# Construction Law Update

July 2020

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# Legislative update

## NEW SOUTH WALES

### Amendments and new regulations introduced for the NSW strata building bond and defect inspection scheme

***Strata Schemes Management Amendment (Building Defects Scheme) Act 2018*** **(NSW)**
***Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020*** **(NSW)**

*Andrew Hales | Jonin Ngo*

The *Strata Schemes Management Amendment (Building Defects Scheme) Act 2018* (**2018 Amendments**) and *Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020* (**2020 Regulations**) came into effect in NSW on 1 July 2020.

In order to avoid fines, developers must be aware of the changes introduced by the 2018 Amendments and 2020 Regulations.

#### Key features of the 2018 Amendments

The 2018 Amendments introduced various changes to the *Strata Schemes Management Act 2015* (**Strata Act**). These relate to:

- **Time for lodging bonds**: Developers are now required to lodge a building bond before an application for an occupation certificate is made for any part of a building. Previously, a building bond need only be lodged before an occupation certificate was issued.
- **Extension of period of time during which the bond may be called upon**: The maximum period of time during which a building bond may be called upon has been extended to 2 years plus 90 days after the final report is given to the Secretary. Previously, this period was 2 years plus 60 days.
- **Costs for which bond may be realised**: Amounts secured by building bond can now, in certain circumstances, be realised to meet the costs of a building inspector and the developer's share of the costs for a report arranged by the Secretary to determine the amount of a building bond to be realised to meet the costs of rectifying defective building work identified in the final report.
- **Mechanism for determining amount of building bond to be realised for defective work**: A mechanism for determining the amount of a building bond to be realised to meet the rectification costs for defective building work has been introduced – either by agreement between the owners corporation and developers or, failing agreement, as determined by the Secretary.
- **Cancellation and release of building bond by Secretary**: The Secretary is allowed to release a building bond in certain circumstances.
- **Document identifying building defects**: Developers are now required to provide to the building inspector a document setting out defects which it is aware of (including any building defects considered at the first annual general meeting of the owners corporation) and other documents prescribed by the regulations within 28 days after a building inspector is appointed (or within any other period prescribed by the regulations). Penalties apply for a failure to do so.
- **Increased penalties in relation to developer's building bond obligations**: If developers fail to lodge building bond as required or fails to lodge a bond that is 2% of the contract price for the relevant building work, the penalty has been increased to 10,000 penalty units and, in the case of a continuing offence, a further 200 penalty units for each day the offence continues.
- **False or misleading information in relation to contract price or building bond**: It is now an offence for developers to give false or misleading information in relation to the contract price of building work or the amount required to be secured by a building bond.

- **Debt recovery mechanism**: Amounts secured by a building bond may now be recovered as a debt due against developers if a bond is not provided or the amount secured is insufficient.
- **Broad investigation and enforcement powers**: New investigation and enforcement powers for the purposes of the building bond and defects scheme have now been introduced.

### Key features of the 2020 Regulations

The 2020 Regulations introduced various changes to the *Strata Scheme Management Regulation 2016* (NSW). These include:

- **Appointment, qualifications and functions of building inspectors**: Further provisions and regulations relating to the appointment and qualifications of building inspectors and functions of building inspectors.
- **Register of persons qualified to be appointed as building inspectors**: The keeping of a register of persons qualified to be building inspectors which is available for inspection by the public.
- **Nomination of building inspector for approval by owners corporation**: Regulations surrounding nomination of building inspectors by developers requiring a written notice in the approved form to be given at least 14 days before the general meeting of the owners corporation.
- **Further documents to be provided by developers to building inspector**: Developers required to provide various additional documents to building inspector within 28 days after the building inspector is appointed.
- **Different builder to rectify defective building work**: Permitting developers to appoint another builder to rectify defective building work in certain circumstances.
- **Method of determining contract price for building bond**: Changes to definition of 'contract price' to include contracts whether paid or payable and provisions relating to 'contract price' if there is no written contract or if the parties to the building contract are connected persons.
- **Provisions of document to substantiate contract price**: Allowing the Secretary to request from developers the provision of information or documents to substantiate the contract price used to calculate the amount of a building bond.
- **Changes to documents to be provided when lodging a building bond**.
- **Provisions relating to procedures for applying for, and payment of, amounts secured by a building bond**.
- **A $1,500 fee for the Secretary to arrange appointment of a building inspector for interim and final inspection**.

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# QUEENSLAND

## Updates to security of payment laws finalised but rollout delayed by COVID

### *Building Industry Fairness (Security of Payment) Act 2017* (Qld)

*David Pearce | Sarah Cahill | Elissa Morcombe*

### Key points

The latest amendments to the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) have been enacted, with the primary goal of streamlining the project bank accounts regime with dates for further rollout of the scheme to be fixed by proclamation.

When reading the *Building Industry Fairness (Security of Payment) and other Legislation Amendment Bill 2020* (Qld) (**Bill**) for a second time, the Queensland Government announced further delays to the amendments, including the phased rollout of the project bank accounts regime. The amendments have no fixed commencement date; however, the Government provided indicative start dates for the further rollout of the project bank accounts regime of 1 March 2021 for a broader range of government projects and 1 January 2022 for the industry more broadly. This puts the changes after the upcoming Queensland election.

## The Amendment Act

On 23 July 2020, the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020* (Qld) (**Amendment Act**) was enacted.

The Amendment Act is largely the same as the tabled Bill, with the primary change being a further delayed timeframe to the staged implementation of the reforms. Our previous alert summarises the key amendments contained within the Bill as tabled. To read more about these changes, access the alert via this *link*.

## Further delays to phased rollout of PBAs

The next phase, which was set to commence on 1 July 2020, will now commence on a date to be fixed by proclamation. In the second reading speech, Minister Mick de Brenni confirmed this delay is a result of COVID-19 and continued uncertainty regarding its impact on the construction industry.

The Queensland Government intends to implement the reforms in accordance with the following timetable, provided Queensland continues to manage the pandemic well:

- *1 March 2021*: trust accounts will be required for all new State Government building contracts worth between $1M and $10M, with the option for State authorities to 'opt in' for eligible projects;
- *1 July 2021*: the regime will be extended to State Government and Hospital and Health Services building contracts valued at $1M or more;
- *1 January 2022*: the regime will be extended to private sector, local government, statutory authorities and government owned corporations eligible building contracts worth $10M or more;
- *1 July 2022*: the regime will be extended to private sector, local government, statutory authorities and government owned corporations building contracts valued at between $3M and $10M; and
- *1 January 2023*: full implementation with the regime applying to all eligible building contracts worth $1M or more.

## Delays to security of payment amendments

COVID-19 has also delayed reforms to the security of payment regime which were set to commence on 1 July 2020 under the tabled Bill but will now commence on a date to be fixed by proclamation. In addition to the changes summarised in our previous alert, these reforms introduce new administrative requirements with penalties for non-compliance, including requirements to:

- provide a supporting statement declaring that subcontractors have been paid with each payment claim (although a failure to do so won't affect the validity of a payment claim);
- pay the certified amount in a payment schedule by the due date; and
- notify and provide evidence to the registrar of payment of an adjudicated amount.

## Looking forward

Once implemented, the new project and retention trust requirements will introduce an increased administrative and cost burden to projects, especially for contractors. When planning, tendering and entering into new contracts, we recommend that parties consider the indicative timeframes for implementation of the reforms and ensure that, if applicable, these arrangements are reflected in project plans, tender and contract documents. Parties should also consider how these documents should deal with the security of payment amendments, for example, by including the requirement to provide a supporting statement with a payment claim in the payment provision.

Fortunately, the proposed extended timeframe will allow industry more time to plan for the transition.

According to Minister de Brenni, the intended purposes of the phased approach also include more time to allow:

> *… licensees to develop their skills and knowledge around the framework; and it allows for the finance sector, particularly the banks, to establish their software products and their trust account instructions to support the implementation of the framework*.

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# WESTERN AUSTRALIA

## WA's new security of payment legislation. It's just around the corner!

### *Building and Construction Industry (Security of Payment) Bill 2020* (WA) – Exposure Draft

*Tom French | Penny Bond*

#### Overview

On 11 December 2018, the State Government of Western Australia released John Fiocco's report on security of payment reform. Approximately 44 recommendations were made as part of that report.

Following that report, the state government commenced drafting a new bill to implement the report's recommendation. The state government recently released an exposure draft of its *Building and Construction Industry (Security of Payment) Bill 2020* (**Bill**) to a limited number of stakeholders. We anticipate that government will consider stakeholders' views before introducing the Bill to parliament later this year.

This update has been drafted by reference to the brief explanatory statement released with the Bill (**Explanatory Statement**). The Explanatory Statement suggests that the Bill will repeal and replace the *Construction Contracts Act 2004* (**CCA**). The new laws will not apply retrospectively; the CCA will continue to apply to construction contracts entered into before the Bill's date of commencement.

The Explanatory Statement identifies three key reform areas:

- harmonisation of security of payment laws, by providing for laws that are more consistent with those in other Australian jurisdictions;
- introducing deemed statutory trusts, intended to provide better protection of retention moneys and security in the event of insolvency; and
- enhancing the role and powers of the Building Services Board (**BSB**) to take regulatory action against building service providers who fail to pay debts arising through adjudication or court and to introduce an exclusion regime for service providers with a history of financial failure.

#### Harmonisation of security of payment laws

The Bill will introduce new security of payment laws in Western Australia which will replace the CCA regime.

The Bill includes provisions to void 'unfair' contract terms, specifically 'unfair time-bars'. The Bill also renews the prohibition on 'pay-when-paid' provision.

Consistent with security of payment laws in other Australian jurisdictions, the Bill introduces a statutory right to receive payment and to make a payment claim each month or more frequently if provided for in the contract. The Bill also introduces a right for payment claims to seek the return of security held under the contract (for example, a bank guarantee or retention money).

#### Rapid adjudication

The Bill maintains rapid adjudication, which remains a *'pay now-argue later system'*; however, the proposed adjudication regime is more consistent with the regime in other Australian jurisdictions. We consider this will be beneficial for our national clients who are familiar with the East Coast model for adjudication.

The following will apply under the proposed regime:

- Claimants must make an adjudication application within 20 business days of receiving a payment schedule.
- If no payment schedule is provided, claimants must provide the respondent with a further 5 business days to provide the payment schedule before making an adjudication application.
- Importantly, respondents who fail to provide a payment schedule will be barred from providing an adjudication response.
- Respondents who do provide a payment schedule will only be permitted to respond by reference to the reasons for withholding payment included in the payment schedule.

The procedures for adjudication remain largely similar to those in the CCA. However, the Bill introduces a new adjudication review mechanism for certain types of adjudication determinations. Reviews will be conducted by a single senior adjudicator. This review mechanism replaces the current limited right of review to the State Administrative Tribunal in the CCA.

### Deemed statutory trusts

One of the proposed major changes is the introduction of a retention trust scheme. The scheme will apply whenever retention money or security is withheld under a construction contract, despite any term in a contract to the contrary.

Where a construction contract provides that one party may hold retention money or security, that party (trustee) will be required to hold those funds in a dedicated trust account with an approved financial institution for the benefit of the party who provided the money. The trustee will not be entitled to withdraw moneys from the trust account unless they have a contractual entitlement to do so.

### Enhancing regulatory oversight

The final major change is the proposed enhanced powers of the BSB as the regulator responsible for the conduct and behaviour of registered building services providers. Notably, the BSB will be empowered to:

- declare 'excluded contractors' where an insolvency event has occurred, effectively excluding entities with a history of insolvency from registering as a building service contractor; and
- take disciplinary action where a building service provider has failed to pay a court judgement debt or adjudication determination debt.

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# In the Australian courts

## NEW SOUTH WALES

### Repudiation of a contract does not absolve accrued rights

#### *Cohen v Zanzoul trading as Uniq Building Group* [2020] NSWSC 592

*Andrew Hales | Phoebe Roberts | Jonathan Molina*

### Key points and significance

Repudiation of a contract can occur when a party acts in a way that is substantially inconsistent with the contract terms. The repudiation and termination of a contract does not mean the contract is rescinded *ab initio* (from the beginning). Any rights accrued by the innocent and defaulting parties during the course of the contract being performed or partially performed continue unaffected by termination. This includes an owner's right to recover damages for any defective building work and a builder's right to payment for work performed.

Restitution on the basis of a *quantum meruit* is not available where there is an enforceable contract and rights have accrued under that contract before repudiation.

### Facts

Mr and Mrs Cohen (**owners**) and Danny Zanzoul trading as Uniq Building Group (**builder**) entered into a contract on 22 May 2013 (**contract**) under which the builder agreed to demolish an existing dwelling on the owners' waterfront property and construct a new multi-level dwelling for the amount of $2,577,785 (**contract sum**). The contract comprised the 'Minor Works Contract Conditions (Principal Administered)' form AS4906-2002 together with a bespoke document called 'Official Order'.

The owners arranged finance with Commonwealth Bank of Australia (**CBA**), however, the parties understood that the cost of the construction of the new dwelling would exceed the construct sum and that the owners would fund the excess from their own resources. The Official Order provided for payments to be made over the contract sum. The contract stipulated the date for practical completion as 4 September 2014. It was

agreed that practical completion did not occur any earlier than 17 November 2015 when an occupation certificate was issued.

The builder made 23 progress claims during the course of the works. Claims 1 to 17 were paid in full by CBA between 24 June 2013 and 15 October 2014. The 18th claim was split between CBA and the owners as the CBA facility was exhausted. Claims 19 to 23 were submitted to the owners but they were not paid in full. It was agreed that the shortfall amount was $142,668 including retention. The defects liability period commenced when the occupation certificate was issued on 17 November 2015 and ended on 17 May 2016.

A dispute arose during the defects liability period as a result of which the builder asserted that the owners repudiated the contract by refusing to make any further payments. The owners meanwhile demanded that the builder had to rectify incomplete and defective work. The builder said he was willing to rectify the work but said the owners needed to address the long overdue payments. The owners had the defective work rectified by others during 2017 and 2018. The owners sued for damages and the builder cross-claimed for the unpaid amounts said to be owed to him, both under the contract and as a *quantum meruit*. In his pleadings, the builder accepted the owners' repudiation of the contract.

## Decision

### Did the owners repudiate their obligations under the contract?

Stevenson J held that it was clear that the owners' actions were a repudiation of the contract arising from the following:

- in reference to an email between the owners and the builder dated 7 December 2015, the owners continuously refused to pay the builder money due under the outstanding progress claims, even though it was a term of the contract that the owners pay the builder upon submission of a progress claim unless the owners were to dispute the claim by issuing a 'Progress Certificate'. Further, the owners did not invoke the provisions of the contract concerning defective work and the contract did not give the owners the right to withhold payments due under the contract by reason of unspecified defects; and
- a conversation that took place on 14 October 2016 between the owners and the builder in the presence of an inspector from the Office of Fair Trading. In this conversation, the owners alleged that they had overpaid the builder. This assertion was found to be untrue during cross-examination.

These two instances showed a clear intention to either not be bound by the contract or not fulfil the owners' obligations under the contract.

### Was the builder absolved from any liability for defective work?

It was found that the builder was not absolved from any liability for defective work, even though the builder had validly terminated the contract by his pleadings in the current proceedings on 4 April 2018. The owners and builder had unconditionally acquired the following rights which accrued from the respective breach of contract by the other:

- the plaintiff had the right to recover damages from the builder in relation to any defective building work; and
- the builder had the right to recover from the owners the outstanding monies due to him under the contract.

Stevenson J agreed with the position of Kiefel CJ, Bell and Keane JJ in *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32, where it was held that the concept of the contract becoming entirely irrelevant upon discharge or repudiation was fallacious, meaning repudiation of a contract *'operates only prospectively'* and is *'not equivalent to rescission ab initio'*. Any rights accrued during the course of the contract being performed or partially performed continue unaffected by termination.

### Was the builder entitled to a *quantum meruit*?

It was held that that a claim for *quantum meruit* was not available where the builder's right to make a claim for preliminaries, margin and delay damages had accrued by the time of the owners' repudiation of the contract.

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## *Cohen v Zanzoul trading as Uniq Building Group (No 2)* [2020] NSWSC 838

*Andrew Hales | Michelle Knight | Jenny Cohen*

### Key point and significance

A builder will not be able to argue that it was not given the opportunity to rectify defects, or that the owner did not mitigate its loss in having another builder rectify those defects, if the builder's agreement to rectify is contingent on receiving payment of outstanding progress claims. That may be an understandable position for a builder to take, but it does not mean that the builder was not given the opportunity to rectify defects.

An owner's entitlement to damages for defective work accrues when the defective work is done. A builder cannot therefore rely on an argument that a defect is only a temporary disconformity if it is not rectified within the time required after notification.

### Facts

The facts of this case are summarised in this edition in the decision *Cohen v Zanzoul trading as Uniq Building Group* [2020] NSWSC 592 (**Judgment No 1**). The proceedings concerned the Cohens' (**owners**) claim for damages for Zanzoul's (**builder**) failure to rectify defects and incomplete work. The builder claimed that the owners' failure to pay the full amount of multiple progress claims was a repudiation of the contract.

In Judgement No 1, it was determined (applying the High Court's findings in *Mann v Paterson Constructions*) that the parties' rights, which had respectively accrued under the contract before the termination, were not absolved upon termination. It followed that the owners were entitled to recover damages from the builder for defective or incomplete building work, and the builder was entitled to recover monies owing under the contract, as these rights had accrued before termination.

In Judgement No 1, consideration of the amounts recoverable by the owners was deferred. The issues decided in the second judgment were:

- whether the owners were entitled to recover damages in respect of defects notified on 11 February 2016, in respect of which the builder alleged he was not given an opportunity to rectify;
- whether the owners had mitigated their loss; and
- whether the owners were only entitled to claim damages for incomplete work above the amount they would have been obliged to pay the builder to complete the works.

### Decision

#### 11 February 2016 defects

It was found that the builder was given an opportunity to rectify but refused to do so until the owners acknowledged the progress payments that he said remained owing to him. Additionally, it was held that the owners' entitlement to damages had accrued when the defective work was done and they were entitled to recover the cost of rectifying the defective work.

#### Mitigation

It was found that the issue of failure to mitigate was not properly pleaded. In any event, the court found that there was no evidence which demonstrated that the builder could have rectified defects for less than the cost incurred by the owners.

#### Incomplete work

It was found that the owners had demonstrated the cost to complete the works by way of expert evidence. The court dismissed the builder's claim to discount the amount by reference to the amount the owners would have been obliged to pay the builder had he completed the work.

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## Parties 'held to their bargain' as NSW enforces expert determination dispute mechanism

### *The Illawarra Community Housing Trust Limited v MP Park Lane Pty Ltd* [2020] NSWSC 751

*Andrew Hales | Danielle le Poidevin*

### Key point

A court will ordinarily favour a broad interpretation of a dispute resolution provision and hold parties to the bargain they strike in agreeing to resolve disputes by reference to expert determination. A clause providing for expert determination is also likely to survive termination of a contract.

#### Facts

This case concerns the construction of an expert determination clause in a written Project Delivery Agreement (**agreement**) under which the Illawarra Community Housing Trust Limited (**housing trust**) appointed the defendant developer, MP Park Lane Pty Ltd (**developer**), to develop approximately two hectares of land into a seniors' apartment building, in addition to 140 -160 apartments and low density housing dwellings.

The agreement specified that, in doing so, the developer was to achieve specified critical dates or risk a material breach of the agreement (**critical dates**). The agreement also included an expert determination clause (clause 21) which provided that:

- any dispute in connection with the agreement was to be dealt with by clause 21;
- a notice of dispute be given in the event of such a dispute;
- the parties must meet to resolve the dispute; and
- absent resolution, either party may submit the dispute to expert determination.

After the parties fell into dispute about whether the developer could achieve the critical dates, the housing trust gave notice terminating the agreement. The developer responded by giving a dispute notice under clause 21 in which it contended that, among other things, the housing trust's termination amounted to a repudiation of the agreement (**dispute notice**). The developer accepted that repudiation, terminated the agreement, claimed damages and took steps under clause 21 to appoint an expert.

In the proceedings, the housing trust sought a declaration from the NSW Supreme Court that clause 21:

- did not survive the termination of the agreement and therefore could not be used to deal with the current dispute regarding the termination or repudiation of the agreement;
- did not confer jurisdiction upon an expert to determine a dispute about the termination or repudiation of the agreement;
- was so uncertain as to be void or unenforceable; and
- did not require the conduct of an expert determination as a condition precedent to commencing court proceedings to determine the dispute regarding the termination or repudiation of the agreement.

The housing trust also sought a declaration that the dispute notice was unenforceable and an injunction restraining the developer from taking steps under the expert determination clause.

#### Decision

The court dismissed the housing trust's case. Observing that the agreement was *'a detailed document plainly intended to legislate comprehensively for a substantial project'*, Hammerschlag J determined that clause 21 ought to be construed *'liberally and not narrowly'* so as to *'avoid working commercial inconvenience'*. In doing so, his Honour concluded that the dispute was to be properly resolved by expert determination and, as such, *'[t]he parties should be held to their bargain'*.

#### Did clause 21 survive termination or repudiation of the agreement?

The housing trust argued that the words *'in connection with this agreement'* in clause 21 had wide operation so, when read within the context of clause 21 and the agreement, it was confined to disputes in connection with the performance of the agreement and did not cover, for example, disputes *'in connection with its*

*frustration, termination or repudiation'*. In making this argument, the housing trust pointed to several *'textual indicators'*, including, for example, the fact that the agreement required the parties to continue performance of the agreement when disputes arose.

His Honour was quick to dismiss this argument, noting that '[a] dispute after termination or about termination of the Agreement is one in connection with it' and that a demarcation in this way 'lacks commercial rationality' as the 'parties would not have the benefit of the speedy and informal process to which they agreed'.

#### Did an expert have jurisdiction under the agreement to determine a dispute regarding termination or repudiation?

The housing trust claimed that the dispute was not *'apt to be resolved by an expert'* because it involved issues of mixed fact and law about termination. In making this argument, the housing trust pointed to implications from other provisions in the agreement and general commercial considerations as evidence that the parties did not intend that the expert determination process apply to any dispute arising from the agreement.

Hammerschlag J held that these arguments were simply not supported by the words of clause 21. Instead, the meaning of clause 21 was to *'determined objectively by reference to its text, context and purpose, the question being what a reasonable person would have understood them to mean'*. In doing so, preference was to be given to a construction of clause 21 which was consistent with the agreement as a whole, and that avoided commercial inconvenience. Liberal constructions of dispute resolutions clauses are a settled means of avoiding commercial inconvenience, and contrary to the housing trust's arguments otherwise, there was no reason why that ought not be the approach taken here.

Specifically looking to the use of the word *'any'* at clause 21.1, his Honour concluded that *'[o]n its plain meaning, if there is a dispute and it is in connection with the Agreement, it must be dealt with under [clause] 21'*.

#### Was clause 21 so uncertain as to be void or unenforceable?

The housing trust sought to argue that if clause 21 otherwise covered the dispute, it nevertheless failed to operate because it was void for uncertainty. Hammerschlag J did not accept this submission. Instead his Honour concluded that the absence of express procedural rules and mechanisms did not render clause 21 vague or unworkable; it was sufficient that the parties *'left it to the expert'* to stipulate a process for the conduct of the determination.

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## Proportionate liability applied to absent neighbours' liability for Rural Fire Service's controlled burn

### *Woodhouse v Fitzgerald and McCoy (No 2)* [2020] NSWSC 450

*Andrew Hales | Chern Tan | Terri Raciti*

### Key points and significance

Proportionate liability under Part 4 of the *Civil Liability Act 2002* (NSW) (**CLA**) can be applied to a concurrent wrongdoer, even if it is protected by statutory immunities and not a party to the proceedings. Further, even though it may be found that a duty of care owed by a wrongdoer is non-delegable, that wrongdoer's liability can be apportioned between concurrent wrongdoers under the proportionate liability provisions of the CLA.

The absentee landowners of a rural property were found to owe a non-delegable duty of care to prevent the re-ignition and spread of fire onto their neighbour's property. Controversially, the Rural Fire Service (**RFS**) was held 65% responsible for Mr Woodhouse's damages, despite the neighbours' acknowledgment that they were ultimately responsible for preventing the spread of fire and ensuring that the fire was properly extinguished. Even though the neighbours' duty of care was non-delegable, their liability was significantly reduced by the culpability of the party to whom they delegated the task. These general apportionment principles arising under Part 4 of the CLA will apply to building and construction disputes.

At the time of publishing, the neighbours have filed notice of their intention to appeal. We will monitor the outcome of any appeal.

## Facts

Mr Woodhouse was the owner of the Berridale faming property known as 'Myack'. In September 2012, Myack was extensively damaged by fire totalling roughly $1,150,000 worth of loss. Mr Woodhouse claimed that the fire started on an adjoining property, 'Doran', which was owned by absent landowners, Mr Fitzgerald and Ms McCoy (**neighbours**). Mr Woodhouse alleged that the fire to his property was the result of negligence during and after a controlled burn, conducted at Doran in August 2012 on behalf of the neighbours by the RFS, to eradicate noxious weeds. Mr Woodhouse argued that fire in an old hollow tree left standing on a ridge near the boundary of Doran was not fully extinguished and reignited on 5 September 2012 (a day of unseasonably high fire danger resulting in a total fire ban) when high winds drove the resulting grass fire into Myack.

Mr Woodhouse commenced proceedings in the NSW Supreme Court seeking damages in negligence (a lack of reasonable care) and nuisance (unlawful interference in his use and enjoyment of Myack) against the neighbours, arguing that they were responsible for the damage caused at Myack.

The RFS was not joined as a party to the proceedings.

## Decision

### Non-delegable duty of care

Mr Woodhouse submitted that the neighbours had control of Doran, which they exercised when they requested the RFS undertake the controlled burn and later when they permitted the RFS volunteers to enter the property to perform the burn and conduct post burn patrols. Mr Woodhouse submitted that, in the circumstances, the neighbours' duty of care was a non-delegable one given the nature of the risk of fire escaping Doran and Mr Woodhouse's vulnerability to that fire.

The neighbours accepted that, as occupiers of Doran on which a fire may ignite, they owed a duty to their neighbours to take reasonable care to prevent the ignition of a fire and its spread, but they denied that this duty was a non-delegable one. The neighbours submitted that they did all that they could reasonably do by engaging the RFS to conduct the burn and were unaware of the risk that could be posed by a burned, smouldering tree. The neighbours further submitted that they were not provided any advice from the RFS of the need to monitor the tree, although this was contradicted by an earlier acknowledgment by the neighbours that they had requested the assistance of the RFS to undertake the prescribed burn; that they would remain responsible for preventing the spread or escape of the fire and ensuring that it was properly extinguished; and that they would notify Mr Woodhouse of the burn.

Schmidt AJ accepted that it was established there was a known risk of fire escaping either during, or after the burn, if not properly extinguished and that Mr Woodhouse was especially vulnerable to such damage, particularly in circumstances where he had not been given prior notice of the burn by the neighbours. While the RFS was authorised to enter Doran to undertake the burn in the neighbours' absence, her Honour held that the neighbours' decision not to be present during the burn cannot have diminished the duty of care they owed to Mr Woodhouse.

Her Honour held that electing to burn 550 acres on Doran without prior notice to Mr Woodhouse carried *'inherent and very significant risks'*. Her Honour considered that the lighting of the fires on Doran could readily spread to Myack and cause great damage there, both during the burn and afterwards, if the fires were not properly extinguished. That required the neighbours to use all reasonable precautions to prevent the fire extending to Mr Woodhouse's property which could not be satisfied simply by engaging the RFS and its volunteers. Her Honour noted that, having provided the acknowledgment of their responsibility when obtaining the assistance of the RFS, *'it is difficult to conceive that [the neighbours] had no understanding of their own responsibility for the control of the fire they arranged to be used on Doran'*.

Her Honour determined that, even though the RFS was a competent third party, it was the nature of the relationship between the neighbours and Mr Woodhouse, as neighbours, whose property they had an obligation to safeguard and protect, which made their duty a non-delegable one in circumstances when the neighbours elected to undertake a burn on Doran.

### Concurrent wrongdoer

Part 4 of the CLA allows a court to apportion liability between concurrent wrongdoers to the extent that *'the court considers just having regard to the extent of the defendant's responsibility for the damage or loss'*. Mr Woodhouse contended that Part 4 did not apply, as a concurrent wrongdoer must be a wrongdoer at law and, for that reason, the RFS could not be a concurrent wrongdoer as it had no legal liability to Mr Woodhouse for its acts and omissions in the conduct of the burn and its subsequent monitoring.

However, her Honour held that, given the acts and omissions of the RFS contributed to the damage which Mr Woodhouse suffered, it must be concluded that under section 34 of the CLA, the RFS was a concurrent wrongdoer even if it would not be liable to Mr Woodhouse for its wrongdoing by reason of either section 128 of the *Rural Fire Services Act* (provision of immunity for acts done in good faith) or section 43A of the CLA (public or other authority's exercise of, or failure to exercise, a special statutory power). Her Honour described this as *'one of those unusual cases…where someone who the evidence established caused loss or damage is not legally liable for that wrongdoing but is still a concurrent wrongdoer for the purposes of section 34'*.

Her Honour attributed fault to the neighbours at 35%.

### Nuisance

Her Honour accepted that Mr Woodhouse's claim in nuisance was established against the neighbours. As they had engaged the RFS to assist with the eradication of the noxious weeds by fire, there could be no question that the neighbours understood such a fire was a potential source of nuisance. While her Honour noted that the fire was not spread deliberately to Myack, the evidence established that by their own acts and omissions, the neighbours permitted the nuisance which resulted in the damage suffered by Mr Woodhouse. Her Honour did not deal with whether proportionate liability applied to the claim in nuisance, although at the end of the judgment when dealing with damages, her Honour said damages should be adjusted to take account of RFS being a concurrent wrongdoer and Mr Woodhouse's contributory negligence.

### Contributory negligence

The neighbours submitted that if the risk of the tree reigniting was a foreseeable one (as claimed by Mr Woodhouse), then it was equally foreseeable to him, once he became aware that the burn had been conducted. Her Honour held that, unlike the neighbours, Mr Woodhouse was an experienced grazier who would have known of the risk of re-ignition which existed, particularly given the unseasonable conditions on 5 September 2012. Accordingly, her Honour allowed a 10% reduction for contributory negligence.

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# QUEENSLAND

## It's just and convenient to order a separate trial where the parties expect to wait a while

### *Brisbane Airport Corporation Pty Limited v Arup Pty Limited* [2020] QSC 202

*Michael Creedon | Luke Trimarchi | Cameron Gee*

### Key point and significance

A court will consider it just and convenient to order a separate trial on issues of liability and quantum in circumstances where a trial to determine all issues will not be ready for some time, even where that separate trial will risk prolonging the proceeding as a whole. A separate trial in this regard is said to nevertheless save time and costs, as well as better facilitate the prospects of a settlement in the interim.

### Facts

Brisbane Airport Corporation (**BAC**) and Arup Pty Limited (**Arup**) were parties to an agreement under which Arup agreed to provide engineering consultancy services to BAC in relation to the Northern Apron Expansion (**NAE**) project at Brisbane airport. In 2010 BAC first identified significant cracks in the NAE. In 2016 BAC sued Arup for negligence and, in the alternative, for alleged representations in relation to the design of the

NAE. BAC alleged that Arup's design of the NAE was defective in five respects, and that extensive works were required to rectify each of those defects.

The quantum of damages therefore depended the scope of Arup's liability which had not yet been determined. On this basis, Arup contended that a separate trial, pursuant to rule 483(1) of the *Uniform Civil Procedure Rules 1999* (Qld), should be held first to determine the issue of liability and the quantum issue should be heard separately.

Arup submitted that it was just and convenient to order a separate trial on liability because, in relation to the quantum issue:

1. BAC was contemplating performing early rectification works in light of the current reduction in air traffic from the COVID-19 pandemic. Such works relied upon unpredictable assumptions regarding the programming, sequencing and the ultimate cost of the works;
2. regardless of any early rectification work, the scope and extent of a quantum trial depended upon the court's findings regarding liability; and
3. overall, there were good reasons to make the orders sought, particularly in consideration of the time and cost savings.

In contrast, BAC submitted:

1. there was uncertainty that a separate trial would result in any savings to time and costs;
2. there was a real probability that a separate trial would delay the proceeding as a whole;
3. a separate liability trial would inhibit rather than encourage settlement; and
4. a separate trial would be lengthy and require duplication of evidence given by the same witnesses in both trials.

## Decision

### Quantum of damages in a state of flux

Arup submitted and the court agreed that BAC's quantum case was in a state of flux due to the current COVID-19 pandemic and was likely to remain uncertain for a substantial period of time. The court held the uncertainties presented by the changed operational environment and the processes involved in awarding any contract for early rectification works made it very unlikely that a trial on quantum issues could be conducted even in 2021.

### Potential savings on costs

Arup noted that if it succeeded entirely on the issue of liability, there would be no need for a subsequent trial to determine the quantum issues, and in any event, a trial on liability would determine, with certainty, the defects (if any). The court agreed that there would be a substantial saving of time and costs if liability was resolved entirely in Arup's favour; however, if Arup was found liable in respect of some or all of the alleged defects, then costs saving would be far less certain. The court held that regardless of the outcome of Arup's liability, a separate trial would nevertheless be beneficial for facilitating a settlement.

### Would a separate trial prolong the proceeding as a whole?

The court accepted that, although there was a real prospect that a separate trial would delay the proceeding as a whole, there was also some prospect that a separate trial may, depending on its outcome, lead to the whole proceeding ending earlier. In the court's opinion, it was more likely that a separate trial would increase the risk of prolongation, meaning a trial on all issues was more favourable in this respect; however, this was ultimately not the determinative issue.

### Order

The court concluded that the prospect of saving time and costs and also facilitating settlement in the interim were strong reasons to hold a separate trial on liability. In the court's opinion, these considerations outweighed the risk that the proceeding may be delayed as a whole. As such, the court ordered that it was just and convenient to conduct a separate trial on liability.

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## Be careful what you plead for! Unnecessary pleadings derail contractor's case

### *Somerset Civil Pty Ltd v Sugarbag Road Pty Ltd* [2020] QSC 203

*Julie Whitehead | Alexandria Hammerton | Danielle le Poidevin*

### Key point

To make the case that a principal ought not to benefit from section 42 of the *Queensland Building and Construction Commission Act 1991* (Qld), a contractor will need to establish that the principal knew (at the time of entering into a relevant contract) it was engaging an unlicensed contractor to carry out building work.

### Facts

Somerset Civil Pty Ltd (**Somerset**) claimed payment of $1.1 million from Sugarbag Road Pty Ltd (**Sugarbag**) for work performed as part of a subdivision development at Little Mountain, Caloundra (**Project**). Sugarbag rejected this claim, contending that Somerset did not hold the requisite licence under the *Queensland Building and Construction Commission Act 1991* (Qld) (**Act**) and therefore, by virtue of section 42 of the Act, Sugarbag did not have to pay Somerset and was entitled to have the money it had already paid returned.

Somerset sought an order lifting a stay on its notice of non-party disclosure under the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**), by which it sought to obtain a copy of a contract entered into by Sugarbag with another unlicensed third party contractor (**third party contract**). In its Amended Particulars, Somerset had pointed to the third party contract to establish a pattern of behaviour which proved that Sugarbag was '*likely to enter into a contract with Somerset, knowing it to be unlicensed and thus engage in a course of conduct which would work to exclude Somerset from the consequence of failing to hold the requisite licence'* (**Particulars**).

Sugarbag contended that it believed Somerset held an appropriate licence at the time of entering into a contract with Somerset and sought to have these particulars struck out.

The issue to be resolved by the Supreme Court of Queensland was therefore whether Sugarbag knew or ought to have known that Somerset did not hold a relevant licence, thus excluding Sugarbag from claiming the benefit of section 42 of the Act.

### Decision

Martin J dismissed Somerset's application, striking out Somerset's particulars and ordering Somerset to pay Sugarbag's costs.

Noting Keane JA's comments in *Cook's Construction Pty Ltd v SFS 007.298.633 Pty Ltd (formerly t/as Stork Food Systems Australasia Pty Ltd)* (2009) 254 ALR 66, which observe that the benefit of section 42 of the Act cannot be claimed by a *'payer who knowingly engaged an unlicensed builder to carry out building work in contravention of s42'*, his Honour ultimately determined that Somerset's particulars *'[did] not provide a basis for such an argument'* against Sugarbag and did not establish that its argument regarding the third party contract was relevant.

Instead, Martin J found Somerset:

- had failed to plead that, in entering into contracts with third party contractors, Sugarbag knew that the third party contractors did not hold an appropriate licence under the Act;
- had failed to establish when Sugarbag learned Somerset was not appropriately licensed and which individuals had this knowledge; and
- was inconsistent in how it had presented its case in its particulars, as compared to its Statement of Claim.

His Honour therefore deemed Somerset's particulars 'unnecessary' and liable to be struck out pursuant to rule 162 of the UCPR.

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# VICTORIA

## If I could turn back time

### *Citi-Con (Vic) Pty Ltd v Punton's Shoes Pty Ltd* [2020] VCC 804

*Alison Sewell | Tom Johnstone | China Waters*

#### Key point

In cases where a payment claim has already been served in respect of a particular reference date, that claim cannot be withdrawn in substitution of a later claim in respect of the same reference date, unless the submitting party has agreement from the other party. Unilateral withdrawal of a claim is not permitted, and the later claim will be invalid.

#### Facts

Citi-Con (Vic) Pty Ltd (**builder**) served a payment claim on Punton's Shoes Pty Ltd (**owner**) on 29 October 2019 which relied on a reference date of 30 July 2019 (**October Claim**). The builder had however already served an earlier payment claim in July 2019 which relied on the same reference date (**July Claim**).

The October Claim was served via email to the owner with a note that the builder was withdrawing all and any payment claims previously issued in respect of that reference date, including the July Claim. The owner did not agree to the withdrawal of the July Claim and claimed that the October Claim was invalid as it breached section 14(8) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) which prohibits a claimant from serving more than one payment claim in respect of each reference date.

#### Decision

Marks J held that the builder was not permitted to unilaterally withdraw the July Claim and substitute the October Claim, and as a result the October Claim was invalid.

In reaching this conclusion, her Honour took the view that section 14(8) of the Act did not allow for unilateral purported withdrawal of a payment claim which had already been served. Her Honour held that parties can, by agreement, decide that an earlier payment claim may be substituted for another in particular circumstances, which may often be a cost-effective and expeditious way of dealing with disputes. However, in the absence of agreement between parties, as was the case here, a builder cannot substitute a claim already served for another.

Her Honour then referred to established case law that the consequence of serving more than one payment claim in respect of the same reference date is that the second claim is void. This meant that, of the two claims submitted by the builder, the October Claim was void.

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## 'Not applicable' doesn't always mean what you want it to mean

### *Gemcan Constructions Pty Ltd v Westbourne Grammar School* [2020] VSC 429

*Cameron Ross | Tom Johnstone | Gary Yang*

#### Key point and significance

This case reiterates the general approach courts will take when interpreting a contract, that is, to give effect to the clear and unambiguous meaning of a clause unless there is a clear intention evinced by the parties to negate its effect.

This is of even greater importance when using standard form Australian Standard construction contracts, which specifically provide an annexure where deletions and amendments can be made to the general conditions. When seeking to negate or change the effect of a particular clause in such a contract, it is imperative to specifically delete or amend the terms themselves rather than relying on the contract

particulars, lest the absence of such deletion or amendment be construed by the court as an acquiescence to the clear meaning of the clause.

## Facts

Gemcan Constructions Pty Ltd (**builder**) was engaged by Westbourne Grammar School (**owner**) to conduct works at the owner's campus in Williamstown under an amended AS 4000-1997 contract.

During the course of the works the builder attempted to refer a number of disputes to arbitration pursuant to the contract between the parties.

The General Conditions of the AS 4000-1997 contract provided that:

- if a dispute between the parties has not been resolved within 28 days after service of the notice of dispute, that dispute was to be referred to arbitration;
- if within a further 14 days the parties had not agreed upon an arbitrator, the arbitrator was to be nominated by the person identified in the contract particulars; and
- the arbitration was to be conducted in accordance with the rules identified in the contract particulars.

The owner contended that, because the contract particulars (relating to the nominated arbitrator and the rules for arbitration) were stated as being 'not applicable', there was no binding agreement for arbitration under the contract.

## Decision

The court held that there was a valid arbitration agreement and appointed the barrister nominated by the builder as the arbitrator.

### Was there a valid arbitration agreement?

The court stated that the dispute resolution clause in the General Conditions evinces an intention to create, and does create, a valid and binding agreement to refer disputes that have not resolved by the parties to arbitration. It was clear and unambiguous in its terms, expressly providing that a dispute was to be referred to arbitration if not resolved within the requisite time. This clearly showed the objective intention of the parties.

The court held that the use of 'not applicable' in the contract particulars did not evince an intention to negate this clause as it was merely impacting upon the mechanism by which certain procedural aspects of the arbitration are to be decided.

Importantly, Annexure Part B to the contract, which provided for the General Conditions to be amended (and which took priority over the General Conditions), did not delete or amend any clauses relating to dispute resolution and arbitration. This, in the court's view, confirmed the objective intention of the parties not to negate the clause providing for dispute to be referred to arbitration.

### Which arbitrator should be appointed?

In the absence of agreement between the parties as to how many or how arbitrators were to be appointed, the court was given the power to make such appointment under the *Commercial Arbitration Act 2011* (Vic).

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# Saving grace! Security of indemnity certificates

## *Radman v Open Plan* [2020] VSC 318

*Nikki Miller* | Tom Johnstone | James Mullins

### Significance

Parties to court cases involving judicial review of an adjudicator's determination made under the *Building and Construction Industry Security of Payment Act 2002* (**SOP Act**) should be aware of the potential for the court to grant an indemnity certificate.

Such a certificate gives a party the right to apply to the Appeal Costs Board for payment of both the respondent's and the appellant's legal costs in respect of the appeal, on the basis that the error of law is attributed to a fault of the administration of justice rather than of the parties. The costs of having the error rectified ought ordinarily not to be borne by the unsuccessful respondent but from a public fund.

In this case, the court held that an adjudicator appointed pursuant to section 23 of the SOP Act constitutes a 'court' under the *Appeal Costs Act 1998* (**ACA**). Accordingly, where an adjudicator's determination on a payment claim is quashed upon judicial review (including if the court allows an appeal by consent), the respondent may be entitled to an indemnity certificate in respect of legal costs incurred in relation to the judicial review proceedings.

### Facts

Radman (**principal**) engaged Open Plan Pty Ltd (**builder**) to construct residential dwellings on land owned by the principal. During the course of the works, the builder issued a number of payment claims under the SOP Act. The principal disputed the payment claims, which were referred to adjudication pursuant to section 23 of the SOP Act. The principal sought judicial review of the adjudication determination on the basis of jurisdictional error, which the court ultimately quashed by consent orders.

The builder submitted that it was entitled to an indemnity certificate in respect of costs under section 4 of the ACA on the basis that:

- the subject proceeding for judicial review was an 'appeal' as defined by section 3 of the ACA;
- the adjudicator was a 'court' within the meaning of section 3 of the ACA;
- the judicial review had 'succeeded' within the meaning of section 4(1) of the ACA in that the court by consent quashed the adjudication determination; and
- the award of an indemnity certificate would be consistent with the purpose of the ACA.

### Decision

Digby J ordered that the builder be granted an indemnity certificate.

#### Meaning of 'appeal'

His Honour held that the term 'appeal' was to be given a wide meaning on the basis of the underlying policy and purpose of the ACA. His Honour held that, as remedial legislation, the ACA must be construed broadly and beneficially. An appeal refers generally to the right of entering a superior court to redress the error of a lower court. His Honour held that judicial review of the adjudication determination under the SOP Act (being to a superior court on an error of law) was an 'appeal' within the meaning of the ACA.

#### Meaning of 'court'

His Honour similarly held that the term 'court' was to be construed broadly and beneficially for the reasons above. It was not confined to a court, tribunal or other body from which there exists an express right of statutory appeal on a question of law.

An adjudication determination is binding upon the parties, has the effect of a judgement of the court and is enforceable as such. His Honour held that it follows that an adjudicator appointed under the SOP Act constitutes a 'tribunal' or 'other body' within the meaning of 'court' in section 3 of the ACA.

### Success in underlying proceeding

His Honour held that allowing an appeal by consent was not a mere exercise of 'rubber stamping'. The court maintained a duty to be satisfied that there was at least an arguable error as a precondition to allowing an appeal by consent.

Digby J was satisfied that the adjudicator had made a jurisdictional error and concluded that the judicial review of the adjudication determination had 'succeeded' within the meaning of the ACA.

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## Identifying the relevant contract and reference dates for the issuance of payment claims

### *Rapid Concrete Developments Pty Ltd v Lorem Constructions Pty Ltd* [2020] VCC 858

*Owen Cooper* | *Tom Johnstone* | *Alisdair Reeves*

### Key point

Parties should be mindful that if a reference date under a construction contract is expressed to arise as a single one-off payment on completion of the works, that reference date will only crystallise when everything required of the contractor has been fulfilled (including rectification of defects and outstanding matters) unless there are qualifying words saying otherwise.

### Facts

Lorem Constructions Pty Ltd (**head contractor**) engaged Rapid Concrete Developments Pty Ltd (**subcontractor**) in order to perform certain concreting works. The works were the subject of two quotations (**contract 1** and **contract 2**) and four subsequent interactions between the parties, both written and oral, relating to additional works in respect of which the subcontractor submitted that an additional four contracts arose (**additional works payment claims**).

The subcontractor issued nine payment claims under the alleged contracts in the amount of $321,587.57, which remained part paid or unpaid by the head contractor. The subcontractor sought judgment against the head contractor under the *Building and Construction Industry Security of Payment Act 2002* (Vic) for the amounts unpaid.

### Decision

The court ruled in favour of the head contractor and dismissed the subcontractor's application.

#### Relevant contracts

The court held that the additional works payment claims were variations to contract 1 and contract 2 and not separate contracts, on the basis that (among other things):

- the description of the works in the invoice were referable to the works under the contract;
- there were references to 'further' works in the relevant payment claim; and
- there was evidence that particular additional works were to 'speed up the building works'.

#### Reference dates

Having determined that there were only two contracts, the court turned to the payment term under those contracts (being *'on completion of works…in accordance with our payment terms being on or before 30 days from invoice date'*) in order to determine the relevant reference date.

Holding that the reference date is distinct from the terms regarding payment of invoices, the court found that the parties intended that the 30-day payment of invoices term was to be separate from the reference date for payment, being on completion of the works. The court upheld the principle that where a reference date is a single or one-off payment claim, the time by which service of that payment claim crystallises is when everything required of the contractor has been fulfilled (including rectification of defects and outstanding matters).

Relying on expert and affidavit evidence of the parties, the court determined that the works were incomplete as at the date of issuance of the payment claims and that therefore no valid reference date existed.

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# WESTERN AUSTRALIA

## Discretionary v mandatory stay of proceedings

### *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* [2020] WASCA 77

*Tom French | Zubayr Abrahams | Penny Bond | Kajal Parmar*

#### Key point and significance

This decision highlights some of the difficulties parties to an arbitration agreement may have in keeping the dispute within the confines of a confidential arbitration, particularly where the dispute involves 'strangers' to the arbitration agreement.

Section 8(1) of the *Commercial Arbitration Act 2012* (WA) (**Act**) provides that, in an action brought in respect of a matter which is subject to an arbitration agreement, if a party requests, the court must refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. This case establishes that, where section 8(1) of the Act is engaged, the court will be required to order a stay of parallel legal proceedings.

However, although section 8(1) does not apply to 'strangers' or 'non-parties' to the arbitration agreement, the court does have the discretion to order a stay of parallel legal proceedings in exercising its general powers to control its processes. This may occur where the court has referred parties to arbitration under section 8(1) and makes a parallel decision relating to 'strangers' to the arbitration agreement which would ultimately bind the arbitral parties.

#### Facts

This case follows on from two earlier proceedings commenced by Wright Prospecting Pty Ltd (**WPPL**) and DFD Rhodes Pty Ltd and others (**DFD Rhodes**) in respect of the Hope Downs Deed (**Deed**). The Deed was entered into by various parties, including Hancock Prospecting Pty Ltd (**HPPL**), Georgina Hope Rinehart (**Mrs Rinehart**), Bianca Hope Rinehart (**Ms Rinehart**), Hope Rinehart Welker (**Ms Welker**), Ginia Hope Rinehart (**Ms Ginia Rinehart**) and John Langley Hancock (**Mr Hancock**). The Deed provided for the resolution of disputes relating to the titles of the Hope Downs Tenements by way of confidential arbitration.

Although they were not parties to the Deed, WPPL and DFD Rhodes commenced proceedings claiming a beneficial interest in the Hope Downs Tenements. In addition to filing defences in these primary proceedings, Mr Hancock and Ms Rinehart brought counterclaims against the other parties to the Deed. Applications were made under the Act to stay (ie halt or defer to a later time) those defences, the counterclaims and the whole proceedings. However, the primary judge only granted a stay of the counterclaims.

The appellants, HPPL and Mrs Rinehart, sought leave to appeal the primary judge's decision in declining to stay Mr Hancock and Ms Rinehart's defences or the primary proceedings generally. The appellants contended that the court was under a duty to do so under either sections 5 or 8 of the Act. Alternatively, they contended that the primary judge erred in exercising the court's general discretion to stay the primary proceedings.

#### Decision

The court confirmed the primary judge's decision to stay the counterclaims and decision to refuse to stay the defences under section 8 of the Act. The court also agreed with the primary judge in not granting injunctive relief. However, the court was divided on the issue of whether the discretion to stay the whole of the primary proceedings was within the exercise of the court's general power to control its own processes. The court ultimately ordered that this discretion be re-exercised, either by this court or upon remittal to the primary judge.

From the grounds of appeal submitted by HPPL and Mrs Rinehart, of which there was overlap, the court summarised the issues as:

- the extent to which mandatory stay was required by the Act;
- whether to stay the primary proceedings was within the exercise of the court's general power to control its own processes; and

- whether the appellants had a claim for injunctive relief.

### Issue 1: The extent to which mandatory stay was required by the Act

HPPL and Mrs Rinehart submitted that the learned primary judge was bound by the Act to stay the primary proceedings, or at least Mr Hancock and Ms Rinehart's defences, pending an arbitration between the parties to the Deed. This submission required the court to consider the interpretation of section 8 of the Act and specifically the phrase *'a matter which is the subject of an arbitration agreement'* in section 8.

The court found that section 8 required the consideration of the subject matter of the controversy and the parties who disputed that subject matter. The fact that a dispute involves strangers to the arbitration agreement, ie WPPL and DFD Rhodes, does not prevent the dispute from falling under the operation of section 8. However, parties not bound by the arbitration agreement are not affected by section 8. If section 8 of the Act is engaged, it will require the court to stay the proceedings in order to effect a referral of the parties to arbitration.

The court found the Deed manifested an intention that any dispute amongst the parties to the Deed was to be dealt with by confidential arbitration. The court found the cross-appeals by Mr Hancock and Ms Rinehart against the other parties to the Deed fell within the meaning of a 'matter' in section 8. Hence the court agreed with the primary judge's decision to refer those parties to arbitration and stay the counterclaims against those parties.

On the other hand, as WPPL and DFD Rhodes were true strangers to the Deed, any dispute between them and any party to the Deed could not be settled by arbitration. The court found that the claims brought by WPPL and DFD Rhodes and any defences to those claims fell outside the scope of section 8. The court held the primary judge was correct in refusing to stay those defences.

The court also briefly considered the operation of section 5 of the Act, finding that the provision did not prevent the court from exercising its ordinary jurisdiction in relation to disputes between persons who are not parties to arbitration agreements.

### Issue 2: Court's power to grant stay in its own discretion

The primary judge considered whether the primary proceedings should be stayed in the exercise of the court's power and discretion to control its own proceedings. The primary judge held that it was not in the interests of justice that the primary proceedings should be stayed.

Quinlan CJ upheld the primary judge's decision in not staying the primary proceedings, finding the primary judge was not shown to have acted upon a wrong principle, to have taken into account irrelevant considerations or to have failed to take into account relevant considerations. Quinlan CJ held the primary judge's decision was not unjust or plainly unreasonable.

On the other hand, Beech and Vaughan JJA found error in the learned primary judge's decision not to grant stay of the primary proceedings. Beech and Vaughan JJA found that, where a court refers parties to arbitration under section 8 of the Act, the potential for the court to make a determination on parallel proceedings, which would ultimately bind the arbitral parties, was a significant factor in support of staying the legal proceedings. As the parties were referred to arbitration under section 8 in relation to the counterclaim, if the primary proceedings were allowed to continue, the court could make a decision that would be binding on the arbitral proceedings. This would have the potential to undermine the mandatory referral contained in section 8 of the Act. Considering this, the court concluded that it was for the court to re-exercise its discretion.

### Issue 3: Alternative claims for injunctive relief

HPPL and Mrs Rinehart claimed that Mr Hancock and Ms Rinehart should have been restrained from making any claim in respect of the Hope Downs Tenements. The court found that the primary judge correctly applied the test, considering:

- whether the applicant made out a prima facie case; and
- whether the balance of convenience favoured the grant of the injunction.

The primary judge found that a prima facie case of a breach of the Deed had been established. However, the primary judge was not satisfied that the balance of convenience favoured the grant of the injunction. The court agreed with the primary judge's decision in refusing to grant an injunction.

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## When can you bring multiple adjudication applications under the same progress claim?

### *Sandvik Mining and Construction Australia Pty Ltd v Fisher (No 2)* [2020] WASC 123

*Tom French | Zubayr Abrahams | Penny Bond | Kajal Parmar*

### Significance

The case confirms that each item in a progress claim can give rise to a payment dispute. Multiple adjudications are permissible from the same progress claim, provided that they relate to non-overlapping items in the progress claim.

### Facts

Civmec Construction and Engineering Pty Ltd (**Civmec**) was engaged by Sandvik Mining and Construction Australia Pty Ltd (**Sandvik**) under a construction contract for the fabrication, assembly and commissioning of machinery.

A payment dispute arose in respect of a progress claim issued by Civmec (**Progress Claim**). In response to that Progress Claim, Sandvik issued a payment notice certifying a negative amount of $881,380.15, which was arrived at after deducting 15 items and also deducting amounts previously certified. Civmec disputed the certified amount and applied for adjudication under the *Construction Contracts Act 2004* (WA) (**Act**) in respect of the dispute.

#### First Determination

In the first adjudication, Civmec challenged five items of deduction from the Progress Claim, which was adjudicated in favour of Civmec (**First Determination**).

#### Second Determination

Following the First Determination, Civmec submitted a second adjudication application regarding seven items of deduction. The Adjudicator determined in favour of Civmec, finding that Sandvik was liable to pay Civmec the sum of $1,664,650 (**Second Determination**).

#### Application for judicial review

Sandvik sought judicial review of the Second Determination on the basis that the adjudicator did not have jurisdiction as the same payment dispute had already been determined in the First Determination.

In applying for judicial review, Sandvik referred to the earlier decision *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2018] WASCA 28 (***Duro***), in which the court held that where a progress claim contains a number of itemised amounts, each may itself be treated as a 'payment claim' for the purposes of the Act. We considered the significance of that decision in our *June 2018 Construction Law Update*.

While Sandvik accepted the principle in Duro, it submitted that a progress claim could only give rise to a single payment dispute. Sandvik further contended that each of the disputed items in the Second Determination had been determined in the First Determination.

### Decision

The court dismissed Sandvik's application. The court held that while the Act prohibits multiple adjudications of the same dispute, it was not satisfied that factually the First and Second Determinations concerned the same payment dispute.

The court noted that the Act prohibits multiple adjudications of the same payment dispute. This is achieved by the operation of:

- section 6(2), which states a payment dispute will not arise to the extent to which the payment claim includes matters that were the subject of an application for adjudication that has been dismissed or determined;
- section 25(a), which prohibits a party from applying for adjudication of a payment dispute if an application for adjudication in relation to that payment dispute has already been made; and

- section 41(1)(b), which prohibits a party from applying for an adjudication of a dispute if that dispute has already been determined under a previous adjudication.

However, the Act does not prevent multiple adjudications of different payment disputes, even when they arise from the same progress claim.

In determining the issues, the court was required to consider, on the proper construction of the Act, whether the First Determination was only in relation to the five items challenged by Civmec, or whether it was a payment dispute in relation to the whole of the Progress Claim. If the latter was accepted, then Mr Fisher did not have the jurisdiction to make the Second Determination.

The court considered the earlier decision of *Duro* and found that each item in a progress claim can itself constitute a payment claim giving rise to its own payment dispute. Each of these items can also be grouped together to form a single payment dispute, and different groups of non-overlapping items can be the subject of separate adjudication applications. As the payment disputes would effectively be different in each application, the claims under the second application would not be determined on the merits of the first adjudication.

The court found that the First and Second Determinations involved two separate payment disputes as they concerned different non-overlapping items under the progress claim. Therefore, the court found that Mr Fisher did have jurisdiction to make the Second Determination.

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