Construction Law Update

August 2020

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In the Australian courts

AUSTRALIAN CAPITAL TERRITORY

Set-off: Clear and unequivocal communication is key

***On Forbes Developments Pty Ltd v Chase Building Group (Canberra) Pty Ltd* [2020] ACTSC 163**

Ben Fuller | Andrew Black | Joseph Gordon

Key points and significance

Section 29 of the *Building and Construction Industry (Security of Payment) Act 2009* (ACT) (**Act**) allows a claimant to suspend work until certain unpaid amounts are *'received'*. Receipt can include constructive receipt by way of set-off, however, a clear and unequivocal communication of the set-off is required. A purported set-off is unlikely to be effective as constructive receipt where the respondent is simultaneously seeking to dispute the unpaid amount.

A set-off must also be against a final and binding amount owed. Set-off against an arguable contractual claim is likely to be void as an attempt to contract out of the Act.

Facts

Background

The plaintiff, On Forbes Developments Pty Ltd (**developer**), entered into a contract with the defendant, Chase Building Group (Canberra) Pty Ltd (**builder**) for the builder to design and construct an apartment building in Canberra.

Several disputes arose between the parties, including a claim for liquidated damages by the developer and a variation claim by the builder. The builder issued a payment claim pursuant to the Act, including a claim for amounts in respect of variations. The developer responded by way of a payment schedule, stating that the developer proposed to pay nothing due to the outstanding liquidated damages. The builder proceeded to adjudication and was awarded an amount for variations (**adjudicated amount**). The adjudicator did not make a decision in respect of the liquidated damages.

The developer failed to pay the adjudicated amount to the builder. As a result, the builder suspended the construction work under section 29 of the Act.

Meanwhile, in a fairly convoluted set of proceedings:

- the developer referred its liquidated damages claim to binding expert determination under the contract (which was determined in the developer's favour);
- the developer issued a statutory demand under the Corporations Act 2001 (Cth) seeking payment of the full amount of the liquidated damages determined by the expert;
- the developer commenced proceedings in the Supreme Court of the Australian Capital Territory seeking to overturn the adjudicator's decision; and
- the builder commenced proceedings in the Federal Court seeking to set aside the developer's statutory demand.

The adjudicated amount was ultimately paid into the court (but not to the builder), after the developer was ordered to do so as part of the developer's Supreme Court proceedings.

The Supreme Court hearing

The hearing concerned the relatively narrow issue of when the builder's entitlement to suspend work under section 29 of the Act ended. Section 29 provides that a builder may suspend work during the period *'ending 3 business days after the day the claimant receives the amount payable'*.

The developer argued that the amount payable was *'received'* when the developer set off that amount against the liquidated damages owed to it. The developer claimed that this occurred on either the date of the

expert's determination, the date the adjudicated amount was paid into court, or alternatively on one of the various dates on which the developer amended its originating application to the court.

The builder claimed that *'receipt'* for the purpose of section 29 of the Act required actual receipt of the amount payable and was not satisfied by the developer exercising a right of set-off. The builder also claimed that (in any event) the developer's right of set-off was void under section 42 of the Act as an attempt to contract out of the Act. In the alternative, the builder claimed that there was no *'receipt'* of the adjudicated amount until the date of the hearing, as that was the first date on which the developer gave an *'unqualified acknowledgment'* of its set-off.

Decision

The adjudicated amount was *'received'* on the date of the hearing, being the first time it was clearly and unequivocally set off against the liquidated damages.

'Receipt' of the adjudication amount

Crowe AJ held that *'receipt'* for the purpose of section 29 of the Act included *'constructive receipt'* by way of set-off. His Honour concluded that the builder's submission (that *'actual'* receipt was required) would create a *'commercial quandary'* and could lead to *'unjust outcomes'* where the developer had a good countervailing claim.

'Contracting out' and the right of set-off

The court accepted the developer's submission that section 42 of the Act *'had no work to do in the circumstances of the case'*. Crowe AJ held that the developer was relying on a *'final and binding'* expert determination to support its right of set-off, rather than an *'arguable'* claim of set-off under the contract. His Honour noted that giving effect to the expert determination was *'implicitly required'* under section 38 of the Act (which preserves parties' rights under the contract).

His Honour did appear to accept, however, that a set-off based on an *'arguable'* contractual claim (rather than an established debt) would be inconsistent with section 42 of the Act.

Timing of receipt

The court ultimately held that the adjudicated amount was only *'received'* on the date of the hearing. His Honour held that the set-off was only *'put beyond doubt'* by consent orders made on that date.

In reaching this decision, his Honour rejected the contention that the adjudicated amount was set off on the making of the expert determination, or on payment of the amount into court. His Honour held that *'something more than the crystallisation of a countervailing contractual claim'* was required. What was required was *'some clear and unequivocal communication'* which acknowledges the discharge of the adjudicated amount.

Due to the convoluted nature of the various proceedings in both the Supreme Court and the Federal Court (which resulted in *'starkly inconsistent'* positions being taken by the developer in relation to the amounts owing), his Honour determined that no such *'clear and unequivocal'* communication had occurred before the date of the hearing.

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NEW SOUTH WALES

Liquidated damages for a nominal amount did not provide an exclusive remedy for delay

Cappello v Hammond & Simonds NSW Pty Ltd [2020] NSWSC 1021

Andrew Hales | Kate Morrison | Jonathan Molina

Key points and significance

In circumstances where a builder has enforceable contractual rights to money that has become due under a contract, the builder cannot elect to claim a reasonable remuneration in quantum meruit unconstrained by the contract.

Generally, where parties choose to make provision for the payment of liquidated damages they are to be taken as excluding a right to claim general damages. However, where a liquidated damages clause is for a nominal amount of say $1 per working day in a standard form residential building contract in NSW, it will not necessarily provide an exclusive remedy for delay. This will depend on the proper construction of the contract in question. A builder will therefore need to carefully consider the amount that it agrees to pay for liquidated damages in order to avoid a claim for general damages.

Facts

Hammond & Simonds NSW Pty Ltd (**builder**) entered into a construction contract with Mr and Mrs Cappello (**owners**) on a costs-plus basis to undertake renovation work to the ground floor of a two-storey residence in Haberfield. The contract was the standard form Housing Industry Association (HIA) NSW Residential Building Contract for Works on a Cost Plus Basis.

The builder terminated the contract for non-payment of part of an invoice and claimed further payment for works that had not been invoiced.

The work under the contract was completed approximately 7 months late. The builder made no applications for extensions of time in accordance with the contract. The owners claimed:

- $370,000 for the decrease in the value of the property between the time it ought to have been completed and the time it was in fact completed; and
- $30,000 for general delay damages.

The builder contended that the owners were only entitled to recover an amount of $1 per day, in accordance with the contractual provisions relating to liquidated damages. The builder claimed that by making provision for liquidated damages the parties were taken to have intended to exclude a right to general damages.

The owners' position was that on the proper construction of the contract, the liquidated damages clause did not provide an exclusive remedy and that, if it did, it was rendered void by section 18G of the *Home Building Act 1989* (NSW) (**HBA**) as it would have the effect of restricting the rights of the person with the benefit of the implied warranty under section 18B(1)(d) of the HBA (that the work will be completed within the time stipulated in the contract).

The issues considered by the Supreme Court of New South Wales were:

- whether the builder validly terminated the contract for non-payment of part of an invoice;
- whether the builder was entitled to recover the balance of the invoice along with payment for work performed but not invoiced before termination in the amount; and
- whether the owners were entitled to damages for delay in completing the building work in excess of the liquidated damages amount of $1 for each working day of delay that the parties included in the contract.

Decision

Did the builder validly terminate the contract?

Ball J held that it was clear that the builder validly terminated the contract in circumstances where the builder's solicitor issued the owners with a notice in accordance with the contract in relation to the outstanding balance of the invoice, the owners did not pay the outstanding amount and the builder's solicitor subsequently sent a 'notice of termination' to the owners by registered post.

Was the builder entitled to payment of the invoice and further payment for works performed?

The builder was entitled to payment of the balance of the invoice. However, the builder had framed its additional claim in quantum meruit for the reasonable value of work performed rather than by substantiating a claim for damages arising from the termination by bringing evidence of the additional work that had been done and the amount that it would have been entitled to invoice in accordance with the contract for that work. For that reason, his Honour found that insufficient evidence had been brought to prove that the builder was entitled to an amount for the additional work under the contract.

Were the owners entitled to damages due to the delay in completing the building work?

Ball J found that the liquidated damages clause should not be interpreted as providing an exclusive remedy for delay. Rather, by specifying the amount of liquidated damages at $1 per working day, the parties intended not to provide for a substantive right to claim liquidated damages and intended instead to leave the owners a right to claim damages they could prove they had actually suffered. His Honour noted that the position may well have been different if the clause had provided for the payment of a 'substantial amount' by way of liquidated damages.

His Honour applied the principle that if two interpretations of the liquidated damages clause are available and on one interpretation the clause is rendered void by section 18G of the HBA, that is a reason for preferring the alternative interpretation.

His Honour found that it should not readily be inferred that:

- the drafters of the standard form residential building contract intended to adopt a default position that rendered the provision relating to liquidated damages void; and
- the parties to the contract, by making the default position express in their contract, intended to achieve a different result from the default position.

However, in respect of quantum of damages, his Honour found that the owners did not meet the test for general damages that applies for breach of contract. As a result, the owners were only entitled to the $1 per day as damages for delay on the basis that the alleged diminution in value of the property was too remote and there was no other basis for general damages to be awarded.

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Expert determination clause – the parties should be kept to their word

Lepcanfin Pty Ltd v Lepfin Pty Ltd [2020] NSWCA 155

Andrew Hales | Nick Grewal | Jack McFadden

Key point and significance

Dispute resolution clauses should be given a broad and liberal construction unless the words in their context should be read more narrowly. The rationale for this is that the parties should be held to the commercial agreement that they reached to resolve disputes in the manner that they agreed in the contract. This will hold the parties to their intention and avoid commercial nonsense where disputes are divided between different forums with potentially different outcomes.

Facts

This case is an appeal from the decision of the New South Wales Supreme Court concerning an expert determination between parties who entered into a Development Deed (**deed**) to develop land in Leppington, including Lepcon Pty Ltd (**Lepcon**), Lepfin Pty Ltd (**Lepfin**) and Lepcanfin Pty Ltd (**Lepcanfin**).

Under clause 3.3. of the deed, Lepcon was required to pay Lepfin $3.9 million; however, only $1,143,332 was paid. Clause 12.4 of the deed provided that a facilitation fee payable to Lepcanfin would increase by the amount of the shortfall under clause 3.3. As such, Lepcanfin alleged it was entitled to an increase of the facilitation fee in the amount of the $2,756,667 shortfall (**top-up**).

The deed also required the parties to enter into guarantees and contained a dispute resolution clause which provided for expert determination in relation to a wide range of disputes.

The parties entered into two amendment deeds, one of which stated that Lepcanfin *'waives the Existing Defaults on and from the Effective Date'*. A dispute arose as to whether this waiver included the top-up. In accordance with the dispute resolution clause, the parties entered into an expert determination agreement (**EDA**) pursuant to which an expert was appointed to make a final and binding decision. The EDA noted a *'brief description of the subject matter of the dispute'* which discussed Lepcanfin's entitlement to the top-up and did not make reference to any *'penalty'*. Before execution of the EDA, the parties exchanged submissions, including in relation to whether clause 12.4 of the deed *'was void and unenforceable as a penalty'*.

During the course of the expert determination, Lepcanfin attempted to argue that the expert should only consider the dispute as defined in the EDA and therefore not consider the penalty issue. However, the expert considered the entitlement to the top-up and the penalty issue and found that the top-up had not been waived but was a penalty and was therefore void or unenforceable.

Lepcanfin commenced proceedings alleging that the expert had exceeded her mandate by considering the penalty issue and asking whether Lepcanfin could litigate the question of whether the guarantors were liable for the top-up, even assuming a penalty.

The trial judge found that the expert had not exceeded her mandate and summarily dismissed this aspect of the matter. In relation to the guarantees, it was held that, as these arose out of the deed, they fell within the scope of the expert determination clause and should be dealt with in that way. Lepcanfin appealed in relation to the mandate issue and the guarantee issue.

Decision

The New South Wales Court of Appeal granted leave to appeal in relation to the mandate issue but dismissed the appeal with costs and refused leave in relation to the guarantee issue.

In relation to the mandate issue, the court noted that dispute resolution clauses must be construed by reference to the language used, the circumstances known and the commercial purpose of the contract in a way to avoid commercial nonsense. The court considered that dispute resolution clauses should be viewed with a broad and liberal construction unless the words in their context should be read more narrowly, and that there was a lot of authority to support a broad interpretation as being the default. The rationale for this is that the parties have reached a commercial agreement to resolve disputes in a certain way, and their intention is not to divide disputes between different forums with potentially different outcomes.

On these facts, the court determined that the dispute resolution clause ought to be viewed with a broad ambit, and therefore all aspects (including legal questions) should be resolved by expert determination. As such, the expert was within her mandate to determine the penalty issue, as a narrow construction of the clause relying only on what was stated in the EDA, as opposed to also including issues raised in submissions before the EDA was signed, would result in fragmented proceedings and duplicated expense. The court noted the close relation between the issue relating to the entitlement to the top-up and the penalty issue and noted that it would be fanciful for the issues not to be resolved together by the one expert.

In relation to the guarantee issue, the court considered that the parties should be held to their bargain, and the issue should also be decided in accordance with the dispute resolution clause, rather than proceedings in court.

The court also determined that is was appropriate that the trial judge determined the matter on a summary basis in the circumstances.

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Suspension STILL does not affect accrued rights to a progress payment

Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd [2020] NSWCA 172

Andrew Hales | Karen Hanigan | Jessica Orap

Key points and significance

- A builder has a right to make a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) even where the work is later taken out of its hands by a developer, as long as the reference date arose before the works were taken out or suspended.
- An adjudicator must determine the amount of a progress payment (if any) which is to be made to a claimant, even if that amount is '$nil' or '$0' under section 22(1)(a) of the Act.
- It is not necessary for a claimant to seek a declaration that an adjudication determination is void in court before applying for a second adjudication. The Act does not require a claimant to do so.

Facts

The NSW Court of Appeal considered a developer's application to appeal the decision of the Supreme Court of NSW (which we considered in our March 2020 Construction Law Update available *here*).

Parrwood Pty Ltd (**developer**) engaged Trinity Constructions (Aust) Pty Ltd (**builder**) under an amended AS4902-2000 contract to design and construct a development known as the Affinity Project.

In September 2019, the developer took the work out of the builder's hands for substantial breach of the contract. The builder served a payment claim for work up to 25 August 2019 and the developer responded with a payment schedule for $nil.

There were two adjudication determinations:

- on 15 November 2019, where the first adjudicator determined that despite a valid reference date being available, the developer had validly exercised its right to take work out of the builder's hands, such that payment under the contract was suspended until it became due after a final reckoning under clause 39.6 of the contract, but declined to determine an adjudicated amount (**first determination**); and
- on 22 November 2019, where the second adjudicator determined that the first determination was void because the first adjudicator failed to determine the amount of the progress payment. The second adjudicator determined the value of the progress payment (**second determination**).

The developer commenced proceedings in the Supreme Court and the builder filed a cross-claim.

Supreme Court decision

The Supreme Court upheld the second adjudicator's determination that the first determination was void because:

- the first adjudicator failed to determine the progress payment to be paid to the builder as required by section 22 of Act; and
- the first adjudicator wrongly determined that the builder's right to a progress payment was suspended until payment became due under the contract because the developer had exercised its right to take the work out of the builder's hands. A right to a progress payment under the Act had arisen given that the reference date arose before the date of suspension.

Decision

The Court of Appeal dismissed the appeal.

Was the first determination void?

The builder's entitlement to make a payment claim did not cease as a valid reference date had arisen before the date that the developer exercised its right to take the works out of the builder's hands.

The first adjudicator had failed to perform his statutory duty to determine the amount of the progress payment (if any) to be paid by the developer to the builder.

Based on the first adjudicator's language, the court held that the first adjudicator did not determine an amount (if any) payable to the builder and continuously admitted that he did not make any such determination. As a consequence, the court found that this failure to perform an adjudicator's duty under section 22(1)(a) of the Act was *'as clear a case as one might find of misconception of function amounting to jurisdictional error'*.

Was the second determination void?

The builder did not necessarily have to commence litigation seeking a declaration that the first determination was void before proceeding to a second adjudication because:

- a court's determination is a possible solution to the problem;
- the Act does not expressly or impliedly prohibit the builder from applying for a second adjudication until a court has declared an earlier determination void;
- while the parties could avoid time and costs in proceeding to litigation before applying for a second adjudication, that is not enough to prevent the builder from exercising its rights under the Act; and
- there was no abuse of process in applying for a second adjudication, especially in the circumstances where the first determination was void.

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Attempting to derail an adjudicator's determination? Don't be stopped dead in your tracks

MTR Corporation (Sydney) NRT Pty Ltd v Thales Australia Ltd [2020] NSWSC 1174

Andrew Hales | Michelle Knight | Emily Miers

Key point and significance

The difficulty faced by a respondent in seeking to set aside an adjudicator's determination for a denial of procedural fairness has been highlighted in this Supreme Court decision. The court will not lightly find that an adjudicator has made a determination on a basis for which neither party contended, and without giving the parties an opportunity to make submissions on the question, such that a breach of natural justice arises.

Facts

MTR Corporation (Sydney) NRT Pty Ltd and UGL Rail Services Pty Ltd formed a systems joint venture (**SJV**) for the delivery of works on the Sydney Northwest Rail Link. SJV was required to design, build, test and commission a package of works including the delivery of trains, communication based train controls, low voltage power distribution, tunnel mechanics and electrical systems.

On 3 August 2015, SJV entered into a construct contract with Thales Australia Ltd (**Thales**) in respect of the installation of input/output points required to integrate third party equipment and systems in the Sydney Metro system.

On 5 June 2020, pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**), an adjudicator determined Thales was entitled to payment of $25,246,170 (**determination**).

SJV appealed the adjudicator's determination on the basis that it contained four jurisdictional errors. SJV alleged that the adjudicator:

- decided a claim on a basis that had not been advanced by either party (**ground 1**). SJV contended that the adjudicator should have informed the parties that she considered Thales' claim had been made pursuant to cl 3.7 of the Specification (and not only cl 57 of the Contract), and given them the opportunity to make submissions in relation to the issue;
- failed to perform her duties set out in section 22(2) of the Act (**ground 2**);
- failed to come to a view or consider the merits of three of Thales' claims (**ground 3**); and
- failed to decide whether a set-off totalling $800,000 had been made out (**ground 4**).

Decision

The NSW Supreme Court dismissed SJV's appeal in its entirety. Each ground of appeal asserted by SJV is considered below.

Ground 1: In considering whether the adjudicator decided a claim on a basis that had not been advanced by either party, the judge determined that although the payment claim did not expressly refer to cl 3.7 of the Specification, the description in the payment claim was apt to refer to a claim under cl 3.7. The payment schedule referred to both cl 3.7 and cl 57. In the adjudication application, Thales developed detailed arguments by reference to cl 3.7 and in subsequent paragraphs asserted a claim under cl 57. The adjudication response referred to both cl 3.7 and cl 57. The adjudicator interpreted Thales' claim to be asserted under cl 3.7 and under cl 57. The judge held that the adjudicator had not failed to afford the parties procedural fairness in preferring one claim over the other.

Ground 2: The adjudicator had rejected an argument put forward by SJV on the basis it was not raised in the payment schedule. In doing so, the judge found that the adjudicator had evaluated SJV's contentions. Whether or not the evaluation was correct was irrelevant as any such error did not deprive the adjudicator of jurisdiction. **Ground 3:** The judge disagreed with SJV's claim that the adjudicator failed to come to a view or consider the merits of three of Thales' claims. SJV had rejected two of the claims in the payment schedule on the basis that Thales had not substantiated the amount claimed. The judge held that the adjudicator considered the two claims and formed the view that the quantum was not in dispute. SJV had rejected the third claim by reference to a release which the adjudicator was not satisfied had effect in relation to that claim. Accordingly, the judge held that the adjudicator had given proper consideration to the third claim as well.

Ground 4: The adjudicator concluded that the reasons supporting SJV's set-off claim as put forward in the adjudication response were not raised in the payment schedule and could not then be considered in the determination. The judge found that the adjudicator had therefore not simply rejected the set-off claim.

QUEENSLAND

Reviewable errors by the QBCC result in Qld Home Warranty Scheme decision being set aside

Kline Industries International Pty Ltd v Queensland Building and Construction Commission [2020] QSC 243

Michael Creedon | Amy Dunphy | Danielle le Poidevin

Key points

This case serves as a reminder that decisions made by the Queensland Building and Construction Commission (**QBCC**) in relation to the Queensland Home Warranty Scheme are subject to judicial review. It also serves as a warning to homeowners wanting to make a claim under the Scheme to do so as soon as possible after defects are identified.

Facts

The Queensland Supreme Court considered whether building company Kline Industries International Pty Ltd (**Kline**) could review a decision made by the QBCC to approve a claim for $106,636 under the Queensland Home Warranty Scheme and the Insurance Policy Conditions (**QBCC decision**). In doing so, the QBCC rendered Kline liable to debt recovery proceedings for this amount under sections 71(1) and 111C of the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**).

The QBCC decision related to defects with the external poles and base poles of a residential dwelling and garage at a property at Reedy Creek, Queensland (**defects**). The homeowners learned of the defects with the poles in January 2015 and of the defects with the garage in March 2017. The homeowners filed a claim with the QBCC under the Queensland Home Warranty Scheme in January 2018 (**claim**). In December 2018 the QBCC approved the claim, and by July 2019 it had issued Kline with a Notice of Debt for $106,636.

The claim was approved in circumstances where:

- the QBCC proceeded on the basis that the homeowner learned of all defects on 1 March 2017; however, the original defects were evident in January 2015 and the homeowners did not lodge a complaint until January 2018; and
- although Kline was issued with a Direction to Rectify (**DTR**) and Failure to Rectify Notice (**FRN**) before the Notice of Debt, there was evidence it had not actually received those notices.

Kline applied to the Queensland Supreme Court to set aside the QBCC decision under section 30(1)(a) of the *Judicial Review Act 1991* (Qld) (**JR Act**).

Decision

Citing the decision of *Lange v Queensland Building Services Authority* [2012] 2 Qd R 457, Flanagan J accepted that the QBCC's decision was one to which the JR Act applies, as it was an administrative decision made under an enactment, namely the QBCC Act, the *Queensland Building and Construction Commission Regulation 2018* (Qld) and a statutory instrument, the Queensland Home Warranty Scheme.

His Honour considered that two reviewable errors arose in relation to the QBCC decision, and these reviewable errors required the QBCC decision to be set aside.

First reviewable error: Accepting the homeowners' claim out of time

The first error concerned the QBCC's exercise of discretion in accepting the claim out of time. Under the Insurance Policy Conditions the homeowners had three months from January 2015 to lodge a claim with the QBCC, although the QBCC may extend this time. However, in assessing the homeowners' claim, the QBCC proceeded on the basis that all of the defects had become evident in March 2017.

Flanagan J concluded that in considering whether time should be extended, the actual period of delay was a relevant consideration the QBCC was bound to consider. The QBCC had information before it evidencing that the homeowners had first noticed the defects in January 2015 but had incorrectly identified March 2017. The difference from the actual period of delay (2 years, 8 months and 27 days) was significant, given the specified time period for bringing such claims. On this basis, and in considering the incorrect period of delay, the QBCC had regard to an irrelevant consideration in exercising its discretion to extend time.

Second reviewable error: Determining that Klein would not comply with the DTR

The second error concerned the QBCC being satisfied that, for the purposes of the Insurance Policy Conditions, Kline would not have complied with the DTR.

A builder's liability under the Insurance Policy Conditions arises where a DTR is issued and the QBCC is satisfied that the builder will not comply with the DTR.

The QBCC gave evidence that the reason it was satisfied that Kline would not comply with the DTR was that Kline did not apply for an extension of time to comply with the DTR. Kline gave evidence that it had informed the QBCC (via telephone and email in December 2018) that it had not received a DTR.

The court found that, if the DTR was not received by Kline, a DTR was not in fact issued so as to give Kline notice of a requirement to rectify defective works, and as such the underlying requirement for the QBCC to be satisfied that Kline would not comply with a DTR was absent. This information was central to whether the QBCC was satisfied that Kline would not comply and, having been informed by Kline it had not received the DTR, the QBCC ought to have made further enquiries before concluding that Kline would not comply with the notice. Further, the reasoning by the QBCC that Kline had not applied for an extension of time was flawed in circumstances where the QBCC was informed that Kline had not been issued with a DTR.

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Contributing partners

Email *firstname.lastname@minterellison.com*

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

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

Ben Fuller
Partner
T +61 2 6225 3216
M +61 448 220 303

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

ME_175798602