Construction Law Update

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In the Australian courts

COMMONWEALTH

Binding Nemo: when is an agreement binding?

***ACME Properties Pty Ltd v Perpetual Corporate Trust Limited as trustee for Braeside Trust* [2019] FCA 1189**

Andrew Hales | Nick Grewal | Adam Hanssen

Key point and significance

An offer to lease signed by the parties but expressed to be subject to formal approval in the landlord's absolute discretion and execution of all legal documentation was not a binding agreement to lease.

Where parties reach an agreement of a contractual nature, and also agree to subsequently draw up a formal contract, they may intend to be bound either (i) immediately; (ii) immediately, but with the operation of certain clauses or conditions subject to execution of the formal document; or (iii) only upon execution of the formal document. In all cases, whether the agreement is binding is contextual, and is determined by the parties' intentions, which are objectively ascertained by looking at the circumstances under which the agreement was executed, and the meaning of the words used.

Facts

ACME Properties Pty Ltd (**tenant**) and Perpetual Corporate Trust Limited (**landlord**) entered into negotiations for the renewal of a lease. The landlord provided to the tenant a document described as an offer to lease. The offer was based on the terms of the existing lease and was subject to:

- formal approval of the landlord (to be given or withheld in its absolute discretion); and
- execution of all legal documentation by the landlord and the tenant.

The offer was signed by the tenant and subsequently accepted by the landlord. Prior to the parties executing the legal documentation for the proposed lease, the landlord accepted an offer from a third party to lease the premises. The tenant sought to enforce the offer to lease as a binding agreement to lease.

Decision

The court found that the offer to lease did not constitute a binding agreement because it was expressed to be subject to the execution of all legal documentation, namely the lease. The court relied on the leading case *Masters v Cameron*, which provides that where parties reach an agreement of a contractual nature and also agree to subsequently draw up a formal contract, the case may fall into one of three categories. It may be a situation in which:

- the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect;
- the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but have made performance of one or more of the terms conditional upon the execution of a formal document; or
- the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

Which class a transaction falls into will depend on an objective interpretation of the language and the conduct of the parties.

In giving reasons, the court considered that the 'subject to contract' provision signified that no binding agreement was to come into existence independently prior to execution of the legal documentation.

This outweighed other factors to the contrary, including that the offer to lease was expressed as an offer that was open for acceptance, was signed by both parties and that it covered most of the commercial terms for the proposed lease. The court also held that the landlord's conduct was consistent with reserving the right not to enter into a binding agreement or to waive the 'subject to contract' provision.

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A contractor is entitled to be paid the time-based costs of carrying out a variation, notwithstanding an express exclusion of delay costs

Lucas Earthmovers Pty Limited v Anglogold Ashanti Australia Limited [2019] FCA 1049

Andrew Orford | Laura Berry

Key point and significance

A clause that excludes the recovery of costs resulting from delay or disruption will not operate to preclude the recovery of all time-related costs of carrying out variations. However, such a clause will prevent the recovery of costs incurred as a result of overall delay to the contract, even if the delay was partly caused by variations.

Facts

On 10 May 2011, Anglogold Ashanti Australia Limited and Independence Group NL (together, the **Principal**) engaged Lucas Earthmovers Pty Limited (**contractor**) to construct a 200 km access road to a gold mine site in Western Australia.

The contract contemplated that the contractor would construct the subbase and wearing course of the road from material obtained from areas along the road alignment. However, much of this material did not meet specification and the contractor was instead required to haul material from borrow pits, resulting in additional costs and delays.

The parties agreed that the additional works carried out by the contractor constituted a variation under the contract for which the contractor was entitled to be paid a reasonable rate or price under the terms of the contract.

The Principal paid the contractor $1.6M for the direct costs incurred by the contractor in relation to the additional haulage and the placement of the material on the road but refused to pay the contractor any time-related costs on the basis that the contract provided that:

> *'Notwithstanding any other provision of this Contract, the Contractor will not be entitled to claim any Liabilities resulting from any delay or disruption (even if caused by an act, default or omission of the Company or the Company's Personnel (not being employed by the Contractor))'.*

The contractor submitted that this clause did not preclude the recovery of the time-related costs of carrying out variations and sought a further $3M in alleged time-related costs in relation to the additional works that it carried out.

Decision

The court found that the delay costs exclusion in the contract only applied to losses, costs and expenses **caused by** delay or disruption, and did not operate to preclude the recovery of all time-based costs. In particular, the exclusion did not prevent the recovery of any time-related costs of carrying out variations.

However, the court considered that while the contractor's claim was characterised as being for the time-related costs of variations, the contractor was actually seeking to recover delay costs comprised of those costs which it incurred by the delay to the completion of the contract as a whole.

The court therefore concluded that the delay costs exclusion in the contract did operate to preclude the contractor's claim.

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NEW SOUTH WALES

Cross-claims against concurrent wrongdoers – the door is still open

Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd [2019] NSWCA 161

Andrew Hales | Lachlan Williams | Stephanie Skevington

Key point and significance

A defendant who nominates a concurrent wrongdoer in its defence is not precluded, by reason of that fact alone, from cross-claiming against that alleged concurrent wrongdoer on an independent cause of action.

Facts

The applicant, Landpower Australia Pty Ltd (**Landpower**) is the sole defendant in proceedings brought by Lindsay and Faith Northcott (**Northcotts**) in respect of a harvester purchased from Landpower for use in the Northcott's agricultural cropping business.

In those proceedings, the Northcotts have sought damages for breach of contract, negligence, misleading or deceptive conduct and negligent misrepresentation relating to the performance of the harvester.

In Landpower's defence to the proceedings, Landpower:

- named a number of alleged concurrent wrongdoers (including Penske Power Systems Pty Ltd (**Penske**)); however, none of the alleged concurrent wrongdoers were joined as defendants in those proceedings; and
- alleged that the Northcotts' claims were apportionable claims for the purposes of Part 4 of the *Civil Liability Act 2002* (NSW) (Part 4) and section 87CB of the *Competition and Consumer Act 2010* (Cth) (which was ultimately accepted by the Northcotts).

Landpower cross-claimed against Penske:

- claiming relief pursuant to section 5 of the *Law Reform (Miscellaneous Provisions) Act 194*6 (NSW) (section 5) if, as alleged, the Northcotts suffered loss or damage. This claim was ultimately conceded by Landpower as being bound to fail; and
- alleging other claims in respect of misleading and deceptive conduct, negligent misrepresentation and breach of contract (as between Landpower and Penske).

Penske was successful in seeking orders to summarily dismiss the amended cross-claim. Landpower appealed that decision.

Decision

The court allowed the appeal, holding that section 36 of Part 4 does not preclude a cross-claim against an alleged concurrent wrongdoer based on an independent cause of action.

Interestingly, the court stated that:

- such a claim may be characterised as an alternative plea against the possibility that a cross-defendant is not found to be a concurrent wrongdoer or the plaintiff's claim is not held to be apportionable; and
- as far as costs are concerned, the running of this alternative plea is at the risk of the defendant.

An example given by the court was where the cross-defendant is found not to hold a duty of care to the plaintiff or did not cause or contribute to the plaintiff's loss but the cross-defendant did owe a duty to the defendant (or was otherwise liable to the defendant).

The court noted that that proportionate liability regimes are not intended to undermine independent substantive rights that a defendant may have against alleged concurrent wrongdoers and it would be undesirable and potentially prejudicial to wait for a determination (that a particular entity was a concurrent wrongdoer) to be made in order to bring separate proceedings under an independent cause of action.

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Staircase to heaven? A reminder that development approvals are permissive not mandatory and an interim occupation certificate is sometimes enough

Pollak v Yapp [2019] NSWCA 150

Andrew Hales | Phoebe Roberts | Nick Meyer

Key point

A warranty to complete *'works'* in accordance with a development approval does not extend to an obligation to complete *'all'* works the subject of the development approval. Further, an interim occupation certificate in the correct circumstances may be considered to be an *'occupation certificate'* in a contract of sale.

Significance

Purchasers should pay special attention to the drafting of contractual warranties which specify works that are required to be completed before settlement, as works stated in development approvals are permissive and not mandatory.

Depending on whether an interim occupation certificate allows occupation of all areas for which an occupation certificate may have been required (ie all areas that may have comprised altered portions of the building or an extension to the building), an interim occupation certificate can satisfy the description of an *'occupation certificate'* in a contract of sale.

Facts

The parties entered into a contract for the sale of land in Woolloomooloo on 30 June 2018 which was due for completion on 11 October 2018. The purchaser did not complete the contract on the basis that the vendor failed to adhere to obligations contained in Special Condition 49.

Special Condition 49 provided that:

- the vendor disclosed that alteration works had been carried out in accordance with the development approval; however, the lower staircase required replacement;
- works to the lower staircase would be complete prior to settlement;
- the vendor warranted that all development consent conditions would be satisfied on or before completion; and
- the vendor would provide an occupation certificate to the purchaser before settlement.

Only some of the work authorised by the development approval had been completed. The vendor undertook works to the lower staircase and provided an interim occupation certificate to the purchaser on 24 August 2018 in anticipation of settlement.

The primary judge held that:

- the wording of Special Condition 49 that, *'The vendor warrants that all Development Consent Conditions will be satisfied on or before completion'*, did not require the vendor to complete the balance of the works permitted by the development approval before completion or in satisfaction of the vendor's warranty; and
- Special Condition 49 could be satisfied by provision of an interim rather than a final occupation certificate.

The purchaser appealed the primary judge's order for specific performance of the contract.

Key issues

- Whether the first sentence in Special Condition 49 was a disclosure that all permitted works approved by the development approval had been carried out.
- Whether Special Condition 49 required provision of a final occupation certificate, rather than an interim occupation certificate.
- Alternatively, whether the interim occupation certificate authorised the purchaser to occupy the stairs only or the whole of the premises.

Decision

The Court of Appeal dismissed the appeal. The court found that no ambiguity arose in relation to Special Condition 49 and the vendor's actions in undertaking alternation works to the staircase and providing an interim occupation certificate in respect of those works satisfied the relevant obligations.

In respect of the first key issue, the court held that the drafting of Special Condition 49 which provided that, *'… the vendor discloses works have been carried out in accordance with the Development Approval… however, the lower staircase requires replacement'*, was a disclosure by the vendor that any works that had been carried out were carried out in accordance with the development approval (except for the lower staircase), rather than that all work permitted by the approval had been carried out.

In respect of the second key issue, the court found that it was incorrect to assume that a final occupation certificate could only be issued once all of the work the subject of the development approval was completed. The court agreed with the primary judge's finding that Special Condition 49 could not be read as requiring only a final occupation certificate.

Finally, in relation to the third key issue, the court held that the interim occupation certificate extended to all works undertaken pursuant to the development approval and could not be read as authority to only occupy the staircase in isolation.

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You can't have your cake and only read every second page

Rhomberg Rail Australia Pty Ltd v Concrete Evidence Pty Limited [2019] NSWSC 755

Andrew Hales | Georgie Roest | Kawshalya Manisegaran]

Key point

Even though only every other page of a variations register relied upon by a claimant was included in its adjudication application, the presence of other relevant supporting material meant that a respondent was not denied procedural fairness when a determination was made in respect of variations that it had not addressed in its responsive submissions.

Significance

Parties must read adjudication documents 'reasonably carefully', and must anticipate possible findings and make submissions on potential findings in relation to which that party received express notice, or should reasonably have anticipated. A party cannot rely on an unaddressed inconsistency by the adjudicator as grounds for failure to afford natural justice where a person acting reasonably in the circumstances would have at least appreciated that there was an inconsistency and anticipated potential findings in its submissions.

Facts

Concrete Evidence Pty Ltd (**subcontractor**) served a final progress claim under a subcontract with Rhomberg Rail Australia Pty Ltd (**contractor**) claiming the amount of $37,110 for the balance of the contract works, together with the amount of $1,206,754 claimed in respect of 119 variations.

In an adjudication determination made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**), the adjudicator determined an adjudicated amount of $1,061,800.

In its adjudication application submissions, the subcontractor stated that *'CE has created a further Variations Register for the purposes of this adjudication which records the variation claims that remain outstanding and in respect of which CE wishes to pursue. The variations register is at Tab 7'* and *'At Tab 8 of the application are supporting documents in respect of each of the remaining variations'*.

The variations register at Tab 7 was incomplete in that only every other page of the register was included behind Tab 7. However, Tab 8 contained supporting documents for all variations claimed by the subcontractor, including in relation to those referred to in the pages missing from Tab 7.

In its adjudication response, the contractor submitted that *'Given the Claimant's withdrawal of all variations which do not appear in Tab 7, the Respondent has not addressed those variations in this Adjudication Response'*. The adjudicator dealt with that submission by stating that *'The adjudication application is to be read as a whole'* and *'I have assessed the variations included in tab 8 as these variations are included in the payment claim and the Claimant has provided submissions for these variations in the adjudication application'*.

In subsequent judicial review proceedings, the contractor submitted that the adjudicator ought to have exercised his power under section 21(4)(a) of the SOP Act to request further written submissions from either party and the failure to do so had denied the contractor procedural fairness because the adjudicator proceeded to deal with the variations without giving the contractor an opportunity to make submissions in relation to them.

Decision

The proceedings were dismissed.

The court held that 'anyone reading Tab 7 reasonably carefully would have appreciated that the document was incomplete because a comment on the foot of at least one page (of a table that was only four pages in length) was obviously incomplete'. The court further noted that a person acting reasonably would at least have appreciated that there was an inconsistency between Tab 7 and Tab 8, and therefore appreciated that there was at least a risk that the adjudicator would proceed with his adjudication by reference to Tab 8 rather than Tab 7.

In obiter, the court referred to the following purported reason for withholding set out in the payment schedule: *'Assessment to follow'*. The court stated that this is not a reason at all; it is a statement that reasons will be provided later. The contractor would not be able to rely on those reasons in its adjudication response.

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So tell me why, give me good reasons … a claimant needs to know

Style Timber Floor Pty Ltd v Krivosudsky [2019] NSWCA 171

Andrew Hales | Georgie Roest | Jessica Orap

Key point and significance

For a payment schedule to be valid in accordance with section 14 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**), it must indicate the reasons for withholding payment with *'sufficient particularity'* so that the claimant is aware of the real issues in dispute and the nature of the case it will have to meet in an adjudication. It is not enough for a payment schedule to merely reject payment, make vague statements or seek to incorporate other documents by general reference.

Facts

Style Timber Floor Pty Ltd (**Style Timber**) engaged Mr Krivosudsky (trading as RK Grinding) to carry out floor grinding and topping works at various sites in Sydney. Mr Krivosudsky served a payment claim on Style Timber relating to seven invoices and five sites for a total amount of $106,166.50.

Mr Wang of Style Timber responded to the payment claim by email stating that *'…I will show you the working agreement between Style timber and RK grinding, many emails, photos, videos, back charges from builders and other trades, complaints from my clients. You will understand why I can't pay you. The damages you have done is more than what you claimed. Then it's up to you what you want to do next.'*

District Court

In the NSW District Court, Mr Krivosudsky sought the claimed amount and filed a motion seeking summary judgment. Style Timber contended that its email, when read in conjunction with other correspondence preceding the payment claim, was a valid payment schedule under the Act. His Honour Justice Leeming rejected that defence and granted summary judgment in favour of Mr Krivosudsky.

Style Timber sought leave to appeal to the NSW Court of Appeal.

Decision

The Court of Appeal held that Style Timber's email was not a valid payment schedule under section 14 of the Act.

A payment schedule must indicate the reasons for withholding payment with *'sufficient particularity'* to enable the claimant to:

- understand the real issues in dispute between the parties so that it can make an informed decision as to whether or not to proceed to an adjudication; and
- know the nature of the respondent's case which it will have to meet if it pursues an adjudication.

There is no requirement for the reasons to completely particularise the respondent's case, however, reasons in a payment schedule must be readily ascertainable.

Style Timber's email did not:

- provide any reasons for withholding payment in accordance with section 14(3) of the Act;
- identify the payment claim to which it related nor did it identify the sites to which Style Timber had allegedly incurred damage; and
- adequately specify and incorporate the *'many emails'* and other documents upon which Style Timber relied.

Accordingly, Style Timber's email was so general that it was impossible to determine the scope of the dispute and failed to satisfy the requirements of a valid payment schedule under section 14 of the Act.

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QUEENSLAND

Courts will not lightly find an adjudicator has breached natural justice

ABC Glass & Aluminium Pty Ltd v Nik Nominees Pty Ltd & Anor [2019] QSC 171

Andrew Orford | Sarah Ferrett | Samantha Byrne

Key point and significance

An adjudicator will not necessarily be in breach of natural justice by relying on a case authority to which neither party has referred the adjudicator, failing to provide the parties with an opportunity to make additional submissions in respect of the case authority, and misstating the effect of the authority. These circumstances will not impact the adjudicator's decision where the adjudicator's consideration of the case authority does not impact the finding on the evidence that resolves the issue.

Facts

The second respondent, Robert Douglas Sundercombe (**adjudicator**), determined that the first respondent, Nik Nominees Pty Ltd (**Nik Nominees**), was entitled to a progress payment in relation to a construction contract within the meaning of the *Building and Construction Industry Payments Act 2004* (Qld) (**Act**). The applicant, ABC Glass & Aluminium Pty Ltd (**ABC**), sought a declaration that the adjudication decision was void and an injunction restraining Nik Nominees from seeking to enforce the decision. The dispute between Nik Nominees and ABC arose out of refurbishment works at the Hamilton Island Yacht Club Villas. Nik Nominees fabricates aluminium products and fabricated and supplied the shutters that were installed on the project by ABC.

ABC served a payment schedule in response to the payment claim in which it stated the amount of the payment that it proposed to make was nil. ABC asserted that there was no construction contract within the definition under the Act, as the agreement between the parties *'was a cooperative enterprise… for the specific purpose of the Project whereby the parties shared resources including staff, management*

responsibility and profit'. ABC relied on the fact that ABC and Nik Nominees had a direct relationship with the head contractor and Nik Nominees had received payment from the head contractor. ABC also asserted that, even if it was a construction contract, section 3(2)(c) of the Act excluded the contract because the arrangement was for profit share.

The adjudicator addressed the issue of jurisdiction by reference to the matters raised by ABC. When considering jurisdiction, the adjudicator noted that the parties had not provided any case law that supported their various positions and identified four judgments relevant to section 3(2)(c) of the Act, including the decision in *Eddelbrand Pty Ltd v H M Australia Holdings Pty Ltd* [2012] NSWCA 31.

ABC sought relief on the basis that the adjudicator made two jurisdictional errors, namely:

- a breach of natural justice by making a decision on ABC's submission that there was no construction contract within the meaning of section 3(2)(c) of the Act based on a view of the law for which neither party contended and in respect of which the adjudicator provided no opportunity to the parties to make submissions concerning his view of the law; and
- failing to discharge his function under the Act by considering material which was not permitted by section 26(2) of the Act, providing a determination without foundation, failing to intellectually engage with the issues, and not deciding his jurisdiction properly under section 25(3) of the Act.

Decision

The court held that the adjudicator had not made a jurisdictional error on either ground raised by ABC.

Was the adjudicator bound to ask for submissions on *Eddelbrand*?

The court considered that it was common ground for both parties that the relevant critical issue before the adjudicator was whether the agreement between the parties was a profit share arrangement. The court held that the adjudicator's consideration of *Eddelbrand* did not make any difference to the conclusion which he reached on the evidence before him. ABC could not show that the conduct of the adjudicator in not seeking submissions on *Eddelbrand* was a substantial denial of natural justice in the circumstances or even a denial of natural justice. The court also considered that the adjudicator's use of *Eddelbrand* did not constitute a failure to follow the procedure anticipated by section 25(3) of the Act. ABC's reliance on section 25(3) as a means by which the adjudicator could have sought further written submissions did not assist ABC in overcoming the conclusion that the adjudicator's failure to seek submissions on *Eddelbrand* did not amount to a substantial denial of natural justice.

Did the adjudicator consider material outside of section 26(2) of the Act?

ABC argued that by referring to case law which the parties had not provided to the adjudicator, the adjudicator was looking outside the matters which he was permitted to consider under section 26(2) of the Act. The court considered that Nik Nominees correctly submitted that section 26(2) of the Act deals with what the adjudicator can consider in deciding an adjudication application after determining that jurisdiction exists. Section 26(2) applies to the consideration of the subject matter itself and not jurisdiction. Therefore, the court held there was no substance in ABC's reliance on section 26(2) to challenge the adjudication decision.

Did the adjudicator provide a determination without foundation?

ABC argued that the adjudicator could not consider whether the agreement between the parties was an excluded contract within section 3(2)(c) of the Act, unless the adjudicator first identified the terms of the agreement. The court disagreed with this submission stating that the submission was based on an interpretation of section 3(2)(c) which did not reflect the wording of the section.

Was there engagement by the adjudicator?

ABC submitted that the adjudicator was required to engage in an *'active process of intellectual engagement'* in considering the matters referred to in section 26(2) of the Act. Specifically, ABC claimed the adjudicator failed in his duty to engage intellectually in respect of the terms of the agreement, including timing of progress payments and the relationship between the compensation payable, as sought in the invoices, and the goods supplied to Nik Nominees. The court held that ABC could not succeed on this argument, as ABC's assertion of what was required of the adjudicator did not reflect relevant provisions of the Act.

Implied contractual duty of good faith and fair dealing triumphs

Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd & Ors [2019] QSC 163

Andrew Orford | Sarah Ferrett | Charlotte Lane

Key point

This decision highlights the importance of the implied contractual term to act in good faith and deal fairly.

Significance

There is an unresolved question in Australian common law of contract, namely, whether there is an implied term of good faith in the performance of commercial contracts generally speaking, or whether the implication of such a term must always satisfy the requirements for a term implied in fact. Such a term, however, will be implied in an array of contractual relationships, particularly if it is required for commerciality and to give business efficacy to a contract.

Facts

The plaintiff, Aurizon Network Pty Ltd (**Aurizon**), is a subsidiary of Aurizon Holdings Limited, a listed company and Australia's largest rail freight operator. Aurizon is the lessee of the land for the rail corridor and operator of the network and associated rail infrastructure known as the Central Queensland Coal Network (**Network**), Australia's largest export coal rail network.

The dispute in this case concerned the operation of six contracts entered into between Aurizon and one of the defendants, Glencore Coal Queensland Pty Ltd (**Glencore**), each styled the Wiggins Island Rail Project Deed (2011) (**WIRP Deed**). The underlying subject matter of the WIRP Deeds was the funding and construction of works to upgrade the capacity of Aurizon's rail infrastructure network for the transport of coal from the mines of the various defendants (of which Glencore was one) to a new coal ship loading terminal, named the Wiggins Island Coal Export Terminal (**WICET**).

Aurizon sought to establish the liability of each defendant for amounts payable under the WIRP Deed month by month for what was termed the '**WIRP Fee**'. The dispute arose because each defendant gave notice to Aurizon under a provision of their respective WIRP Deeds that, if valid, would have the effect of reducing that defendant's liability to pay the fee to nil. Aurizon contended that none of the defendants were entitled to give such notice.

Under each of the WIRP Deeds, the scope of the works to be funded and constructed by Aurizon was identified by reference to particular section s of railway track, termed '**Segments**'. Each Customer was identified as a Customer in respect of each Segment it proposed to use for additional capacity. Capacity was measured by reference to the number of train services for a standard coal train for a designated route over a designated time period. Each such Segment was termed a '**Customer's Segment**' for that Customer.

Clause 6 of each WIRP Deed provided for variations to the scope of the works to be carried out for a Segment. There were two express restrictions on the Customer's right or power under clause 6.1(c) to give notice of its intention not to be a Segment Customer. First, the power was limited to the period prior to the '**First Milestone Target Date**'. Second, at least one Segment Customer for the relevant Customer's Segment must remain liable for the WIRP Fee in respect of each Segment.

Aurizon contended that the notices given by the defendants were invalid on three grounds:

- First, on the proper construction of clause 6.1(c), a notice could not have been given for a Customer Segment that was necessary to enable Aurizon to provide what were termed the 'Aggregate Access Rights' for the relevant defendant, or there was an implied term of the WIRP Deed to the same effect.
- Second, there was an implied term of the WIRP Deed that the Customer had a duty to act in good faith towards and deal fairly with Aurizon in respect of giving notice under clause 6.1(c) that was breached.

- Third, the 'Port Facilities (Initial) Available Date', as defined in the WIRP Deeds, and thereby the First Milestone Target Date in clause 6.1(c), occurred by 30 September 2015, ending any entitlement to give notice under clause 6.1(c) before the notices were given.

The defendants' case relied on the fact that they notified Aurizon prior to the First Milestone Date under a provision of the WIRP Deed. Notification allowed the defendants to cease being a 'Customer Segment', which transferred the burden of the WIRP Fee onto any remaining Segment Customers. As a consequence, the burden of the WIRP was thrust upon only a few Customers rather than dispersed among the originally anticipated Segment Customers. The court regarded this as a *'superficially bizarre game of musical chairs'*.

Decision

The court found for Aurizon on the grounds that the defendants breached an implied term to act in good faith and deal fairly with Aurizon in respect of giving notice under clause 6.1(c) of the WIRP Deeds. It was not accepted that clause 6.1(c) could operate in a way that would leave a Customer, who held only a low proportion of the overall increase in capacity for access rights for a Segment, as the only Customer responsible for all of the WIRP Fees that would have been payable by the other Customers. There was no evidence that each of the parties had been prepared to accept that risk in the context in which the WIRP Deeds were executed (that is, by each individual customer with Aurizon by way of separate deeds).

Each of the notices given by the defendants under the provision of the WIRP Deed were held to be invalid and of no operative contractual effect.

Further, the court considered *The Queensland Competition Authority Act 1997* (Qld) (**Act**). The Act makes provision for the declaration by the Minister for the Act of a service. The Network is a 'declared service' because it is a 'coal system'. For a declared service, the Act imposes obligations upon an access provider to negotiate in good faith with an access seeker to provide appropriate access to the declared service. Reasonable efforts must also be made to satisfy the reasonable requirements of the access seeker.

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An arbitration clause may render clauses allowing court proceedings unenforceable

Bulkbuild Pty Ltd v Fortuna Well Pty Ltd & Ors [2019] QSC 173

Michael Creedon | Laura Berry | Ray Zhai

Key point

An arbitration clause can take precedence over any other contract provisions that allow parties to institute court proceedings, so long as the subject matter is within the scope of the arbitration clause and the arbitration clause is not null and void, inoperative or incapable of being performed.

Significance

A dispute resolution provision in a contract which allows a claim to be resolved in court may not be enforceable if the claim is also within the scope of an arbitration clause in the contract.

Arbitration clauses that are commonly included in construction contracts may need to be amended to limit their scope to avoid any unintended consequences.

Facts

Bulkbuild Pty Ltd (**contractor**) and Fortuna Well Pty Ltd (**principal**) entered into a contract for the design and construction of serviced apartments in Brisbane (**contract**). Anthony Fendt and Project & Retail Management Pty Ltd (**superintendent**) was, at varying times, the superintendent under the contract.

The contract contained an arbitration clause which required the parties to refer any unresolved dispute concerning a claim in tort or under statute to arbitration (**Arbitration Clause**). The contract also included a provision stating that nothing in the dispute resolution clauses, which included the Arbitration Clause, should

'prejudice the right of a party to institute proceedings to enforce payment due under the Contract or to injunctive relief or urgent declaratory relief' (**Summary Relief Clause**).

The contractor sued the principal in the Supreme Court of Queensland, claiming that the principal failed to pay for work performed under the contract. In the same proceeding, the contractor also sued the superintendent for negligence in issuing payment certificates and assessing variations.

The principal applied to the court for an order to stay the proceeding until the contractor complied with the Arbitration Clause.

Decision

The court found for the principal and granted an order to stay the proceeding.

The court confirmed that the Arbitration Clause constituted an 'arbitration agreement' within the meaning of the *Commercial Arbitration Act 2013* (Qld) (Act) and found that section 8 of the Act placed a mandatory requirement on the court to refer the parties to arbitration if the court is seized with a claim on the same subject matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

The court agreed with the contractor that the claim against the superintendent could be pursued in the court at the same time as the arbitration, since the superintendent was not a party to the contract. However, the court found that a similar claim being litigated in two avenues was a mere inconvenience and rejected the claim from the contractor that the arbitration agreement was incapable of being performed on that basis.

The court stated that the Arbitration Clause should take precedence over the Summary Relief Clause, whatever the scope of the Summary Relief Clause might be, as long as the claim was within the scope of the Arbitration Clause and the Arbitration Clause was not null and void, inoperative or incapable of being performed. The court therefore concluded that the claim should be referred to arbitration notwithstanding the fact that the Summary Relief Clause stipulated that the Arbitration Clause should not prejudice the contractor's right to institute proceedings to enforce payment due under the contract.

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Contractors and subcontractors must ensure both a safe place of work and a safe system to work

Cootes v Concrete Panels & Ors [2019] QSC 146

Michael Creedon | Petrina Macpherson | Ray Zhai

Key point

An employer has a duty to ensure that there is both a safe place of work and a safe system to work.

Significance

An employer may still be liable for injuries of an employee where the employee is performing work beyond the employee's specific work scope, if the employer fails to ensure that there is a safe place of work.

Facts

Concrete Panels (**subcontractor**) was engaged to supply and install concrete and associated works for SMJ Projects (**contractor**) at a work site in Ipswich (**site**). Darren Cootes (**employee**) was employed by the subcontractor to 'run the jobs and do them' when he was sent to the site.

There was a 2.6 metre high excavation area to one side of a trench at the site. The employee noticed that there was gravel falling down and told the subcontractor that he was concerned that there would be a cave in causing injury to any worker in the trench. As a result of the employee's report, the site foreman (**foreman**) sent a labourer (**labourer**) to construct the shoring up of the excavation. The employee was asked by the foreman to be the 'spotter', and he was not in charge of the labourer nor in charge of the work that was being performed. While the labourer was away, the employee noticed that the labourer's drill was in the trench and

went into the trench to retrieve the drill. The excavation collapsed upon him and the employee suffered serious injuries.

The employee brought a proceeding against the contractor and the subcontractor in the Supreme Court of Queensland for damages suffered as a result of his personal injury.

Decision

The court found that both the subcontractor and the contractor breached their duties of care to the employee and awarded him over $1.4m in damages.

The court rejected the subcontractor's argument that it was not part of the employee's employment duties for him to rescue the labourer's drill. The court stated, while there was no evidence that it was a specific part of the employee's duty to rescue the drill, the subcontractor directed the employee to 'run the jobs and do them'. The court stated that it would delay the employee to do his job if the drill was buried, and therefore it was within the employee's scope of duty to rescue the drill. The court emphasised that an employer had a duty to ensure that there was both a safe place of work and a safe system to work, and held that the subcontractor failed to ensure that there was a safe place to work and breached its duty of care.

The court found that the contractor impliedly approved the construction, as there was no evidence that the contractor took any steps to ensure that the safe work plan in relation to the excavation was adhered to. The court stated that the contractor had power to control the work being undertaken, which was an important aspect of the totality of the circumstance which could cause a duty of care to arise. The court concluded that, by failing to treat the excavation properly, the contractor breached its duty of care, notwithstanding that the duty of care owed by the contractor was more confined than the duty owed by the subcontractor.

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Failing to adequately identify construction work will be fatal to a contractor's payment claim

KDV Sport Pty Ltd v Muggeridge Constructions Pty Ltd & Ors [2019] QSC 178

Andrew Orford | Matt Hammond | Samantha Byrne

Key point

A payment claim that does not reasonably identify the construction work the subject of the claim will not satisfy the requirements of section 17(2)(a) of the *Building and Construction Industry Payments Act 2004* (Qld) (**Act**) and therefore will not enliven the jurisdiction of an adjudicator.

Significance

The consequence of failing to comply with section 17(2)(a) of the Act may result in an adjudicator's decision being declared void in its entirety where the adjudicator has incorrectly concluded his or her jurisdiction is enlivened. Whether a payment claim adequately identifies the work the subject of the claim under section 17(2)(a) of the Act is an objective test that involves consideration of the background knowledge of both parties which can be derived from their previous dealings. It is not enough to simply provide the categories of work. A valid payment claim must clearly identify the construction work to which it relates and be reasonably comprehensible to the principal. Given that the current security of payment regime in Queensland contains a near identical provision to section 17(2)(a) of the Act (contained in section 68(1)(a) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld)), this decision will be relevant to the current regime.

Facts

On 14 August 2017, KDV Sport Pty Ltd (**KDV**) and Muggeridge Constructions Pty Ltd (**Muggeridge**) entered into a contract in relation to the construction of student accommodation. The contract was a lump sum contract for $10.627 million, under which Muggeridge was contracted to carry out the construction work.

Muggeridge served a payment claim on KDV in the amount of $2,365,432 on approximately 20 August 2018. The claim was a one page document that made reference to the Trade Breakdown Schedule (**Schedule**) which was a separate document required under the tender that formed part of the agreement. The Schedule set out various categories of work and attributed a portion of the contract price to each category. The payment claim provided no meaningful information of the work performed. It only identified the category of work and the percentage value claimed by reference to the Schedule.

KDV's solicitors wrote to Muggeridge contending that the purported payment claim was invalid because it did not meet the requirements of section 17(2) of the Act. While reserving its primary position, KDV provided a payment schedule under the Act which provided for a payment of nil. Subsequently, Muggeridge applied for adjudication. On 4 December 2018, the adjudicator issued a decision which determined that KDV owed Muggeridge $802,198.59 plus interest.

KDV contended that the adjudicator's decision was affected by jurisdictional error. KDV raised three issues for determination, which were:

- the payment claim failed to identify the construction work for which payment was claimed and therefore did not satisfy the requirements of section 17(2)(a) of the Act;
- the decision was void because the adjudicator did not comply with section 26(2) of the Act by failing to provide the required level of natural justice to the parties and failing to adequately set out in his reasons the process by which he came to and justified the valuation of the construction work; and
- the adjudicator failed to take into account submissions as to the requirements imposed on KDV to withhold amounts for subcontractors' charges pursuant to the *Subcontractors' Charges Act 1974* (Qld) and thereby did not comply with section 26(2) of the Act.

Decision

The court found that KDV was successful on its first ground by establishing a jurisdictional error on the basis that there was not a valid payment claim for the purposes of the Act. Consequently, the court was not required to consider the remaining two issues. The court held that the description of construction work divided by category was not sufficient to identify the actual construction work claimed and did not satisfy the requirement of section 17(2)(a) of the Act.

Section 17(2)(a) of the Act requires that a payment claim must reasonably identify the construction work to which it relates, such that the basis of the claim is reasonably comprehensible to the principal or sufficient to enable the principal to understand the basis. The court held that if a principal is unable to ascertain with sufficient certainty the work to which the claim relates, it will not be possible to provide an informed and meaningful payment schedule.

The court considered that the overall purpose of the Act is to provide speedy and efficient means of ensuring progress payments are made without intervention of a court. Whilst it is possible that KDV may have been able to determine what part of the work was being claimed out of the percentage by engaging in a process of reconstruction based on previous claims and amounts paid, the court considered this would be contrary to the intention of the Act. The court held that the intention of the Act is not to require the principal to engage in forensic analysis of previous payment claims to assess the current claim in circumstances where a payment schedule is required within 10 business days of receipt of the claim.

As the payment claim did not meet the requirements of section 17(2)(a) of the Act, the court held the adjudicator's jurisdiction had not been enlivened. Consequently, the entirety of the adjudicator's decision was void.

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Implied duties to cooperate in loan agreements

Lake Laurel Pty Ltd & Ors v Nichols Constructions Pty Ltd & Ors (No 2) [2019] QSC 145

Andrew Orford | Laura Berry | Samantha Byrne

Key point

The courts may imply a term into loan agreements which requires the parties to cooperate and do all such things necessary to enable the other party to have the benefit of the loan agreement or mortgage. The party who seeks to rely on a breach of this implied term will need to be able to show it has complied with its cooperation obligations. That is, the party must be able to show that it has done all things necessary to enable the other party to have the benefit of the loan agreement.

Facts

The first plaintiff, Lake Laurel Pty Ltd (**Lake Laurel**), and the first defendant, Nichols Constructions Pty Ltd (**Nichols Constructions**), were involved in a project to subdivide land for residential purposes. Part of the land was located at Lot 261 Boundary Road, West Laidley (**Lot 261**). On 24 June 2010, Lake Laurel and Nichols Constructions entered into a loan agreement with the second defendants as guarantors. The loan agreement was secured by a registered mortgage. Under the loan agreement, Nichols Constructions agreed to pay the principal sum of $3,775,000 to Lake Laurel by incremental instalments on the sale of each lot in the proposed subdivision, with the balance to be repaid 12 months from registration of the plans of subdivision. The debt under the loan agreement and mortgage were later assigned to the third plaintiff, Peter James Ryan (**Mr Ryan**).

Mr Ryan claimed the debt under the loan agreement had become due and payable as Nichols Constructions had breached express and implied terms of the loan agreement by allowing the development approval for Lot 261 to lapse and by failing to obtain registration of the plans of subdivision within a reasonable time. Nichols Constructions did not challenge Mr Ryan's claim that it had breached the loan agreement and mortgage. Nichols Constructions instead argued that the principal sum under the agreement had not become payable due to an earlier breach by Lake Laurel of the implied duty of cooperation under the loan agreement and the mortgage. It was argued by Nichols Constructions that this implied duty required Lake Laurel to either assist Nichols Constructions to obtain registration of the plans of subdivision of Lot 261, or at the least not to hinder or obstruct Nichols Constructions from doing so. A key issue to this argument was whether, if such a breach was established, it could be relied upon to defend the claim by Mr Ryan in relation to recovery of the principal sum.

Preliminary issues

There were two preliminary issues which the parties asked the Supreme Court to determine separately of the trial, namely:

- Is the effect of clause 6 of the loan agreement and/or item 5 in the schedule to the loan agreement that the principal sum under the loan agreement is payable upon demand?
- Whether a plan of subdivision of Lot 261 into Lots 804 and 805 registered on 29 January 2018 constituted 'registration of the plan(s) of the Ziebarth Subdivision' (being Lot 261) within the meaning of item 5 in the schedule to the loan agreement, such that it triggered the obligation to repay the principal sum under clause 6 and item 5 within 12 months of registration?

To answer these questions, the court had to construe the loan agreement objectively by reference to what a reasonable person in the position of Lake Laurel and Nichols Constructions would have understood it to mean, having regard to the language used by the parties, the surrounding circumstances known to them at the time of the transaction and the commercial purpose or objects to be secured by the agreement. Importantly, the answer to each of question 1 and question 2 was 'no'. As a result, the dispute had not been resolved and the trial proceeded to determine whether Nichols Constructions had breached express and implied terms of the loan agreement.

Trial decision

Implied obligation to cooperate

The court held that the loan agreement was not the source of any contractual obligation (express or implied) for Lake Laurel to do anything to obtain development approval or operation works approval, or take other steps necessary to achieve registration of the plans of subdivision. The court found that it was appropriate to construe the loan agreement as including an implied obligation on Lake Laurel not to hinder Nichols Constructions' efforts to do the things which were necessary to secure the benefit of the loan agreement to Lake Laurel.

Consequently, the court held it was an implied term of the loan agreement and the mortgage that both parties would cooperate and do all such things necessary to enable the other party to have the benefit of the loan agreement and the mortgage. For Mr Ryan, the benefit to Lake Laurel was the receipt of the principal sum owing under the loan agreement. For Nichols Constructions, the benefit was the deferment of paying the principal sum until a specified event (being the registration of the plans of Lot 261 subdivision).

Breach of the implied obligation to cooperate

The court held that Lake Laurel's alleged breach of its duty to cooperate did not hinder Nichols Constructions' efforts to attain registration of the plans of subdivision of Lot 261. The court held there was no evidence of any efforts made by Nichols Constructions to attain registration of a plan of subdivision of Lot 261. Therefore it could not be concluded that anything Lake Laurel did, or failed to do, had hindered Nichols Constructions from obtaining registration and sealing of the subdivision plans. Consequently, the absence of any evidence from Nichols Constructions to progress the works prior to the lapse of the development approval constituted a breach by Nichols Constructions of the implied terms to cooperate. Nichols Constructions had not done all things necessary to enable Mr Ryan to have the benefit of the loan agreement and the mortgage.

Costs issue

In relation to costs, a question arose as to whether the fact that two of the five bases of argument were dealt with as preliminary questions under r 483 supports a different exercise of the costs discretion. Whilst the court found the preliminary questions could have been dealt with in one hearing, it was not persuaded that separating the arguments added to the duration of the trial. Accordingly, the court found it should not exercise its discretion as to costs in relation to the preliminary matters.

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Court of Appeal confirms that solar farms do not need to be installed by licensed electricians

State of Queensland v Maryrorough Solar Pty Ltd [2019] QCA 129

David Pearce | Luke Trimarchi | Ray Zhai

Key point

The Queensland Court of Appeal confirmed that section 73A of the *Electrical Safety Regulation 2013* (Qld) was invalid on the basis that it was not authorised by its principal legislation.

Significance

Solar farms larger than 100kW are not required to use only licensed electricians or electrical apprentices to locate, mount, fix and remove solar panels.

Facts

The essential facts of the case were previously reported in the June 2019 issue of the Construction Law Update, which can be accessed at *https://www.minterellison.com/articles/construction-law-update-june-2019*.

Section 73A of the *Electrical Safety Regulation 2013* (Qld) (**Regulation**) required licensed electrical workers to perform work on solar panels at solar farms with rated capacity higher than 100kW. Any locating, mounting fixing or removing solar panels at solar farms was 'working' on a solar panel for the purpose of section 73A. Section 73A was introduced by the *Electrical Safety (Solar Farms) Amendment Regulation 2019* (Qld) made under the *Electrical Safety Act 2002* (Qld) (**Act**).

Maryrorough Solar Pty Ltd (**installer**) owned project rights involving locating, mounting, fixing and installing solar panels that was subject to changes made by section 73A. The installer applied to the Queensland Supreme Court for a declaration that section 73A of the Regulation was invalid and the court allowed the application.

The State of Queensland (**State**) appealed the decision to the Court of Appeal.

Decision

The Court of Appeal dismissed the appeal and confirmed that section 73A of the *Electrical Safety Regulation 2013* (Qld) was invalid.

The court found that the Act contained provisions with comprehensive definitions of works that electrical licences were required and agreed with the trail judge that, upon applying those definitions, section 73A sought to require persons to comply with the Act when they were not doing the work regulated by the Act. The court compared those provisions with the general provision the State argued that section 73A was authorised under and stated that section 73A involved 'a new step in policy' which required a licence for work that was not 'electrical work' and was practically irreconcilable with the Act which required the licence for the performance of electrical work. The court therefore rejected the State's argument that section 73A was authorised under the general safety provision of the Act on the basis that the general safety provision must be regarded as subordinate to those detailed provisions which it was inconsistent with.

The court further rejected the State's argument that section 73A was authorised under the provision in the Act to prescribe safety and technical requirements for electricity supply, on the basis that section 73A concerned solar panels that could only be used to generate rather than to supply electricity.

The court also considered the general regulation-making powers under section 22 of the *Statutory Instruments Act 1992* (Qld) and held that section 73A could not be authorised through those powers as section 73A was beyond the scope and general operation of the enactment with its departure from the licensing scheme of the Act.

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'Building Contract Tie In Deed' does not create separate indebtedness to a lender or builder

Wilkes & Anor v DC Construction Services Pty Ltd [2019] QSC 117

Andrew Orford | Laura Berry | Ray Zhai

Key point

The purpose of a 'Building Contract Tie In Deed' is to allow a lender to substitute itself for the developer under the underlying building contract if the lender becomes entitled to enforce its securities under a mortgage.

Significance

A 'Building Contract Tie In Deed' does not create a separate indebtedness of the developer to the lender or builder, and therefore, failure to make a payment under the building contract is not a default under the mortgage (even if the mortgage is assigned from the lender to the builder).

Facts

Mr and Mrs Wilkes (**owners**) bought a parcel of land and formed Willow Road Development Pty Ltd (**developer**) to subdivide the land. In 2017, the developer entered into a 'Minor Works Contract' (**building contract**) with DC Construction Services Pty Ltd (**builder**) to carry out civil works for the subdivision.

In January 2018, the developer entered into a loan agreement with PMA Holdings Pty Ltd (**lender**) to borrow money for the subdivision (l**oan**). The Loan was secured by a mortgage on the Owners' home (**mortgage**) and a 'Building Contract Tie In Deed' (**Tie In Deed**) which gave the lender some control over the building contract.

In September 2018, the builder made a progress claim against the developer for works complete under the building contract.

In December 2018, the lender assigned the mortgage to the builder. The owners subsequently attempted to sell their home to pay the loan; however, the builder refused to release the mortgage unless the owners also paid the builder's progress claim under the building contract.

The owners applied to the Supreme Court of Queensland for the release of the mortgage.

Decision

The court found in favour of the owners on the basis that the money owed under the building contract was not secured by the mortgage.

The court rejected the argument from the builder that it was the intention of the mortgage documents that securities under the mortgage should include both the loan and any liability owing under the building contract.

The court considered the definition of 'Collateral Securities' under the mortgage and found that, while the Tie In Deed was included in the securities, the Tie In Deed did not impose any relevant obligations on the developer to pay the builder or the lender. The court found that the purpose of the Tie In Deed was to allow the lender to substitute itself for the owners if the lender became entitled to enforce its securities under the mortgage.

The court concluded that the Tie In Deed did not create a separate indebtedness of the developer to the lender or the builder, and therefore, failure to make a payment under the building contract was not a default under the mortgage.

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NORTHERN TERRITORY

Check my authority! Authority essential in creating a binding contract

Halikos Hospitality Pty Ltd & Ors v INPEX Operations Australia Pty Ltd [2019] NTSC 10

David Pearce | Laura Berry | Ray Zhai

Key point

Halikos lost its lawsuit against INPEX as the Supreme Court of the Northern Territory found that there was no contract between the parties.

Significance

Companies dealing with a large corporation need to make sure that the person they are dealing with has sufficient authority.

Facts

Halikos Hospitality Pty Ltd (**Halikos**) operated hotels and serviced apartments. John Halikos and Shane Dignan were directors of Halikos (**Halikos Directors**).

INPEX Operations Australia Pty Ltd (**INPEX**) was part of a joint venture to construct and operate processing facilities for an LNG project near Darwin. Messrs Wheeldon and Davies were project managers, and Mr Kildare was the general manager of the Darwin office, for INPEX (together, the **INPEX Managers**). Mr Okawa was a director and company secretary of INPEX (**INPEX Director**).

Halikos initially had an agreement with INPEX to supply accommodation for five years (**Initial Contract**). The Halikos Directors and INPEX Managers then had a number of meetings and exchanged correspondence over a period of two years in relation to the potential supply of additional accommodation for 15 years (**Additional Accommodation**).

Halikos claimed that INPEX, through a letter from the INPEX Managers, entered into a multi-million dollar agreement with it in relation to the Additional Accommodation (**Subsequent Contract**). INPEX refused to perform the terms of the Subsequent Contract as it considered that the Subsequent Contract was never finalised and the INPEX Managers did not have the authority to conclude the deal.

Halikos brought an action in the Supreme Court of the Northern Territory against INPEX claiming damages for the breach of the Subsequent Contract.

Decision

The court found in favour of INPEX and held that there was never a binding contract.

The court rejected Halikos' argument that the INPEX Managers had ostensible authority to bind INPEX to the Subsequent Contract. The court stated that the Halikos Directors were aware of INPEX's internal approval process through its prior dealings with INPEX in relation to the Initial Contract. The court pointed out that Halikos should have known that even the INPEX Director did not have authority to enter into the Subsequent Contract and therefore had no authority to hold out the INPEX Managers as having that authority, even if the INPEX Director had purported to do so.

The court further rejected Halikos' argument that INPEX intended to enter into the Subsequent Contract by the INPEX Managers telling the Halikos Directors that they were 'happy with that agreement'. The court stated that it was inherently unlikely that INPEX, a subsidiary of a large corporation and a part of a joint venture, objectively intended to legally bind itself to a valuable long-term contract through verbal acceptance by the INPEX Managers. The court concluded that there was no intention to create legal relations, and that was fatal in establishing the formation of the Subsequent Contract.

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Conduct in dealing with payment claims and adjudication applications can be evidence of the existence of payment disputes

Jemena Northern Gas Pipeline Pty Ltd v Civmec Constructions & Engineering Pty Ltd and Smith [2019] NTSC 52

Andrew Orford | Petrina Macpherson | Ray Zhai

Key point

In an adjudication application, the way parties deal with a payment claim and an adjudication application can be used as evidence in determining if there is a payment dispute, notwithstanding that the *Construction Contracts (Security of Payments) Act 2004* (NT) (**Act**) states that the existence of a payment dispute is an objective test.

Significance

Principals must be cautious in their responses to payment claims and adjudication applications, as:

- an assessment of a payment claim, notwithstanding that the assessment disputes the validity of the payment claim, can be evidence of accepting the existence of a payment claim; and
- active participation in an adjudication process can be evidence of recognising that there is a payment dispute.

Facts

Jemena Northern Gas Pipeline Pty Ltd (**contractor**) had an agreement with the Northern Territory Government to design, construct and operate the Northern Gas Pipeline (**project**). The contractor and Civmec Constructions & Engineering Pty Ltd (**subcontractor**) entered into a contract to carry out certain works for the project (**contract**).

The subcontractor made a payment claim to the contractor on the basis that there should have been an extension of time (**EOT**) granted under the contract and as such the subcontractor should be entitled to reversed liquidated damages equivalent to the delay costs (**payment claim**). The contractor rejected the payment claim on the basis that it was not lodged within the timeframe stipulated under the contract for EOT claims.

The subcontractor made an adjudication application under the Act for the alleged payment dispute (**adjudication application**). The contractor applied to the Supreme Court of the Northern Territory for an order to compel the adjudicator to dismiss the adjudication application, arguing that a payment dispute did not exist and therefore the adjudication application lacked a subject matter for the adjudicator to determine.

Decision

The court found in favour of the subcontractor and refused to grant an order to compel the adjudicator to dismiss the adjudication application.

The court confirmed that a payment dispute arose when a payment claim had been rejected and clarified that a claim being out of time did not mean that a payment dispute could not exist.

The court stated that, although whether a payment dispute existed was an objective test under the Act, the way that the parties dealt with the payment claim could be used as evidence in determining if there was in fact a payment dispute. The court concluded that there was a payment claim that had led to a payment dispute and subsequently to the appointment of the adjudicator under the Act, on the basis that:

- the contractor wrote to the subcontractor stating that the contractor, having reviewed the payment claim, assessed nil amount payable, indicating that the contractor accepted that there was a payment claim; and
- the contractor, in its response to the adjudication application, dealt with various contractual terms in detail and asked the adjudicator to find in its favour, which indicated that the contractor recognised that there was a payment dispute, notwithstanding the contractor's primary position in its response that the adjudicator did not have jurisdiction.

The court further stated that it would dismiss the application even if there were no payment dispute on the basis that the application was premature as the contractor was actively participating in the adjudication and there was no reason to suggest that the adjudicator would act beyond his jurisdiction when he had not yet made a determination.

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