Construction Law Update

February 2021

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In the Australian courts

NEW SOUTH WALES

Checkmate – error by adjudicator not material enough to be 'jurisdictional error'

***Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd (No 2)* [2020] NSWSC 1788**

Andrew Hales | Maciej Getta | Jonathan Molina

Key point

Where a court determined an adjudicator had exceeded their jurisdiction, no matter how minor the indiscretion, it was common practice for the whole of the adjudicator's determination to be rejected as invalid. However, the court's powers are not limited in that way. In this decision, the adjudicator's error did not materially affect the totality of the determination and the claimant was still entitled to a significant proportion of the adjudicated amount.

This paves the way for other claimants to have parts of their adjudication upheld, notwithstanding that an adjudicator has exceeded their jurisdiction, where the error did not work practical injustice sufficient to vitiate the whole of the determination.

Facts

We covered the initial Supreme Court decision in these proceedings in our *October 2020* edition of the Construction Law Update. Acciona had sought to quash an adjudicator's determination in favour of Chess in the amount of $640,593.69 on the basis that there was a jurisdictional error that affected part of the determination.

In the payment claim, Chess claimed payment of $22,586 for V17 against which the Acciona scheduled $19,826, leaving only $2,760 in dispute in the adjudication. The dispute related to the labour cost of project managing the works that were the subject of V17. The adjudicator had determined that Chess was entitled to the amount claimed for V17. The adjudicator erred by failing to state reasons for how he came to be satisfied that Chess was entitled to be paid the full value of the claimed amount of V17.

The usual course where an adjudicator's determination is infected by jurisdictional error is, as Acciona submitted, that there has been no determination at law. This is usually so notwithstanding that the error may be with respect to a very small part of the whole determination.

Decision

The court held that the error was not a 'jurisdictional error' that infected the determination as a whole and refused to quash the determination.

The concept of 'materiality' was a critical component in the consideration of whether the determination was infected by a jurisdictional error. The court held that the Act should be interpreted as incorporating a threshold of materiality in the event of non-compliance by an adjudicator in undertaking their statutory task of determining the amount and timing of a progress payment such that legal force and effect should not be denied to a decision made in the event of every error in undertaking that task. The concept of materiality was described as being a question of whether an error results in a decision lacking the characteristics necessary for it to be given force and effect by the Act and whether the error is sufficiently insignificant that it could not have materially affected the decision that was made.

The court accepted that the adjudicator made an error in relation to one component of a discrete and proportionately small aspect of the determination, rather than exceeding his jurisdiction in relation to the claim as a whole. The court found that the amount affected by the error was very small in proportion to the rest of the adjudicated amount, being only 0.43% of the total amount. The error was also not critical to and did not determine the outcome of the adjudicator's findings on other aspects of the claim, as the adjudicator had reviewed the required evidence and materials and made the necessary considerations.

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Full stop after the long stop period: EP&A Act limitation period upheld to bar claim by tenant for loss arising out of defective building work

Bandelle Pty Ltd v Sydney Capitol Hotels Pty Ltd [2020] NSWCA 303

Andrew Hales | Duncan MacKenzie

Key point and significance

A negligence claim by a tenant against a builder for loss and damage arising from a fire that occurred 20 years after completion of the work was held to be time barred by section 6.20 (formerly section 109ZK) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**), which limits the period within which a civil action may be commenced for loss or damage arising out of or in connection with defective building work to 10 years after completion.

Section 6.20 applies to claims:

- for physical property damage as well as pure economic loss;
- for both defects and consequential damage caused by defects (eg water / fire damage which would not have transpired but for the initial defective workmanship;
- made against parties with whom the claimant may not have any contractual relationship;
- made by tenants, not just owners or successors-in-title; and
- irrespective of when the relevant development consent was granted.

Facts

The decision at first instance was summarised in the *January/February 2020* edition of our Construction Law Update.

On 2 January 2017, a fire broke out on the ground floor of a building on George Street, Sydney. The fire activated the sprinkler system on level 5, which was occupied by Sydney Capital Hotels Pty Ltd (**tenant**), causing material damage and consequential loss to the tenant. The fire was allegedly caused by defective building work completed in 1997 by the builder Fletcher Construction Australia Pty Ltd (whose liabilities had been transferred to Bandelle Pty Ltd (**builder**)) on the exhaust duct system which serviced the ground floor and passed through level 5.

The tenant was never a party to a contract in relation to the building work. However, the tenant alleged that the builder owed it a duty of care in doing the work to avoid the risk of harm to it, that this duty was breached, and that damage was suffered as a consequence. The tenant commenced proceedings against the builder in 2019.

The builder pleaded that the tenant's claim was statute barred because of section 6.20 of the EP&A Act.

The judge at first instance ordered that the builder's limitation defence be struck out. Despite acknowledging that he would have reached a different conclusion if deciding the matter afresh, the primary judge considered himself bound to follow a particular interpretation of a Court of Appeal authority (*Dinov v Allianz Australia Insurance* (2017) 96 NSWLR 98 (***Dinov***)).

The primary judge explained that he understood *Dinov* to have held that section 109ZK (the predecessor to section 6.20) was to be given a restricted meaning such that it did not apply to claims for loss or damage caused by defective building work *'in only an accidental, incidental or indirect sense'*. The primary judge found that as the tenant's loss and damage was caused by the builder's work only in this peripheral sense, section 6.20 did not apply.

Decision

The Court of Appeal allowed the appeal and held that section 6.20 applied to bar the tenant's claim in negligence as it was a claim for loss *'arising out of or in connection with defective building work'*.

The court found that the primary judge's understanding that *Dinov* endorsed the view that section 109ZK should be construed restrictively was incorrect and, consequently, he had misdirected himself about the breadth of the expression *'loss or damage arising out of or in connection with defective building work'* in section 6.20.

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Limits to amending a List Statement

Boulus Constructions Pty Ltd v Warrumbungle Shire Council [2020] NSWSC 1847

Andrew Hales | Nicholas Grewal | Jenny Cohen

Key point and significance

There are two key points arising from this case:

- the court will not grant leave to amend a List Statement if the proposed amendments to be pleaded hinge on a speculative assumption; and
- if the definition of 'Contract Document' (or equivalent term) in any given contract is wide enough, a court will allow a party to plead that representations contained in, in this case meeting minutes, are express contract terms.

Facts

The Warrumbungle Shire Council (**Council**) entered into a building contract with Boulus Constructions Pty Ltd (**builder**) to construct retirement units, a community centre and learning centre for $6.87M. The builder claims damages for breach of contract and for misleading and deceptive conduct under the Australian Consumer Law, and the hearing is scheduled for 5 July 2021. This judgment is in respect of an interim issue (prior to the hearing) being an application by the builder to amend its List Statement to claim:

- the Council represented that the site was free of asbestos; and
- the builder has suffered loss on the basis that it would have entered into a 'better' (more advantageous) contract with the Council if the representations had not been made. This was because the builder would have priced asbestos removal in its tendered contract sum in these circumstances.

This claim rested on an assumption that the Council would have accepted its higher price if it had been submitted in the tender.

Decision

Pleadings based on speculation

The court observed that to make out a 'better' contract case, the builder is required to prove the Council would have accepted a higher tendered contract sum. As the Council had not yet served evidence on this issue, the builder could not prove this claim. This resulted in the builder's pleading being a 'hypothetical' claim as it relied on the Council to adduce evidence to prove it would have accepted a higher price. The court concluded that as the builder was not in a position to plead that the Council would have accepted the counterfactual tender, the builder could not hedge its bets by pleading what it would have done 'if' the Council had done so; hoping for the Council to adduce evidence sufficient for it to plead that the Council would in fact have done so.

Representations as terms of contract

The court accepted the representations made by Council could be incorporated as terms of the contract given that the definition of 'Contract Document' included *'…the drawings, specifications and other documents provided to [the builder] and containing the [Council's] requirements in respect of the Works'*. As the alleged representations were included in minutes of a meeting, this arguably fell within this definition. On this basis, the court granted the builder leave to amend its List Statement to plead the representations were terms of the contract.

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No way out, your occupation certificate must comply

Dyldam Developments Pty Ltd v The Owners – Strata Plan No 85305 [2020] NSWCA 327

Andrew Hales | Karen Hanigan | Jessica Orap

Key point and Significance

A builder must ensure that any preconditions specified in a development consent to the issue of an occupation certificate, whether interim or final, have been met. Otherwise there is risk that the occupation certificate will be invalid.

The NSW Civil and Administrative Tribunal has jurisdiction to review the status of an occupation certificate to decide whether it authorised occupation and use of the whole of a building for the purpose of the running of the limitation period for breach of statutory warranties.

Facts

The builder constructed a three-storey residential apartment building. The development consent prescribed that certain conditions were to be complied with prior to the issue of an interim or final occupation certificate.

On 5 September 2011, the residential building works were completed. On that day and on 9 September 2011, the certifier issued certificates identified as *'interim occupation certificates'*. Both certificates purported to authorise the use of the whole of the building and were issued on the basis that certain development conditions were excluded. On 12 October 2011, the certifier issued a certificate described as a *'final occupation certificate'* which contained no excluded development conditions.

On 4 October 2018, the owners commenced proceedings against the builder for breach of the statutory warranties. The builder argued that the proceedings were not commenced within the time limitation period of 7 years prescribed at the time by section 18E of the *Home Building Act 1989* (NSW) (**HBA**).

NCAT Decision – interim certificates not valid

The tribunal found that the interim occupation certificates were not valid because they both stated that mandatory preconditions to the issuing of an occupation certificate (interim or final) were not complied with in breach of section 109H(2) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) and did not authorise the occupation and use of the whole building. Accordingly, the tribunal found that the proceedings were commenced within the 7-year time limitation period from the date of the final occupation certificate (12 October 2011).

NCAT Appeal Panel Decision – proceedings within limitation period

The builder sought leave to appeal on the basis that the tribunal had made an error of law in finding that the interim occupation certificates were not validly issued because the tribunal did not have jurisdiction to determine that issue. The appeal panel found that the tribunal did have jurisdiction to find that the interim occupation certificates were invalid and affirmed the decision of the tribunal that the proceedings were within the limitation period under section 18E of the HBA.

Court of Appeal Decision

Again, the builder sought leave to appeal the appeal panel decision.

The court held that the tribunal had the authority to determine the validity of the occupation certificates. This is because the tribunal's jurisdiction to determine a building claim of this kind depended on whether or not the claim had been brought within the time limitation period in section 18E of the HBA.

At the time, section 18E of the HBA provided that proceedings for a breach of a statutory warranty must be commenced within 7 years after, among other things, the completion of the work to which it relates. Section 3C(2)(a) of the HBA provided that the completion of residential building work occurs on *'the date of issue of an occupation certificate that authorises the occupation and use of the whole building'*.

When considering the validity of the occupation certificates, the court found that the interim occupation certificates did not authorise the occupation and use of the whole building because the interim occupation certificates contravened section 109H(2) of the EP&A Act. That provision provides that an occupation

certificate must not be issued unless any preconditions to the issue of the certificate specified in a development consent had been met.

Given that the development consent required that certain preconditions be met before any interim or final occupation certificate was issued, and the interim occupation certificates clearly stated that some preconditions had not been complied with, the interim occupation certificates were not valid.

Further, interim occupation certificates could only be issued in relation to a partially completed building or the commencement of a new use of part of a building resulting from the change of building use for an existing building, pursuant to section 109H(1)(a) of the EP&A Act. The building was completed. It was not partially completed nor was there any change to the building use. Therefore, the court found that the interim occupation certificates were not interim, even though they were described in that way.

Accordingly, the limitation period ran from the date of the final occupation certificate and the owners' claim was brought within time.

How would this play out under the law today?

The EP&A Act was amended on 1 December 2019 which, among other things, removed reference to 'interim' and 'final' occupation certificates. There is now only one certificate required, being an occupation certificate. This means that the warranty period under the HBA will now begin on the date that the occupation certificate is issued. However, it is important to remember that the amendment only applies to development consents or occupation certificates issued on or after 1 December 2019.

The decision remains important for builders given that the new section 6.10 of the EP&A Act (formerly section 109H(2)) requires that an occupation certificate must not be issued unless any preconditions to the issue of that certificate that are specified in a development consent have been complied with.

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To cap or not to cap (the monetary value of work orders)?

Ericon Buidings Pty Limited v The Owners Strata Plan No 96597 [2020] NSWCATAP 265

Andrew Hales | Adriaan van der Merwe | Jack Morgan

Key point and significance

NCAT's appeal panel has taken a preliminary view that while building claims for defects made in NCAT under the *Home Building Act 1989* (NSW) (**HBA**) are subject to a $500,000 damages cap, work orders have no such cap on their monetary value.

This decision enhances the attractiveness of NCAT as a forum for resolving building defect disputes, in circumstances where a plaintiff is willing to trust a defendant builder to remedy defects. However, where builders have work orders exceeding $500,000 in value made against them and fail to carry out the ordered works, it remains to be seen whether NCAT will consider enforcement proceedings to be bound by the $500,000 cap.

Facts

Original proceedings

The builder, Ericon Buildings Pty Ltd, and the developer, Sundale Developments Pty Ltd (together, **builders**) constructed and developed an eight-storey block of units. The owners corporation of strata plan no 96597 (**owners corporation**) brought proceedings in NCAT against the builders seeking damages and/or a work order under the HBA in relation to alleged defects.

On 9 September 2020, the builders' solicitors forwarded NCAT and the owners corporation's solicitors proposed orders, offering to pay the owners corporation $500,000 plus costs, with no admission of liability (**Proposed Orders**).

The owners corporation's solicitors responded, indicating the owners corporation:

- did not consent to the Proposed Orders; and

- intended to lodge an application to transfer the proceedings to the Supreme Court, due to:
  - the high likelihood of the quantum of damages exceeding the building claim damages cap to NCAT's jurisdiction of $500,000 (under section 48K of the HBA); and
  - the availability of relief under the *Design and Building Practitioners Act 2020* (NSW).

On 16 September 2020, NCAT made procedural orders in chambers, including setting out a timetable:

- for the owners corporation to lodge a transfer application;
- for the builders to file their consent or opposition to the application; and
- the dates for a contested hearing (if applicable) to be heard (NCAT Orders).

The NCAT Orders did not address the Proposed Orders.

Appeal

Rather than contest the transfer application directly, the builders appealed the NCAT Orders to the appeal panel under section 80(2)(b) of the *Civil and Administrative Tribunal Act 2013* (NSW) (**NCAT Act**), alleging NCAT had erred on a point of law.

The builders argued:

- (**Primary ground of appeal**) The NCAT Orders effectively rejected the Proposed Orders and in doing so NCAT either exercised a discretion it did not possess or erred in exercising its discretion;
- (**Further ground of appeal 1**) NCAT's exercise of discretion miscarried because in the builders' Proposed Orders they consented to orders against them providing the maximum sum recoverable ($500,000) as damages;
- (**Further ground of appeal 2**) The Proposed Orders constituted a tender and NCAT either had no discretion to refuse them or erred in exercising discretion to reject them.

Decision

The Appeal Panel refused leave to appeal and alternatively decided that, if leave to appeal was not required, the appeal was dismissed.

The Appeal Panel first considered whether the builders should have brought the proceedings under section 80(2)(a) of the NCAT Act concerning interlocutory decisions (and requiring leave to appeal) rather than section 80(2)(b) concerning ancillary decisions (and not requiring leave to appeal). The Appeal Panel determined that leave was required under section 80(2)(a) and refused to grant leave.

The Appeal Panel then considered the main grounds of appeal.

Primary ground of appeal

The Appeal Panel noted the NCAT Orders had not rejected the Proposed Orders and that the builders were free to advocate for them at the scheduled contested hearing.

Since the Appeal Panel could not overturn a decision which had not been made, this ground was rejected.

Further ground of appeal 1

The Appeal Panel noted the owners corporation had brought proceedings for both a building claim under section 48K of the HBA and a work order under section 48O. For the Proposed Orders to offer the maximum recoverable sum as alleged by the builders, it would be necessary for a work order to be capped in the same manner as a building claim (ie at $500,000 in NCAT). Such a cap is not explicitly reflected in the drafting of sections 48K and 48O.

In support of their argument, the builders cited:

- the potential for very large work orders to be sought;
- the discretionary nature of work orders; and
- the potential for situations where work orders exceeding $500,000 are made, orders are not obeyed and consequential enforcement proceedings for a building claim are subject to the $500,000 cap.

In the absence of textual support for a cap to work orders, the Appeal Panel rejected this ground, concluding:

'our preliminary view is that the Tribunal does have the power to make a work order for an amount greater than $500,000. The relevant cap of $500,000 only applies to building claims, as defined, made under the HBA. There is no general limit in the NCAT Act or elsewhere, on the amounts recoverable in the Tribunal.'

Further ground of appeal 2

A tender is an offer to pay a debt where there is a simultaneous willingness to pay the debt and payment of the sum to the court/tribunal. If a valid tender was offered, NCAT likely had no discretion to reject it.

While the builders demonstrated a willingness to pay (as reflected in the Proposed Orders), the Panel was not satisfied the Proposed Orders reached the threshold of actual payment to NCAT of the $500,000, since the builders could still have defaulted on payment. This ground was therefore also rejected.

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QUEENSLAND

A late adjudication decision is not a decision at all

Civil Contractors (Aust) Pty Ltd v Galaxy Developments Pty Ltd & Ors; Jones v Galaxy Developments Pty Ltd & Ors [2021] QCA 10

Andrew Orford | Matt Hammond | Craig Halangoda

Significance

An adjudication decision which is given after the time limit provided for under sections 85 and 86 of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**) is void and has no legal effect. Consequently, an adjudicator who provides a decision after the time limit is not entitled to be paid any fees for the adjudication.

Facts

This case relates to an appeal of an earlier decision of the Supreme Court. That decision was the subject of a previous article in the Construction Law Update series *April 2020*.

On 29 October 2019, Mr Thomas Jones (**adjudicator**) delivered an adjudication decision under the BIF Act which required Galaxy Developments Pty Ltd (**developer**) to pay $1.3 million to Civil Contractors (Aust) Pty Ltd (**contractor**). The contract was for civil works, a minor part of which included widening a road. In widening the road, the contractor removed a bus seat, bus shelter, bus sign and bike rack before undertaking paving, retaining wall and fencing work. The contractor then re-fixed the bus stop seat, bus shelter and bike rack to the new concrete paving created (**bus stop works**).

When delivering the decision, the adjudicator had requested, and the parties had approved, three extensions of time, with the final extension revising the due date to 24 October 2019. However, the final decision of the adjudicator was not delivered to the registrar until 28 October and was not provided to the parties until 29 October. In the final decision, the 'Decision Date' was specified as 24 October, despite it being provided to the parties some five days later.

Under section 85 of the BIF Act, an adjudicator has 15 business days from the response date (being the date the developer delivered its response on 18 September 2019) to decide a complex adjudication application. However, that due date can be extended under section 86 if the claimant and respondent agree in writing that the adjudicator has additional time. In this case the parties had only agreed to an extension of time to 24 October 2019. The primary judge held that the adjudicator's decision was delivered beyond the time limit specified under the BIF Act as it was after 24 October 2019 and was therefore void.

A separate argument pursued by the developer concerned section 42 of the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**) which states that a person who carries out building work without the relevant licence is not entitled to any monetary consideration. Whilst the contractor had a licence, the developer argued that the bus stop works fell outside of their licence. At first instance, the

primary judge found that the contractor did not hold the relevant building licence to complete all of the work in question and therefore the building contract was void. As such, it followed that the adjudicator's decision was also void.

The contractor appealed both aspects of this decision. In addition, the adjudicator also appealed the primary judge's finding that he was not entitled to be paid any fees or expenses in relation to the adjudication.

Decision

The primary judge's decision was upheld and the appeals were dismissed. However, the court found that the contractor did have the licence required to complete all of the works under the QBCC Act and therefore the contract was valid. Nevertheless, the adjudication decision was still void due to the time limit expiration.

Time Limits

The court found that, whilst the BIF Act does not expressly provide that a decision given outside the time limit will be of no legal effect, there are provisions which provide strong indications that it will be void. The text of section 86 provides for the circumstances in which an adjudicator may decide an adjudication application within a longer period, ie if the parties agree to additional time. This was a strong indication that, absent such an agreement, the adjudicator would not have additional time to decide the application. In adopting a strict approach to the application of time limits, the court rejected the argument that doing so would frustrate the timely recovery of progress payments. Instead, it found that enforcing time limits promoted certainty in a commercial context.

The court also considered a claimant's right to engage section 94 of the BIF Act if the time limit had expired and refer the original adjudication application to another adjudicator or make a new application. Significantly, the existing application does not need to be withdrawn to do so. The court found that this was because, when section 94(2) is engaged, there is no existing application which the adjudicator is empowered to decide. Therefore, the adjudicator loses jurisdiction to decide the adjudication when the time limit has lapsed.

License

Under the *Queensland Building and Construction Commission Regulation 2018* (Qld) (**Regulations**), there are exemptions from the requirement to be licensed which relevantly includes a structure on a road. The primary judge found that the bus stop works did not form part of the works on the road and instead related to a 'footpath'. There is a separate exemption under the Regulations for footpaths, but there is no equivalent exemption for a 'structure' on a footpath, as for roads.

The court found that the bus stop works were structures on a road, despite the fact that they were on the footpath. 'Road' is defined as an 'area of land', including an area of land dedicated to be a road for public use. The court found that the bus stop works were on the 'area of land' dedicated to be a road for public use and not some other private land. For that reason, the bus stop works were exempt from requiring a licence and the contract was valid.

Adjudicator's fees

Under section 95(6) of the BIF Act, an adjudicator is not entitled to be paid any fees if the adjudicator fails to make a decision. The court found that, in this case, because the adjudication decision came after the time limit and therefore had no legal effect, the adjudicator failed to make a decision. Accordingly, under section 95(6), he was not entitled to be paid any fees and was required to repay the fees that had been paid to him.

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The importance of unambiguous drafting is further 'cemented' in our minds

Wagners Cement Pty Ltd & Anor v Boral Resources (Qld) Pty Limited & Anor [2020] QCA 289

David Pearce | Mark Wheelahan | Isabella Impiazzi

Significance

This case reiterates the importance of clear and effective contract drafting, particularly of price adjustment provisions in long term supply contracts and of following notice requirements under contracts.

Facts

This is an appeal of a decision of the Queensland Supreme Court. That decision was included in our *June 2020* Construction Law Update.

Wagners Cement Pty Ltd (**Wagners**) and Boral Resources Pty Ltd (**Boral**) entered into a formal agreement for Boral to purchase cement products from Wagners over a fixed term (**Agreement**). Clause 7 of the Agreement provided that, if Boral could evince a decrease in the market price for cement products, it could issue a pricing notice to Wagners. Wagners could then either:

- accept the pricing notice and continue supplying cement products at a new reduced price; or
- issue a notice to Boral that it was suspending supply of the cement products for six months (**Suspension Period**), relieving Boral of its contractual obligations and allowing another supplier to provide cement products for the Suspension Period (**Suspension Notice**).

Disputes arose between the parties regarding the validity of several pricing notices and Suspension Notices, and the case ultimately turned on the proper construction of the Agreement. The main issues at trial and on appeal were:

- whether Boral's pricing notices issued in March, April and October 2019 were valid and effective to change the price of concrete under the Agreement;
- whether Wagners had issued a valid and effective Suspension Notice in March or whether it had instead waived its rights under the Agreement by accepting the allegedly ineffective pricing notice; and
- whether Wagners had issued a valid and effective Suspension Notice in May.

Decision

Fraser JA delivered the unanimous decision for the Queensland Court of Appeal which allowed the appeal but upheld the trial judge's reasoning in relation to some of the notices.

The March Notices

Boral issued a notice to Wagners in March 2019 purporting to be a pricing notice (**March Notice**) which attached a quote from another concrete company, Cement Australia, for the supply of cement products between 1 May and 31 December 2019. At trial, Bond J held that the March Notice was defective because, on the proper construction of the Agreement, Boral was required to provide evidence that the reduced price was current and available at the date of the pricing notice, not at a time in the future. In affirming Bond J's conclusion, Fraser JA considered the contemporaneous purchase price to be an essential attribute of a pricing notice. Since the supply at the decreased price would not commence until almost two months after the March Notice was issued, it could not be construed as a valid pricing notice under the Agreement.

In response, Wagners informed Boral that it did not consider the March Notice to be valid and it reserved its rights under the Agreement. Wagners then issued a Suspension Notice in terms which reiterated Wagners' position on the invalidity of the March Notice and elected to suspend supply as permitted by the Agreement. At trial, Bond J held that Wagners' actions in purporting to issue a Suspension Notice (**March Suspension Notice**) meant that Wagners had waived any alleged invalidity in the March Notice and had therefore effectively commenced the Suspension Period.

On appeal, the court considered that Boral would potentially have a valid claim in estoppel or for variation of the Agreement if Wagners had represented to Boral that the March Notice did constitute an effective pricing notice under the Agreement. Instead, Boral claimed Wagners had made an election between inconsistent contractual rights to uphold the validity of the March Notice. In overturning Bond J's conclusion, the court

held that the proper construction of the Agreement meant that Wagners did not have the option to waive the non-conformity of notices – the *'If A then B'* language of clause 7 made it clear that Wagners was only entitled to issue a Suspension Notice if a valid pricing notice had been issued. Therefore, since the March Notice issued by Boral did not constitute a valid pricing notice, Wagners could not elect between inconsistent rights because those rights had not been enlivened in the first place.

Boral's April Notice

On 26 March 2019, Boral entered a contract with Cement Australia for the supply of cement products between 1 April and 31 December 2019 (**Cement Australia Contract**). On 1 April 2019, Boral issued another notice purporting to be a pricing notice which relied on the Cement Australia Contract as evidence of a reduction in market price (**April Notice**). At trial, Bond J held that the April Notice was ineffective because the March Suspension Notice was valid, the Suspension Period commenced, and on the proper construction of the Agreement a subsequent pricing notice could not be issued during a Suspension Period.

On appeal, the court overturned Bond J's conclusion and instead held that the March Suspension Notice was invalid and therefore the Suspension Period did not commence. Therefore, since Boral's April Notice was not tainted by error like the March Notice, the April Notice was valid.

Wagners' May Suspension Notice

In response to receiving the April Notice, Wagners issued another notice to Boral purporting to be a Suspension Notice that was drafted in a similar form to the March Suspension Notice (**May Suspension Notice**). In allowing the appeal here, Fraser JA concluded that, because Boral's April Notice was valid as a pricing notice, it therefore enlivened Wagners' power to elect to accept the reduced price or commence the Suspension Period. Therefore, the May Suspension Notice validly created a Suspension Period under the Agreement.

Boral's October Notice

On 2 October 2019, Boral issued another notice purporting to be a pricing notice stating that on 1 October Boral had entered a contract with Cement Australia to extend the original Cement Australia Contract (**October Notice**). Wagners disputed the validity of the October Notice because it was issued during a valid Suspension Period. At trial, Bond J did not consider there to be a Suspension Period in effect because the May Suspension Notice failed to validly initiate the Suspension Period. While Fraser JA ultimately agreed that the October Notice was valid, the court did so on the basis that the proper construction of the Agreement must instead allow a pricing notice to be issued during a Suspension Period. The commercial purpose of clause 7 was to empower Boral to take advantage of a reduction in the market price that was otherwise not available to it under the Agreement. If, as Bond J concluded, pricing notices could not be issued during a Suspension Period, Boral would be forced to wait until the end of the six-month Suspension Period before it could issue another pricing notice. This interpretation ignored the commercial realities of fluctuating concrete prices. Boral would then need to seek short term concrete supplies until Wagners had elected to supply at the submitted market price or suspend. If Wagners then elected to suspend supply again, Boral would be further inconvenienced as it would have to secure a long-term concrete supply or revert back to paying the original, higher price for the concrete products under the Agreement.

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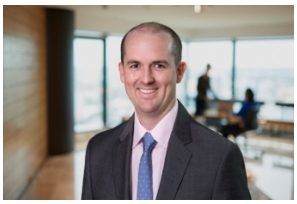

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