Construction Law Update

April 2019

Contents

In the Australian courts

NEW SOUTH WALES

Capturing conversations: the art of actual persuasion

BM Sydney Building Materials Pty Ltd v AWT Building Group (AUST) Pty Ltd;
BM Sydney Building Materials Pty Ltd v AWT Building Pty Ltd;
Harpro Group Pty Ltd v BM Sydney Building Materials Pty Ltd **[2019] NSWSC 421**

Richard Crawford | Phoebe Roberts

Key point: Where a party is attempting to rely on a spoken conversation as a key piece of evidence, the court must feel an 'actual persuasion' of the conversation's occurrence.

Significance

The case is a reminder of the importance of accurate and contemporaneous record-keeping at meetings and in commercial negotiations.

In the absence of a reliable contemporaneous record, a party may face serious difficulties of proof unless the court can be 'reasonably satisfied' that the conversation existed.

The court must feel an 'actual persuasion' that the conversation took place as described by the asserting party, taking into account the nature and consequences of the facts to be proved.

Facts

The case involved a joint venture between Mr Teng (of AWT Building Pty Ltd and AWT Building Group Pty Ltd (together, **AWT**)) and Mr Lee (of BM Sydney Building Materials Pty Ltd) (**BMS**)) to import and supply panels from China in the Australian market.

This venture was conducted through a new company, Harpro Group Pty Ltd (**Harpro**), which had three shares on issue (two to Mr Teng and one to a nominee of Mr Lee) when it was created on 6 January 2014.

The facts of the business dealings between the parties are not agreed between the parties, but in summary:

1. BMS funded the day-to-day operations of Harpro and also supplied building materials to AWT for its own property development.
2. BMS loaned approximately $500,000 to Harpro, the amount of which remains unpaid and is disputed by the parties.
3. On 14 August 2014, in 'suspicious circumstances' Mr Teng was removed as a director of Harpro and his shares were transferred to Mr Lee's nominee.
4. On 18 August 2014, Harpro entered into a written Distribution & Stock Transfer Agreement with Hume Plasterboard Pty Ltd (**Hume**) for the purchase of existing panels of Harpro (at less than the market rate).
5. Hume paid for a portion of the panels. These proceeds went directly to BMS, and, in Harpro's ledger, this payment was recorded as reducing the loan from BMS.
6. Mr Teng alleges that he and Mr Lee verbally agreed that Mr Teng would not sue Mr Lee in respect of the share transfer and the Hume transaction, as Mr Lee (through BMS) would continue to supply building materials for AWT's development. Mr Lee denies this agreement.
7. In March 2015, AWT sent a payment schedule to BMS setting out payments it would make to BMS for goods sold and delivered, and also delivered a cheque to BMS in June 2015, which was dishonoured on presentment. AWT continued to order further building supplies amounting $811,809.05, which remained unpaid.

Three suits were heard together: two in respect of BMS suing AWT for the unpaid goods sold and delivered (the **Debt Proceedings**), and the third in respect of Harpro suing Mr Lee for breaches of his statutory and fiduciary duties (as de facto Director of Harpro) in respect of payment to BMS of monies owed to Harpro (the **Breach of Duty Proceedings**).

Decision

Hammerschlag J found in favour of BMS in the Debt Proceedings, and dismissed the Breach of Duty Proceedings.

The Debt Proceedings (BMS v AWT)

His Honour held that it was clear that AWT has not paid for the goods sold and delivered by BMS, and that these were debts which are due and payable by AWT.

AWT's claim was that BMS should not be able to claim the amounts owing to BMS by AWT pursuant to the 'agreement' that Mr Teng would not sue Mr Lee (as describe above at point 6). His Honour held that AWT's case relied on proving that the agreement conversation had in fact occurred.

His Honour held that, where a party seeks to rely upon spoken words as a foundation for a cause of action, the conversation must be proved to the reasonable satisfaction of the court. This means that:

- The court must feel an 'actual persuasion' of the conversation's occurrence or its existence.
- In the absence of some reliable contemporaneous record or other satisfactory corroboration, a party may face serious difficulties of proof (inexact proofs, indefinite testimony or indirect inferences will not suffice).
- 'Reasonable satisfaction' is not a state of mind that is obtained or established independently of the nature and consequences of the facts to be proved. The court will consider the following additional factors:
  - the seriousness of an allegation made;
  - inherent unlikelihood of an occurrence of a given description; or
  - the gravity of the consequences flowing from a particular finding.

His Honour did not feel an actual persuasion of the agreement alleged by AWT and that this alleged conversation was a 'contrivance'.

His Honour held that if Harpro had been entitled to repayment of the monies directed to BMS from Hume (which it was not), then Mr Lee would have been in breach of the fiduciary duty, because Harpro would not have received the monies it was owed.

If AWT had been able to establish the agreement conversation, it still would have ultimately failed to articulate its own prejudice suffered as a result of Mr Lee's representations, as it was Harpro that would have suffered any loss (not AWT).

The Breach of Duty Proceedings (Harpro v BMS)

Harpro accepted that the payments made directly to BMS were a discharge of their loan obligations, and as such there was no detriment suffered by Harpro.

Harpro contended in the alternative that the loan from BMS was by way of equity and that repayment to BMS was intended to be by way of dividend. This was dismissed given the loan repayments were clearly stated on the Harpro ledger.

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You say "tomayto" and I say "tomahto" - but do we have a contract?

Boss Constructions (NSW) Pty Ltd v Rohrig (NSW) Pty Ltd [2019] NSWSC 374

Richard Crawford | Michelle Knight | Jessie Jagger

Key point and significance

The performance of significant work by one party and payment by the other of some claimed amounts may not be enough to confirm the existence of a binding legal contract. Establishing the existence of a contract requires evidence of communication of acceptance even where there are protracted negotiations.

Facts

Rohrig (NSW) Pty Ltd (**Rohrig**) was engaged by Penrith Anglican College as head contractor for the design and construction of a performing arts centre in Orchard Hills. On 9 November 2017, Rohrig accepted a tender submitted by Boss Constructions (NSW) Pty Ltd (**Boss**) for certain works, including the fabrication and supply of structural steel (**Works**) for the sum of $526,140 (excluding GST). However, Rohrig did not sign the quotation and terms and conditions provided by Boss as part of its tender response.

The parties then entered into lengthy negotiations and discussions as to the terms of the contract under which Boss would be engaged. On 15 November 2017, Boss provided Rohrig with a 'rough schedule' for the Works, with practical completion proposed to occur on 21 March 2018. On the same day, Rohrig emailed Boss to confirm its intent *'to enter into a contract agreement with Boss'* and that it would *'send through your works order and contractual documents by the end of next week'*.

The parties further exchanged formal contract documents, including Works Orders, terms and conditions attached to invoices and a Small Works Package on various occasions between November 2017 and July 2018 (inclusive). Neither party signed the contract documents.

Boss performed a significant part of the Works, and Rohrig paid the sum of $535,583.49. The arrangement between the parties deteriorated, with Boss claiming for unpaid invoices and Rohrig claiming damages following its purported termination of Boss.

On 2 August 2018, Boss issued a notice of suspension of work to Rohrig pursuant to section 27 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) resulting from an unpaid payment claim also issued under the Act. Rohrig purported to terminate the contract and engaged a second contractor for the remaining Works.

Boss made a claim in breach of contract against Rohrig for *'oustanding monies owed', 'for the amount of $224,928.88 works carried out including GST, plus $200,000 for termination of the contract deed'*.
Boss relied on 'Proposal 2' in a version of the 'Small Works Package', which was a Rohrig document that had been amended in mark-up by Boss. Proposal 2 offered the *'construction of all sections'* for $632,900.

Rohrig cross-claimed for breach of contract for liquidated damages and loss of bargain damages, due to the alleged late completion of the Works by Boss and termination requiring the engagement of the second contractor. Rohrig relied upon an earlier 'Works Order' which contained a clause to the effect that the terms contained within would be deemed accepted if Boss performed the Works.

Decision

Hammerschlag J found that, assessed objectively, neither party had established a binding contract. Accordingly, Boss' claim and Rohrig's cross-claim were dismissed. His Honour found (at [75]) that both of the parties had *'acted on the footing that one would be entered into, but never did'*.

Neither party had sufficiently signalled their acceptance of any document issued by the other. While the disposition of the case turned on its own facts, the following points are significant:

- it was not open to Rohrig to point to the Works Order when *'itself did not act as if there was a contract in place'* because it continued to insist on Boss executing and returning other contract documents (at [94]);
- Rohrig could not rely on the deemed acceptance by performance clause in the Works Order (at [86] to [89]) because:

- there was no evidence that the clause came to Boss' attention prior to commencing the Works; and
- Rohrig's cover letter had insisted that Boss print, read and sign the relevant instruments, implicitly suggesting that there would be no agreement unless the document was signed; and

- it may be appropriate in some instances to infer the existence of a binding contract between parties where there has been lengthy negotiations, there was no evidence in this case that either party bent to the other's will and there was no agreement in place based on the parties' continuing behaviour (at [103]).

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Inconsistent contractual rights exercisable at the same time do not result in a 'first past the post regime'

Greencapital Aust Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd (Subject to Deed of Company Arrangement) [2019] NSWCA 53

Richard Crawford | Karen Hannigan

Key Point and significance

Where a contract confers mutually inconsistent rights exercisable at the same time, and there is an absence of words in the contract reconciling the two inconsistent rights, it does not follow that the parties are taken to have agreed to a 'first past the post' regime.

Facts

The proposed development of this site as a housing estate has received media attention for many years; however, the issue in this appeal was one of construction of contractual terms. The decision concerned a contract for sale of land which was subject to an Environmental Protection Authority contamination order requiring Pasminco to remediate the land, which was originally operated as a lead and zinc smelter and, following that, as a fertiliser factory. The dates are important in the factual background of the decision.

In December 2015, Pasminco and Greencapital entered into a contract for the sale of land (**Contract**). The Contract was a standard 2005 Law Society form contract with the following key clauses:

- clause 30 – defined 'Sunset Date' to mean 30 June 2017; and
- clause 37 – provided that the contract was conditional upon the satisfaction of the conditions precedent and that each party had a right to rescind the contract in the event that the conditions precedent were not satisfied.

The registration of a subdivision plan for the land was one of the conditions precedent.

In December 2016, the parties entered into a Deed of Amendment to the Contract. The Deed of Amendment provided for the following key amendments:

- the definition of 'Sunset Date' was extended to be one year later to Saturday 30 June 2018; and
- clause 37 was amended to provide for a purchaser's step in right if the conditions precedent were not achieved by 30 June 2018.

The conditions precedent were not satisfied by 30 June 2018. The next day, Sunday 1 July 2018, and again on Monday 2 July 2018, Pasminco purported to exercise its right to rescind.

Later, on Monday 2 July 2018 and again on 3 July 2018, Greencapital exercised its step-in right.

Decision

Was there a first mover right?

It was not controversial that the 2016 amendment to the Contract provided that Greencapital's right to step-in was available at the same time as Pasminco's right to rescind.

Pasminco contended that the two competing rights were able to be exercised at any time and there was nothing *'untoward in there being a competition between the vendor and purchaser as to who would exercise*

one of those rights' and that a *'first mover'* advantage was familiar in commerce. Greencapital submitted that there was nothing in the objective contemplation of the parties that the valuable step-in right could be defeated by a *'race'* to give competing notices and that this was even more improbable given it was a *'race'* which *'commenced at midnight on a Saturday night'.*

Greencapital was successful in its appeal, with the court agreeing that the conflict between the two contractual rights was resolved by requiring a *'reasonable time'* before the exercise of the right of rescission, in order for the exercise of the step-in right. Leeming JA held that the established principle that a contract should be read as a whole sustains the conclusion that Pasminco's right to rescind was qualified by Greencapital's new right to step-in.

The key factors to the decision were:

- the improbability and impracticality of the 'race' as described above;
- the need to give efficacy to the separately negotiated new valuable right (the step-in right) enjoyed by Greencapital; and
- the orthodox approach that inconsistent provisions are construed as one qualifying the other.

Separately, it was held that correspondence between the parties after the contract was made was irrelevant to the construction of the contract.

As an alternative argument, Pasminco submitted the contract had been frustrated by a state environmental planning amendment which imposed restrictions on the power to grant subdivisions, which was also a condition precedent. The court considered and rejected this submission. The appeal was allowed and the matter returned to the Commercial List of the Supreme Court

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Effective novation of contract – avoid shortcuts

Kai Ling (Australia) Pty Ltd v Rosengreen [2019] NSWCA 3

Richard Crawford | Nicholas Grewal | Lachlan Williams

Key point: Taking shortcuts on a novation of a contract may lead to the novation being ineffective.

Significance

Where parties do not comply with the procedural requirements in a contract regarding novation or substitution, there is a risk that a purported novation is ineffective. To ensure an effective novation of contract, parties should take all necessary steps to demonstrate an express intention to novate a contract to avoid reliance on an argument that a novation is implied by conduct and circumstances.

Facts

Robert Rosengreen (**Rosengreen**) granted an option to purchase land (by deed) to Saadie Group Pty Ltd (**Saadie Group**) on 30 April 2015 (**Option**). Shortly after, on 3 May 2015, Fayez Saadie (sole director of Saadie Group) met with Rosengreen and requested that Rosengreen execute a single 'signing page' (**Signing Page**) which, in terms, was the same execution page as the Option; however, the grantee was listed as Kai Ling (Australia) Pty Ltd (**Kai Ling**).

Saadie Group and Kai Ling were pursuing a possible development of the land in an 'ill-defined' business relationship which was described (for convenience) as a joint venture. Mr Saadie was not an officer of Kai Ling.

Rosengreen executed the Signing Page after being informed by Mr Saadie that the parties *'may need to change the name of the grantee'* (with nothing else being affected). The Signing Page was executed by Rosengreen, and Robert Wang (director) and Zhan Shi (director pursuant to power of attorney) on behalf of Kai Ling.

The day after execution of the Signing Page (4 May 2015), a new option deed was sent by Saadie Group's solicitors to Rosenberg's solicitors (**New Option**), which was in the form of the Option. However:

- Kai Ling's name had been substituted for Saadie Group where relevant;
- the Signing Page appeared in place of the execution page; and
- a handwritten clause included in the Option did not appear in the New Option.

The New Option was endorsed by Saadie Group's solicitors as an *'amended Deed of Put and Call Option'* with amendments concerning the name of the purchaser.

A series of disputes unfolded between the parties (the majority of which were resolved). However, Kai Ling maintained a claim for an interest in the land under the Option on the basis that the Option was novated to Kai Ling from Saadie Group, with the rights and obligations under the Option being between Rosengreen and Kai Ling to the exclusion of Saadie Group.

In the first instance, the court held (among other things) that there was no contractual relationship between Kai Ling and Rosengreen.

Kai Ling appealed the decision on several grounds, most notably on the ground that his Honour erred in determining that there was no novation of the Option.

Decision

The NSWCA dismissed the appeal (with costs) holding that:

- there was no basis for a finding that a tripartite agreement necessary to effect novation had been created between Rosengreen, Saadie Group and Kai Ling; and
- • Saadie Group had, in any event, conducted themselves subsequently on the basis that they remained parties to the Option.

This note does not address the issue of authority to act as between Mr Saadie and Kai Ling (which also failed on appeal).

On appeal, Kai Ling contended that:

- it was Rosengreen's signing and delivery of the Signing Page in the context of the discussion with Mr Saadie that gave rise to the novation; and
- the preparation and transmission of the New Option played no direct part in the novation but it merely recorded a position that had been achieved independently of the document.

Principles

In considering the issue of novation of the Option, the court took the opportunity to address certain principles of novation throughout the judgment, namely:

- a novation, in its simplest sense, refers to a circumstance where a new contract takes the place of the old;
- the enquiry in determining whether there has been a novation is whether it has been agreed that a new contract is to be substituted for the old and the obligations of the parties under the old agreement are to be discharged;
- the crux of novation is intention and that intention may be express or may be implied from conduct and circumstances; and
- in a novation setting of the kind in this case, the promise of the incoming grantee to the grantor to perform promises originally given to the grantor by the outgoing grantee is sufficient consideration.

Reasoning

In reaching its decision, the court considered the circumstances on 3 May 2015 and the parties' subsequent conduct and found:

- there was no basis for finding that Mr Wang and Mr Shi executed the Signing Page as a means of creating a tripartite contract among Rosengreen, Saadie Group and Kai Ling;

- given a variation deed to the Option was entered into by Rosengreen and Saadie Group on 27 November 2015, Rosengreen and Saadie Group considered themselves to be the continuing parties to the Option to the exclusion of Kai Ling;
- whilst in other cases an agreement for future substitution of a new purchaser has been found to give rise to an immediate novation (based on the parties' conduct), the conduct of Rosengreen, Saadie Group and Kai Ling after 3 May 2015 was inconsistent with a substitution of Kai Ling for Saadie Group having occurred on that date or at all;
- the parties made no attempt to proceed in accordance with the provision of the Option contemplating novation or substitution (**Provision**);
- the Provision provided that the 'document' could only be novated by another document signed by each of the parties and the Signing Page was not executed by Saadie Group,

and the Court concluded that:

- it was not shown that Rosengreen and Kai Ling had engaged in any conduct of a contractual kind on 3 May 2015;
- even if there was contractual conduct between Rosengreen and Kai Ling on 3 May 2015, the purpose of that conduct was to deal with a foreseen possible future need to change the name of the grantee under the Option, as distinct from immediately substituting a new grantee; and
- as at 27 November 2015, two of the three relevant parties (Rosengreen and Saadie Group) had acted on clear footing that they alone remained parties to the Option.

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Commercial honesty: You don't say it best when you say nothing at all

Porges v Adcock Private Equity Pty Ltd [2019] NSWCA 79

Richard Crawford | Phoebe Roberts

Key point: This case is a salient reminder that failure to disclose known facts about the affairs of a company can amount to misleading and deceptive conduct, particularly where such information cannot be known to the other party.

Significance

In circumstances where a party is relying on positive representations made about a company or its dealings (for example, in pre-contract commercial discussions), the failure to disclose certain facts can be found to be misleading and deceptive (rather than the positive representation in itself being found to be misleading or deceptive).

The question is one of common sense: would a party considering an investment consider that the omitted information is material in its decision to proceed and, if so, on what terms?

While not a 'construction case', the same principles can apply when negotiating construction contracts.

Facts

Stephen Robert Porges (**appellant**) was the proposed new chairman of Adcock Private Equity Pty Ltd (**respondent**). As a pre-condition of his appointment, the appellant required that the respondent purchase a number of his shares in an unrelated British Virgin Islands entity, SecureOne Corporation, Inc (**SecureOne**).

Amongst the various statements made by the appellant about the state of SecureOne (including that it was trading profitably and that it was an attractive investment), the appellant made representations that he was involved in the day-to-day business of SecureOne and had reliable information about its performance. The respondent purchased the required equity in SecureOne.

The appellant failed to disclose to the respondent that he was involved in a disagreement with the management of SecureOne and that separately a signification claim (in excess of USD10million) against

SecureOne and its shareholders had been served in respect of a breach of a share purchase agreement (and that the costs to defend this claim would cripple SecureOne) (**SPA Dispute**).

The SPA Dispute commenced in the Eastern Caribbean Supreme Court, and, although it was ultimately dismissed, the costs incurred by SecureOne resulted in SecureOne's collapse and the devaluation of its share price to zero.

NSW Supreme Court Decision

In the first instance, the respondent pleaded that the implied and express representations made by the appellant were misleading or deceptive due to his knowledge of the SPA Dispute (as that made the positive representations untrue). The respondent did not plead that the misleading and deceptive conduct was the failure to disclose the SPA Dispute.

Despite the respondent not explicitly pleading that it had relied on the silence, McDougall J held that it was implicit in the pleading that the conduct of the appellant that was relied upon was that the appellant knew of the SPA Dispute and that this was not disclosed to the respondent.

McDougall J remarked that it was *'impossible to accept that an intelligent and experienced business man'* could have thought that the omitted information was of no importance to the respondent and that the most basic considerations of commercial honesty would dictate that he disclose those circumstances to the respondent. Further, his Honour held it was common sense that the SPA Dispute was the type of information that any purchaser considering an investment in SecureOne shares would have thought material to its decision to proceed.

As such, his Honour found that it was clear that the respondent did rely on the silence, and that the conduct of failing to disclose the SPA Dispute was in all the circumstances misleading or deceptive or likely to mislead and deceive.

The decision also provided clarity on the definition of a 'clusterf---', which his Honour held meant a 'perilous state of affairs', referring to a previous Federal Court decision.

The grounds of appeal

The appellant sought to appeal the primary judgment on the following grounds:

1. certain alleged representations as to the degree of his involvement in SecureOne were not accurate;
2. he had reasonable grounds for making some of the alleged representations (and adduced evidence of this);
3. some of the alleged representations were not misleading or deceptive or likely to mislead or deceive; and
4. the respondent did not rely on some of the alleged representations.

Decision

The NSW Court of Appeal unanimously dismissed the appeal.

In respect of point 1 above, White J A (Payne JA and Sackville AJA agreeing) held that the appellant was closely involved in the management of SecureOne and that the primary judge did not err.

In respect of points 2 to 4 above, the court held that the appellant's grounds of appeal had failed to 'grapple' with the decision of the primary judge (finding that the act of failing to disclose the SPA Dispute was the misleading or deceptive conduct, not that each positive representation was misleading or deceptive).

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QUEENSLAND

Excluded individuals subject to certain past insolvency events may qualify for QBCC licences

Ezra Constructions Pty Ltd v Queensland Building and Construction Commission & Ors [2019] QSC 47

David Pearce | Sarah Ferrett | Ray Zhai

Key point: The repeal of provisions allowing an individual to apply to be a permitted individual for a Queensland Building and Construction Commission (**QBCC**) licence were found to materially affect the rights of individuals and companies. The licence exclusion and cancellation provisions in the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**) considered in this case do not operate retrospectively.

Significance

An excluded individual may still qualify for a QBCC licence if the insolvency event excluding the individual occurred before 1 July 2015, notwithstanding the repeal of the provisions in the QBCC Act allowing an individual to be categorised as a permitted individual. The QBCC must include, in its licence exclusion and cancellation notices, information to an individual about his or her right to apply to be a permitted individual where the insolvency events occurred before 1 July 2015.

Facts

The third applicant, James Raptis (**Director**), was a director of RT No 2 Pty Ltd (**Company**), which was not a construction company and did not hold any building licence. The Director resigned on 29 September 2014, one day before the appointment of an administrator to the Company (**Relevant Event**).

The first applicant, Ezra Constructions Pty Ltd (**Ezra**), and the second applicant, Garnet Constructions Pty Ltd (**Garnet**), were construction companies holding open building licences issued by the QBCC. The Director was a director of Garnet and an influential person of Ezra for the purpose of the QBCC Act, which made Ezra and Garnet (together, the **Builders**) excluded companies disqualified from holding building licences because of the Relevant Event.

On 1 July 2015, the *Queensland Building and Construction Commission and Other Legislation Amendment Act 2014* (Qld) (**Amendment Act**) repealed the provision allowing an individual to be categorised as a permitted individual and the corresponding provisions requiring the QBCC to include information regarding the ability to apply to be a permitted individual in its licence exclusion and cancellation notices (**Repealed Provisions**). The Amendment Act also included transitional provisions allowing applications for permitted individuals to be submitted before 1 July 2015 and declared that the QBCC could categorise individuals who apply prior to 1 July 2015 as permitted individuals despite the repeal of the relevant provision (**Transitional Provisions**).

In 2018, the QBCC gave notices (**Notices**) to the Builders and the Director under provisions of the current QBCC Act which did not require the QBCC to include information about the right of an individual to be categorised as a permitted individual (**Current Provisions**). The Notices advised the Builders and the Director that they were an excluded company and individual due to the Relevant Event and did not include information about their right to apply to the QBCC to be a permitted individual for the Relevant Event.

The Builders and the Director applied to the Queensland Supreme Court for a review of the Notices.

Decision

The court allowed the application of the Builders and the Director and set aside the Notices issued by the QBCC.

The court found that the Amendment Act introduced fundamental changes to the regime applicable to excluded individuals and companies, including reducing the time for individuals to be excluded from five

years to three years and restricting the 'relevant events' to insolvencies of construction companies (rather than any companies). The court found that, by repealing the provision allowing individuals to be permitted individuals, the Amendment Act materially affected the rights of individuals and companies.

As the Amendment Act affected substantive rights, the court adopted the legal principle that a statute would be assumed not to have retrospective operation in the absence of some clear statement to the contrary.

The court considered the Transitional Provisions and found that, while the Transitional Provisions only regulated applications to be permitted individuals made (but not decided by the QBCC) before 1 July 2015, they were not sufficient evidence of an intention that individuals and companies should be denied rights previously available to them. The court also found that the Transitional Provisions were consistent with the legislature's intention for the QBCC to have the ability to categorise a person as a permitted individual, despite the repeal of the relevant provision.

The court found that the Builders and the Director should not lose the benefits that existed in their favour under the same Repealed Provisions that excluded them when the Amendment Act did not intend to deprive them of those rights.

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Failure to build dream home amounts to a breach of warranty and wrongful repudiation

Mousa & Anor v Vukobratich Enterprises Pty Ltd & Anor [2019] QSC 49

Michael Creedon | Amy Dunphy | Samantha Byrne

Key point: A contractor must complete works under a building contract in accordance with relevant statutory standards or it may be required to pay damages for breach of warranty. Further, failing to carry out works in accordance with statutory standards may amount to repudiation of the contract.

Facts

The defendant, Vukobratich Enterprises Pty Ltd (**Company**), contracted with the plaintiffs, Gamal Mousa and Margaret Mousa (**Owners**) to build their family home in Cairns for $2.1 million. The work contemplated by the contract was more complex than the kind of residential construction work that the Company had previously performed. This was known by the Owners at the time of entering the contract.

The Company's construction of the family home ultimately concluded with the Owners terminating the contract on 7 December 2015. The construction was largely incomplete and there were extensive defects requiring rectification. Importantly, the contract incorporated various warranties by the Company under part 4 of the *Domestic Building Contracts Act 2000* (Qld) (this act has since been repealed and the relevant provisions can now be found in Schedule 1B of the *Queensland Building and Construction Commission Act 1991* (Qld)), including that the Company would carry out the works in an appropriate and skilful way and with reasonable care and skill.

The Owners filed a claim against the Company and its sole director on 20 March 2017. The relief sought was:

- damages for breaches of statutory warranties against the Company in the amount of $1,571,024.40, being the cost attributable to the rectification of alleged defects (ie the cost of carrying out and completing remedial work to the house);
- damages against the Company for wrongful repudiation of the contract in the amount of $2,524,254.40, being the cost of the alleged defects requiring rectification (outlined above), plus an additional amount of $953,229.86 being the cost to complete the construction of the house; and
- damages against the sole director personally for negligence in the construction in the amount of $1,571,024.40.

Decision

The court found the Company had breached a statutory warranty incorporated into the contract by failing to carry out the works under the contract in an appropriate and skilful way and with reasonable care.

In relation to the defective work, the court held that if the Company had been carrying out the work in an appropriate and skilful way and with reasonable care and skill, it would not have made such significant errors and, if it had, it would have realised and promptly rectified them. The court considered the type of defects that occurred could only allow for the conclusion that the Company failed to carry out the works in an appropriate and skilful way and with reasonable care. The court held that the breach of warranty caused loss and damage that should be quantified as the cost of the rectification work.

The court also found the Company had wrongfully repudiated the contact. The court considered that the nature and magnitude of the rectification work required because of the Company's breach of warranty demonstrated an intention to perform the works in a manner substantially inconsistent with the Company's obligations under the contract, therefore evincing an intention not to be bound by the contract. As a result, the Owners were entitled to terminate the contract and be compensated for the Company's repudiation. The court considered the damages payable should be assessed based on the actual cost of completion and the balance which would have been payable to the Company if it had completed the contract.

The court held that the Company's sole director was not personally liable in negligence for the Owners' economic loss. In order to find that the director personally owed a duty of care to the Owners to prevent pure economic loss, the Owners were required to show that they were vulnerable and unable to take steps to protect themselves from economic loss arising from the director's conduct. The court held that the Owners were able to take steps to protect themselves financially and, despite being aware of the inexperience of the Company in constructing a high-end dwelling, they made the considered choice to contract with the Company anyway.

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Effective service of a payment claim via Aconex: Yes or No?

The Trust Company (Australia) Ltd atf the WH Buranda Trust v Icon Co (Qld) Pty Ltd & Anor [2019] QSC 87

Richard Crawford | Phoebe Roberts

Key point: Submission of a payment claim via Aconex was considered valid service, despite the contract stating that any notice must be delivered to the principal's physical address.

Significance

When using Aconex and service via email, careful consideration is required by the parties in respect of what is considered valid notice and service of a payment claim under the terms of the particular contract.

The court will take into account the commercial context of the contract in determining whether service is valid.

Facts

This case involved an application to set aside an adjudication decision on the grounds that the payment claim was not properly served and so was not a valid claim under Part 3 of the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIPA**).

The applicant was the principal under an amended AS4902, who appointed AECOM Cost Consulting Pty Ltd (**AECOM**) as the principal's representative thereunder.

The contract established Aconex for document control, and the parties used this system for every previous progress claim pursuant to the contract.

The contractor (first respondent) submitted the relevant progress claim (no. 37) (**PC37**) through Aconex and it was endorsed as a payment claim pursuant to BCIPA. AECOM's employee received the Aconex

notification and accessed PC37 on the day it was sent by the first respondent. He then assessed the claim and issued a payment certificate in response (for an amount that was significantly less than the contractor had claimed).

The contractor made a successful application under the BCIPA, which concluded that the amount due to the Contractor was roughly the amount claimed in PC37.

Key contractual provisions

Clause 37.1 (payment): *'… each progress claim shall be given in writing to the Principal's Representative…'*

Clause 7 (services of notices): *'…subject to clause 7A, a notice (and other documents) shall be deemed to have been given and received, if addressed or delivered to the relevant address in the Contract...'* and *''subject to clause 7A … a notice sent by email is not a valid notice for the purposes of the Contract'.*

Clause 7A (BCIPA and QBCC Act Notices): *'Any notice served by the Contractor under the… BCIPA shall be served on the Principal's physical address'.*

Key legislative provisions

Section 17(1) of the BCIPA states that the claimant *'may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment*'.

Section 103(1) of the BCIPA states that *'a notice or other document that under this Act is authorised or required to be served on a person may be served on the person in the way, if any, provided under the construction contract concerned*'.

Submissions

The applicant's key submission was that insofar as PC37 was relied upon as being a payment claim under the BCIPA, it is a *'notice' for the purposes of clause 7A, and therefore it should be served on the Applicant's 'physical address*', being their solicitor's address (rather than through Aconex).

The first respondent's key argument was that the service of a progress claim containing a BCIPA-complaint payment claim is governed entirely by clause 37.1 (*'given in writing to the Principal's Representative'*).

Decision

Applegarth J dismissed the application.

Which contractual notice requirements applied to the progress claim?

His Honour held that clause 37 (not clause 7A) governed to whom and how a progress claim which incorporates payment claim is given, and that clause 7A is concerned with other kinds of notices (for example, an adjudication application).

His Honour confirmed that the subject matter and terms of clause 37, in conjunction with the commercial context of the making of progress claims to the principal's representative supports that conclusion. This decision was consistent with the *'business-like operation'* of the contract, as otherwise this would mean that the parties would have to double handle the notice and it would not make sense for the applicant's solicitors to be receiving all of their construction notices.

In his decision, his Honour did not rely on the fact that the applicant accepted the previous 36 progress claims submitted by the first respondent under the contract, each submitted by Aconex, or that the application did not raise this issue of application of clause 7A in the adjudication process, as he was not of the view that this aided contractual interpretation.

Was the claim validly served?

Yes. In respect of the application of clause 7 (the prohibition of service by way of email), his Honour held that service via Aconex was not *'notice sent by email*'.

His Honour addressed whether AECOM was *'the person who was liable to make the payment'* as required under section 17(1) of BCIPA. Citing Vickery J in a previous Victorian decision, this section does not operate

in a *'commercial vacuum'* and that clause 37 confers express authority upon AECOM as principal's representative to receive a progress claim, and this constitutes service on the applicant.

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