was

remitted to the adjudicator. The adjudicator revised his adjudication and decided, again, that no sum was due to Total.

In its first application, Total asserted that the revised decision was again affected by jurisdictional error. In its second application, Total sought an order that the proceeding be remitted to a different adjudicator.

## Decision on First Application

The court made orders declaring parts of the revised adjudication decision to be void because the adjudicator's conclusion was affected by jurisdictional error. The court also found there was little utility in remitting the matter to the adjudicator for a third time.

### First jurisdictional error

Section 88(3) of the BIF Act requires that the adjudicator must not consider a reason included in an adjudication response that was not included in the payment schedule.

Total alleged that the adjudicator considered a new defence when the adjudicator considered Aniko's submission that there was no concluded contract with Tweed within the suspension period and therefore there was no 'removal' of any work from Total's contract until 20 May 2019 (the date of the formal contract between Aniko and Tweed). This defence was raised in Aniko's adjudication response but was not included in the preceding payment schedule. Aniko contended that the adjudicator did not consider the prohibited material but merely stated that the evidence was before him.

The court held that as the adjudicator applied an active intellectual process to Aniko's evidence and submissions (and did not simply list the material as was argued by Aniko), the adjudicator 'considered' a prohibited matter for the purpose of section 88(3) of the BIF Act.

### Second and third jurisdictional errors

Mr Morrison, a witness for Total, gave evidence that a concluded contract between Aniko and Tweed was in place prior to 20 May 2019, as Tweed was instructed to commence work on or about 14 May 2019 and provided quotations by 15 May 2019.

Total argued that the adjudicator failed to properly consider this evidence (a relevant matter he was required to consider under section 88(2) of the BIF Act) which amounted to a jurisdictional error. Aniko argued that the adjudicator considered the evidence and rejected the conclusion advanced.

The court held that the adjudicator acknowledged the evidence of Mr Morrison but did not disclose whether he accepted or rejected that evidence or explain his reasons for doing so. This contradicted the adjudicator's description of the evidence as 'key' and qualified as a jurisdictional error. Further, the consideration of this issue was a new defence and prohibited by section 88(3) of the BIF Act.

### Fourth jurisdictional error

The court held that the primary focus (on when the contract was concluded) and the secondary focus (on when Tweed commenced work) of the adjudicator's decision were not matters raised by Aniko in its payment schedule. The adjudicator therefore addressed a new defence and addressed the wrong question, or failed to properly consider the correct question, resulting in a jurisdictional error.

## Decision on Second Application

The court declined to exercise its discretion to remit the proceeding to a different adjudicator for the following reasons:

- the parties had endured four contested payment claims, three adjudications and two applications to the court and there was little utility in having another adjudicator consider the same issues;
- declaring parts of the adjudicator's decision to be void effectively leaves part of the dispute undecided;
- if the court was to remit the proceeding to a different adjudicator, the court would be remitting only one of three disputes between the parties as Total's challenge to the adjudicator's decision related to only one claim;
- given there were court proceedings on foot in respect of one claim, remitting the proceeding to a different adjudicator would mean that the parties would be litigating one claim in court and one claim in a further adjudication;

- the parties were no longer dealing with each other in respect of an ongoing project, reducing the need for expeditious, interim determinations provided for by the BIF Act;
- there was likely to be a number of substantial disputes before the new adjudicator as to Total's claims (including with respect to quantum) and the parties were likely to be dissatisfied with the adjudicator's decision;
- the costs already spent, and the costs to be spent, were likely to be disproportionate to the amounts in issue; and
- referring one claim to another adjudicator would lead to the parties fighting the claim in an adjudication before a new adjudicator on a non-final basis, and separately contesting the second claim in a court proceeding, with the third claim either abandoned or prosecuted.

The court held that, on the basis that Total was substantially successful on the issues in the proceedings, Total was entitled to costs.

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## Minds differ on which interpretation of delay costs produces a commercial result

### Santos Limited v Fluor Australia Pty Ltd & Anor [2021] QCA 204

*Andrew Orford | Matt Hammond | Oliver Waddingham*

### Key point and significance

This decision overturns a previous Supreme Court decision, emphasising the courts' ongoing focus on giving a commercial interpretation to contracts.

It is a reminder to those drafting construction contracts to ensure that contract terms are defined and applied consistently throughout the body of a contract and any annexures or schedules.

### Facts

#### Original Decision

This case is an appeal of a decision of the Supreme Court, which was reported on in our *November 2020 to January 2021 Construction Law Update*.

The dispute relates to a contract between Santos Limited (**Santos**) and Fluor Australia Pty Ltd (**Fluor**) for the engineering, procurement and construction of facilities at Santos' Surat Basin CSG project (**contract**). Santos, the principal, alleged that Fluor, the contractor, failed to achieve Mechanical Completion by the Date for Mechanical Completion (**Due Date**). Fluor continued to receive payments from Santos after the Due Date for costs it would not have incurred if Fluor had achieved Mechanical Completion by the Due Date (**MC Delay Costs**).

After exercising a contractual right to inspect Fluor's records, Santos sought repayment of $1.4 billion, including approximately $475 million of 'MC Delay Costs', which Santos says were overpaid. Fluor applied for summary judgment in relation to the claims for MC Delay Costs, and was successful in arguing that the MC Delay Costs were not 'Delay Costs' but were properly claimed, and paid, as 'Actual Costs' under the contract.

Clause 1.1 and schedule 3 of the contract contained two different definitions of 'Actual Costs'. The former expressly excluded 'Excluded Costs', however, the latter made no reference to that exclusion. The primary judge found that the appropriate definition was that in schedule 3, meaning that costs which would otherwise fall within the definition of 'Excluded Costs' could be 'Actual Costs'.

Under Clause 23 of the contract:

- Fluor was required to give Santos notice of any actual or potential failure to achieve Mechanical Completion by the Due Date;
- if a 'Delay Event' occurred that was out of Fluor's control, Fluor was able to apply for an extension of time;
- if Fluor was granted an extension to the Due Date, Santos was to pay Fluor certain costs (**Delay Costs**);

- if Fluor failed to give a notice, or applied for an extension, it was precluded from being paid for the consequences of a Delay Event; and
- Fluor was barred from making any claim 'arising out of, or in connection with, the Delay Event or any delay and disruption of the Work'.

Under clause 24 of the contract, liquidated damages were Fluor's sole liability, and Santos' exclusive remedy for Fluor's failure to achieve Mechanical Completion by the Due Date.

### Appeal

Santos appealed the decision of the primary judge. It pleaded two alternative grounds for recovery of the MC Delay Costs, being that the MC Delay Costs:

1. fell within the items 5(vi) and/or 5(vii) in the definition of Excluded Costs; or
2. were not 'properly incurred' for the purposes of the definition of 'Actual Costs' in cl 1.1, as they had to be incurred only as a result of Fluor's failure to perform its contract.

## Decision

The Court of Appeal allowed Santos' appeal, setting aside the decision of the primary judge, recognising that nothing in schedule 3 provided that costs categorised as 'Excluded Costs' should be included in the 'Actual Costs' for which Fluor was to be paid.

### Excluded Costs

The Court of Appeal accepted Santos' argument that Fluor was obliged to give a delay notice under clause 23, whether the delay was due to a Delay Event or otherwise. The Court of Appeal considered whether restrictions on Fluor making Claims 'arising out of, or in connection with, the Delay Event or any delay and disruption of the Work' (contained in clause 23.5 of the Contract) applied whether there was not a Delay Event.

The primary judge found that the additional 'delay and disruption' could only be delays relating to the Delay Event. His Honour also found that costs such as the MR Delay Costs are not Delay Costs, but are instead a category of Actual Costs (and therefore, could be claimed).

The Court of Appeal rejected the findings of the primary judge on both matters of interpretation. It concluded that the restrictions on Fluor making claims under 23.5 applied to any delay and disruption whether or not a Delay Event had occurred. Further, the Court of Appeal found that Delay Costs, including the MC Delay Costs, were a kind of Actual Cost. Therefore, on correct interpretation, Fluor's claim for the MC Delay Costs was precluded, as it was 'Claim' arising out of, or in connection with, the delay.

The Court of Appeal accepted Santos's argument that the liquidated damages regime under clause 24 limited liability and remedy only, and did not affect Fluor's entitlement to be paid costs for the performance of work. On a proper analysis, it was held that Santos could recover monies it had overpaid, on the basis of an underlying error in the relevant payment certificates.

### 'Properly incurred' costs

The Court of Appeal found that the parties, through the definition of 'Excluded Costs' had prescribed the categories of costs to be excluded, including many which Fluor should not have had to incur. From this, the Court of Appeal concluded that it is 'less apparent' that such costs Fluor should not have incurred would also be excluded by the words 'properly incurred'. Instead, it preferred the view that such costs would be 'actual costs properly incurred', unless they met the definition of Excluded Costs.

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## Court grants stay where ability to pay arbitral award in doubt

### *Bothar Boring and Tunnelling (Australia) Pty Ltd v Ausipile Pty Ltd* [2021] QCA 226

*Sarah Ferrett | Matt Hammond | Gemma Galloway*

### Key point

A court will exercise its discretion to grant a stay pursuant to rule 800 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) where one party holds a legitimate concern that it will not receive payment of a prospective arbitral award due to the other party restructuring its financial affairs.

### Facts

This decision concerns an application for an order pursuant to rule 800 of the UCPR that the enforcement of the court's orders in *Ausipile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd* [2021] QCA 223 be stayed until delivery of an arbitral award in an arbitration between the parties. We reviewed the original decision in our *March-April edition of CLU* and the decision of the Court of appeal is summarised above.

The decision of the Court of Appeal concerned an application for summary judgment under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**). The court made an order under s78(2)(a) of the BIF Act that judgment be entered for Ausipile against Bothar for $761,296.75.

Following this decision, Bothar applied for an order that the enforcement of the court's orders be stayed until the delivery of an arbitral award in an arbitration between the parties. Bothar submitted that it held genuine concerns regarding Ausipile's ability to pay, in circumstances where the ongoing arbitration concerned a sum well in excess of that in issue in the court proceeding. That concern arose in circumstances where:

- a new entity (termed 'Ausipile No.2') had been incorporated some four days after Ausipile received a substantive defects notice from Bothar;
- Ausipile No.2 had the same sole director as Ausipile, and held a building licence from the QBCC in the same class;
- Ausipile had changed its name to be its ACN; and
- Ausipile No.2 was at liberty to operate under the same descriptive name '*Ausipile*'.

### Decision

The court exercised its discretion to grant a stay until delivery of the arbitral award, provided Bothar gave an undertaking as to damages and supplied a bank guarantee securing payment of the judgment debt. The court considered Ausipile's submissions that granting a stay of the judgment sum was at odds with the '*pay now, argue later*' policy of the BIF Act.

In considering the exercise of the discretion to award a stay in the context of the BIF Act, the court cited with approval the judgment of Keane JA (as he then was) in *R J Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390. Here, his Honour discussed the circumstances in which a stay might be justified, including where a builder restructured its financial affairs after the making of a building contract, and where doing so increased the risk to the owner of the possible inability of the builder to meet its liabilities when they were ultimately declared by the courts.

Having regard to the restructuring of Ausipile's affairs described above, the court concluded that these circumstances gave rise to a legitimate concern by Bothar that it might not be paid if it succeeded in obtaining a substantial award in the arbitration. Accordingly, the stay was granted, with costs.

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# Failure to follow contractual procedures fatal for builder

## Cairns Building and Construction Pty Ltd ATF P&T Kelly Trust t/as Phil Kelly Builders v Kaminaras & Anor [2021] QCAT 374

*Michael Creedon | Clare Turner | Gemma Galloway*

### Key point

Failing to comply with the express requirements under a contract for reaching practical completion may disentitle a contractor to payment. If a builder refuses to undertake remedial work in accordance with its obligations under the contract, this may be considered a repudiation of the contract, entitling the other party to the contract to terminate.

### Facts

In July 2018, Mr and Mrs Kaminaras (**Kaminaras**) entered into a contract with Cairns Building and Construction Pty Ltd ATF P&T Kelly Trust t/as Phil Kelly Builders (**builder**) for the design and construction of a house. The builder asserted that the works reached practical completion on or about 29 April 2019. On 10 May 2019, the builder issued a Notice of Practical Completion, a defects document and a final claim to Kaminaras.

Kaminaras did not pay the final claim and each party purported to terminate the contract (Kaminaras on 9 September 2019 and the builder on 10 September 2019).

#### Builder's claim

The builder alleged that any minor defects or omissions did not prevent the work from reaching practical completion and sought to terminate the contract on the basis of the Kaminaras' alleged repudiation. The builder commenced proceedings in QCAT seeking payment of the amount owing or alternatively damages for breach of contract, repudiation and wrongful termination of the contract.

#### Kaminaras' counterclaim

Kaminaras contended that the defects or omissions required substantial remedial work, the work was not practically complete and therefore payment of the final claim was not due. Kaminaras also purported to terminate the contract on the basis of the builder's alleged repudiation. Kaminaras counterclaimed against the builder, seeking damages for breach of contract, or on the alternative breach of warranty or negligence.

### Decision

The Tribunal held that practical completion had not occurred due to a number of items being defective, meaning the builder was not entitled to payment of the final claim. The Tribunal:

- dismissed the builder's claims for damages for breach of contract, damages for the Kaminaras' alleged repudiation and wrongful termination and interest on damages;
- ordered the builder to pay the Kaminaras' damages, representing the costs to rectify the incomplete and defective work; and
- set-off the unpaid final claim and the unpaid agreed variations against the builder's liability to pay those damages, with the net result being that there was no amount to be paid.

#### The defective work

Kaminaras claimed damages on the basis that construction was defective. The Tribunal concluded that, as at 29 April 2019, 10 out of the 16 items were defective.

#### Whether or not practical completion was achieved

The builder asserted that practical completion was achieved on or about 29 April 2019 or alternatively, no later than 10 September 2019 when Kaminaras took possession of the house. The builder relied on the definition of 'practical completion' in the contract which included the words, *'that will not unreasonably affect occupation'* and contended that the defective work did not affect occupation. Kaminaras submitted that the

definition of practical completion under the contract was not satisfied due to the significant defective work items.

The Tribunal was of the view that something 'more than simply minor omissions or defects' was required for practical completion not to be achieved. The Tribunal concluded that the defective work was not minor, especially the roof drainage and underground drainage issues. Practical completion had not been achieved and could not be achieved until that work was rectified.

### The builder's final payment claim and variation claims

The builder made a final payment claim (payable on practical completion) in addition to a number of variation claims. Kaminaras disputed these claims and contended that the builder did not accrue a right to payment because it failed to comply with the procedure for reaching practical completion contained contract.

In accordance with the contract, Kaminaras notified the builder of defects or omissions, which required the builder to issue a further notice of practical completion. Kaminaras' obligation to pay the final payment claim was not triggered until the further notice was received. The builder failed to follow this procedure. The Tribunal held that this failure 'permeated its conduct' on the issue of practical completion, disentitling it to payment.

The Tribunal rejected the builder's variation claims because it failed to comply with the express requirements of the variation clause in the contract.

### Termination of contract

The Tribunal found that Kaminaras was justified in terminating the contract on 9 September 2019 due to the builder's repudiatory conduct in refusing to complete certain works.

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## 'Defined legal relationship' broadly interpreted for the purpose of arbitration agreements

### Cheshire Contractors Pty Ltd v Civil Mining & Construction *[2021] QCA 212*

*Julie Whitehead | Allie Flack | Oliver Waddingham*

#### Key point & Significance

The term 'defined legal relationship' in section 7 of the *Commercial Arbitration Act 2013* (Qld) is to be given a broad interpretation. Parties to a construction contract containing an arbitration clause will be parties to the arbitration agreement created by that clause. The relationship does not need to be further defined or expressly set out in the arbitration agreement.

#### Facts

This case is an appeal of a decision of the Supreme Court, which was reported in our *May 2021 Construction Law Update*.

Civil Mining & Construction Pty Ltd (**CMC**) contracted with the Queensland Department of Transport and Main Roads (**TMR**) to complete a project for a roadworks construction (**project**). CMC subcontracted Cheshire Contractors Pty Ltd (**Cheshire**) to undertake civil engineering works for the project (**subcontract**).

A dispute arose between CMC and Cheshire following Cheshire's claim for the payment of costs associated with alleged directions given by CMC regarding the use of material not in the project specifications. Cheshire filed proceedings in the Supreme Court of Queensland seeking payment of $1,393,616.80 plus GST, interest and the return of a bank guarantee. In response, CMC sought a stay of the proceedings and applied for an order referring the parties to arbitration in accordance with section 8(1) of the *Commercial Arbitration Act 2013* (Qld) (**Act**).

In the first instance, Henry J allowed CMC's application, granting a stay on the proceedings and referring the parties to arbitration under section 8(1) of the Act.

### Appeal

Cheshire appealed the decision on the basis that Henry J had erroneously interpreted the meaning of 'in respect of a defined legal relationship' under section 7(1) of the Act. Cheshire's argument followed that as the purported arbitration agreement did not itself define the legal relation to the which the clause was intended to apply, there was no 'arbitration agreement' within the meaning of section 7(1) of the Act.

### Decision

The Court of Appeal dismissed Cheshire's arguments on appeal, upholding the decision of Henry J.

Cheshire argued that in order to satisfy section 7 of the Act, the arbitration clause itself must define the legal relationship to which it is intended to apply. The relevant clause of the subcontract was the dispute resolution clause, which dealt with 'disputes or differences arising between the parties'. In the original decision, Henry J concluded that considering the clause in isolation would be:

> *'contrary to orthodox principles of construction, particularly that the whole of the relevant instrument is to be considered in construing its meaning,'*

The dispute resolution clause which is the 'arbitration agreement', should be interpreted in the broader context of the documents as a whole. In this case, the subcontract established that there was a contractual relationship between CMC and Cheshire.

The Court of Appeal agreed with Henry J, holding that section 7 of the Act should be given a broad interpretation:

> *'there must be a defined legal relationship – in the sense of an identifiable legal relationship giving rise to legal remedies – but it strains the language of s 7(1) to construe the words as requiring that the agreement itself must define that legal relationship.'*

A number of cases in Australia and New Zealand were referred to that supported the proposition that the term 'defined legal relationship' should be given a broad meaning and not be restricted to relationships recorded in documents, other formal relationships or defined by the arbitration agreement itself.

The Court of Appeal concluded that the existence of a defined legal relationship between Cheshire and CMC could not be clearer. The arbitration agreement was contained within a clause of the subcontract between CMC (as contractor) and Cheshire (as subcontractor). The disputes dealt with by the relevant clause are 'dispute or differences arising between the Parties'. Reading the definition of 'Parties' into that phrase, makes it clear the relevant disputes and differences are those arising between CMC and Cheshire as the parties to the Subcontract. That was a 'defined legal relationship' for the purpose of section 7 of the Act.

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## Challenging legal professional privilege

### Santos Limited v Fluor Australia Pty Ltd & Anor (No 3) *[2021] QSC 281*

*Michael Creedon | Matt Hammond | Oliver Waddingham*

### Key point & Significance

Legal professional privilege extends to documents created in the course of obtaining legal advice, even if those documents are not communicated to or from a lawyer. Privilege cannot be waived purely on the basis that a document is mentioned in court and may be relevant to the parties arguments.

### Facts

This case is a part of the ongoing litigation between Santos Limited (**Santos**) and Fluor Australia Pty Ltd and Fluor Corporation (collectively, **Fluor**) in relation to claims by Santos for overpayments in relation to its GLNG gas project (**Project**).

Before commencing proceedings, Santos carried out a 12 month investigation into the alleged overpayments made to Fluor and issued a number of negative payment certificates under the EPC Contract for the Project. Santos engaged a number of legal advisors to assess their legal options throughout this period. They also

engaged a contract claims consultant, a delay analyst and an engineer to prepare and review documents to be provided to legal advisors.

The judgment relates to three procedural matters that arose throughout the litigation in relation to Santos' investigations and the documents prepared by Santos' advisors.

## Decision

### 1. The power of referees to determine privilege

Justice Brown approved a consent order which provided the referees with power to consider matters of privilege, subject to their power to refer a matter to the court under rule 505A of the *Uniform Civil Procedure Rules 1999* (**UCPR**).

### 2. Fluor's application challenging Santos' claim of privilege

Justice Brown found that Santos had established privilege over the documents and that the documents had been prepared for the sole purpose of obtaining legal advice.

The documents in question were prepared by those parties engaged by Santos to prepare documents for the firms Santos had engaged.

Santos claimed that the documents were privileged on the basis they were created by someone who was engaged for the sole purpose of creating documents to provide to a client or lawyer for the purposes of obtaining legal advice. Fluor submitted that the claim of privilege could not be maintained because the affidavit material provided on behalf of Santos, which relied on the purposes of those individuals' engagement, did not properly claim privilege in accordance with rule 213 of the UCPR.

Justice Brown found that the affidavits provided by Santos under rule 213(3) of the UCPR were compliant, and that the evidence in those affidavits was a sufficient basis for establishing a claim of privilege. Her Honour emphasised that privilege covers a variety of documents, including drafts, notes and other materials brought into existence for the purpose of communication to a lawyer, even if those interim documents are not ultimately communicated to the lawyer.

As an alternate argument, Fluor said that the documents were not privileged from disclosure under rule 212(2) of the UCPR, as they were a statement or report of an expert. Justice Brown found that although the documents were potentially prepared by experts, they did not involve any analysis relying upon a specialisation in a particular field. Therefore, the documents did not fall within rule 212(2) of the UCPR and did not need to be disclosed.

3. **Santos' application challenging Fluor's claim of privilege over an email** Justice Brown denied Santos' application challenging Fluor's claim of privilege in relation to all but one document. Her Honour found that Santos had failed to make out an argument that Fluor had waived privilege by an estoppel case put forward by Fluor in their defence and counterclaim.

The key question was whether there was "*inconsistency between the conduct of the privilege holder in making an implied assertion about that content of the privileged communication, and the maintenance of privilege in relation to the communication in question.*"

Justice Brown was not satisfied that the content of the communications relating to the May 2014 advice had any connection to the claims the subject of the estoppel case and did not relate closely to the state of mind alleged in the defence. On that basis, Her Honour found that "*it is not enough that the client is bringing proceedings could, as a reasonable possibility be relevant and of assistance to the other party*".

Justice Brown also considered whether:

1. Fluor's evidence in respect of documents was sufficient to establish the privileged nature of them; or
2. alternatively, whether certain documents which were disclosed in a redacted form should have been disclosed in whole.

Santos had previously argued that an affidavit claiming privilege in relation to certain documents had deficiencies in the way it identified the basis for the privilege claimed. In response to this, Fluor provided further affidavits to clarify those matters, strengthening their claims to privilege. A claim of privilege over an email between two Fluor senior executives was rejected because the recipient of the document lacked the relevant legal qualifications necessary for a claim of professional privilege.

# VICTORIA

## Recovering offset liquidated damages under the SOP Act

### *Goldwind Australia Pty Ltd v ALE Heavylift (Australia) Pty Ltd* [2021] VSC 625

*Nikki Miller | Tom Kearney | Alice Tyson*

### Key point

The court allowed ALE Heavylift (Australia Pty Ltd) (claimant) to recover payment under the Building and Construction Industry Security of Payment Act 2002 (Vic) (Act) for an amount which had been the subject of an offset for liquidated damages in an earlier payment schedule, because the claim was characterised as being for works performed – and not as a recoupment of liquidated damages.

This decision significantly restricts the scope of Shape Australia Pty Ltd v Nuance Group (Aust) Pty Ltd [2018] VSC 808 (Shape), which had provided (in obiter) that a claim for recoupment of liquidated damages was itself an excluded amount.

### Facts

Goldwind Australia Pty Ltd (respondent) contracted the claimant to erect wind turbine generators (contract).

In September 2020, the claimant delivered to the respondent Payment Claim 11 for $1,467,312.03.

On 14 October 2021 the respondent provided Payment Schedule 11. The respondent approved $914,861.11 and deducted $552,450.92, including a deduction of $484,100.92 for liquidated damages (delay deduction).

On 18 February 2021, the claimant issued Payment Claim 13. The claimant ignored the delay deduction in calculating its claim. The claim included a claim of $484,100.92 in relation to works done in September 2020 (previously claimed in Payment Claim 11, but unpaid as a result of the delay deduction).

On 3 March 2021, the respondent provided Payment Schedule 13 and again applied the delay deduction.

On 18 March 2021, the claimant issued an adjudication application in respect of Payment Claim 13, in which it claimed $1,701,753.23. The adjudicator held that:

- the claim in Payment Claim 13 for the September 2020 works was a claim for work done; and
- the delay deduction in Payment Schedule 13 was an excluded amount under s 10B of the Act.

The respondent sought judicial review of the adjudication determination, relying on the dicta by Digby J in Shape to argue that an attempt to recoup an excluded amount that had been previously deducted was itself an excluded amount under the Act.

### Decision

Stynes J determined that the adjudicator did not err by characterising the September 2020 claim as a claim for work done and consequently taking it into account in determining the adjudication application.

Stynes J held that it was critical to Digby J's reasoning in Shape that the claim was characterised as a claim to recoup liquidated damages. In Goldwind the claimant's claim was for unpaid work previously done, rather than an attempt to recoup liquidated damages.

Her Honour further noted that the practical effect of Shape was that if a claimant failed to challenge an excluded amount in a payment schedule, it will be prevented from recovering that amount in a subsequent payment claim. Stynes J said that such an outcome was contrary to the text and purpose of the Act.

The court held that there are no provisions in the Act that prevent a claimant from seeking to recover a progress payment because of a failure to adjudicate a payment dispute arising in relation to an earlier payment claim.

Stynes J concluded that the suggestion that if a claimant does not refer a dispute about a deduction to adjudication, then the disputed payment schedule creates a baseline against which the next payment claim will be assessed is inconsistent with the purpose of the Act to ensure that any person who carries out construction work is able to recover progress payments.

Accordingly, the court allowed the claimant to recover a claim characterised as being for works performed, which had not previously been paid as a result of the respondent offsetting liquidated damages.

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# 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



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



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



**Julie Whitehead**
Partner
**T** +61 7 3119 6335
**M** +61 422 000 320



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



**Sarah Ferrett**
Special Counsel
**T** +61 7 3119 6528
**M** +61 411 330 984



**Nikki Miller**
Partner
**T** +61 3 8608 2617
**M** +61 418 366 852



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


ME_191827687