Construction Law Update

June 2019

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Legislative update

WESTERN AUSTRALIA

Arrival in 2020: WA's New Security of Payment Regime

Reforms to the Construction Contracts Act 2004 (WA)

Tom French | Candice Lamb | Penny Bond

An update on the Fiocco Report in WA

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.

The State Government has reportedly provided its first update on the security of payment reform project since the Fiocco report.

In what appears to be an exclusive interview to the Australian Financial Review, Attorney-General and Minister for Commerce, Hon John Quigley MLA, provided valuable insight into the progress and likely timing of the law reform. The article also indicates the State Government's direction in progressing the report's recommendations.

Coming to State Parliament in early 2020

According to the update, Minister Quigley will be presenting his position to Cabinet in September and intends to submit a bill to Parliament in early 2020. It is unclear whether the bill will amend, or repeal and replace, the *Construction Contracts Act 2004* (WA). However, given the scope of Fiocco's recommendations, it is likely the Act will be repealed and replaced with a security of payment model akin to that of New South Wales, prior to any uniform law which may still be some time away.

At this stage it is unclear whether any bill will be released to stakeholders prior to its introduction to State Parliament. The State Government may decide not to release a bill for further public consultation, as the Fiocco report process may be considered sufficient to satisfy the State Government's consultation requirements.

The update indicates a likely transitional period of 18 months between any bill passing in State Parliament and the laws coming into operation.

Interestingly, the Government appears to be taking a staged approach to implementation: the security of payment model will initially apply to contracts valued at $20 million and over, then after a further 18 months to contracts valued at over $10 million, and then finally after another 18 months to projects worth $1 million and over. The Government has not expressed an intention to apply the new legislation to contracts valued at less than $1 million.

What can we expect?

According to the update, the new legislation will adopt imputed statutory trusts and repeal WA's current payment dispute system. The New South Wales security of payment model or 'rapid adjudication' model will likely be adopted in its place. As expected from the Fiocco report, the bill will result in major changes to the building and construction industry in Western Australia.

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In the Australian courts

NEW SOUTH WALES

If you want security of payment, an 'other arrangement' must give rise to a legally binding obligation

Lendlease Engineering Pty Ltd v Timecon Pty Ltd [2019] NSWSC 685

Andrew Hales | Jessie Jagger | Naomi Graham

Key point

An 'other arrangement' within the meaning of 'construction contract' as defined in section 4 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**), must be an arrangement that gives rise to a legally binding obligation, although it need not be contractual in nature.

Significance

This decision does not follow earlier NSWSC decisions that an 'other arrangement' is not required to be a legally enforceable arrangement in order to fall within the ambit of the SOP Act. The decision provides a greater degree of certainty to parties who enter into negotiations but do not conclude them by the formal execution of a contract. Care is however still required when seeking to make arrangements for the undertaking of construction work, so that the parties are aware of the rights and obligations that such arrangements may confer under the SOP Act.

Facts

The unincorporated joint venture formed by Lendlease Engineering Pty Ltd and Bouygues Construction Australia Pty Ltd (**head contractor**) is the head contractor on the NorthConnex Project.

The LLBJV was the respondent to an adjudication application made by Timecon Pty Ltd (**Timecon**) relating to the disposal of tunnel spoil to a site in Somersby, NSW.

The adjudicator made an adjudication determination in favour of Timecon.

The head contractor commenced proceedings to have the adjudication determination set aside on the basis of jurisdictional error. The head contractor contended that there was no 'contract or other arrangement' between it and Timecon, and if there was a 'contract or other arrangement', it was not one under which Timecon undertook to carry out construction work or to supply related goods and services for the head contractor.

Decision - an arrangement must give rise to a legally binding obligation but need not be contractual in nature

Ball J considered and did not follow the relevant authorities below in which the respective courts took the view that the 'arrangement' need not be legally binding:

- *Okaroo Pty Ltd v Vos Construction and Joinery Pty Ltd* [2005] NSWSC 45 (per Nicholas J);
- *Machkevitch v Andrew Building Constructions* [2012] NSWSC 546 (per McDougall J); and
- *IWD No 2 Pty Ltd v Level Orange Pty Ltd* [2012] NSWSC 1439 (per Stevenson J).

In any event, his Honour found that the facts of each of the above cases suggested that the relevant arrangement in each case was in fact a legally binding arrangement.

None of the above cases had considered the effect of section 32 of the SOP Act on the issue. This section renders ultimately returnable any payment made resulting from the adjudication of a payment claim where the claimant is found, in civil proceedings, to have no underlying right to be paid. His Honour held that in light of section 32, it makes no sense to interpret the SOP Act as creating a right to a progress claim where the claimant has no underlying right to be paid any amount at any time, as the purpose of the SOP Act would not be advanced by such an interpretation.

On the facts of the case, his Honour decided that there was no contract or other arrangement between the head contractor and Timecon for the disposal of tunnel spoil from the NorthConnex Project. Consequently, the adjudication determination was declared void.

His Honour also found, in obiter, that even if he had concluded that there was a contract or other arrangement between Timecon and the head contractor, he would not have concluded that the contract or other arrangement was for construction work at the Somersby site, or for the supply of related goods and services in relation to construction work carried on as part of the NorthConnex Project.

Note: MinterEllison acted for the head contractor.

Adjudicators – what is required to determine the 'reasonable value' of work?

Iskra v MMIR Pty Limited [2019] NSWCA 126

Andrew Hales | David Bell | China Waters

Key point and significance

The issue in this case was whether an adjudicator failed to value the work having regard to the terms of the contract. An adjudicator's construction of the terms of a contract or assessment of the value claimed in a payment claim is solely within the adjudicator's jurisdiction. They are not matters which are open for judicial review, and so any such error in considering these matters will not constitute jurisdictional error and cannot form a basis upon which an adjudication can be quashed.

Facts

In 2016, MMIR Pty Limited (**principal**) engaged Mr Iskra (**builder**) to perform construction works at its restaurant and function centre in Wollongong. In September 2018, the builder issued a payment claim in accordance with the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**) to the principal for payment for works performed by himself and by subcontractors on a 'do and charge' basis and for a 6% project management fee. The principal served a payment schedule in response, in which it denied that any amount was owed on the basis that the amounts claimed did not relate to the building works and were grossly excessive. The builder applied for adjudication of the payment claim.

Adjudication

In its adjudication response, the principal asserted that the builder, in making the claim, had either fraudulently claimed, inflated the claim or was negligent in carrying out the works.

The adjudicator determined that the builder was entitled to payment as set out in the payment claim and in accordance with the contract. There was ample evidence that *'the works as claimed were undertaken'* and that the builder had provided sufficient information and methodology as to how he arrived at the amount claimed. The adjudicator made reference to the communications between the parties, the statutory declaration provided by the builder and supporting documentation, including an index cross-referencing the underlying subcontractor invoices for all works on the project. In contrast, the adjudicator stated that the principal had not provided any evidence, submissions or information to support its assertions and to justify the withholding of payment.

The principal appealed to the Supreme Court seeking a declaration that the determination was void on the basis that the adjudicator had failed to perform his statutory function and to consider whether the work the subject of the claim had been performed and, if so, to assess the value of the work considered to be performed. The principal argued that the adjudicator had:

- concluded that there was nothing to support the principal's contentions in its adjudication response and that, on this basis, the adjudicator had proceeded to automatically award the builder the full amount claimed; and
- failed to make any rational analysis of whether the amount claimed was justified.

Supreme Court agrees with the principal

Parker J quashed the adjudication determination and held that the adjudicator did not consider:

- the value of the work undertaken by the builder having regard to the terms of the contract and the reasonable value of the works undertaken; and
- the reasonableness of the charges made by the builder for work done himself or the 6% project management fee.

The primary judge held that the adjudicator committed jurisdictional error by failing to form a view as to what was properly payable by having regard to the true construction of the contract and the true merits of the claim, as required by section 22(2) of the SOP Act.

Here is a link to our *March 2019* report of this first instance decision.

The builder appealed to the Court of Appeal. The key issues on appeal were whether the primary judge erred:

- in finding that the adjudicator failed to consider the validity and merits of the claim;
- in finding that the adjudicator had failed to form a view as to what was properly payable in relation to the progress claim because the adjudicator had not had regard to the true construction of the contract and the true merits of the payment claim; and
- in concluding that the adjudicator had committed jurisdictional error.

Decision – adjudicator's decision was valid

The court allowed the appeal, set aside the primary judge's decision and held that the adjudicator's determination was valid, resulting in an order that the principal pay the amount claimed in the payment claim.

Jurisdictional error

The court held that even if the adjudicator's construction of the contract was erroneous, it would not constitute jurisdictional error. Recognition was given to the fact that most adjudicators are not lawyers, and it is not necessary for them to use legal language.

The court held that the adjudicator had engaged in a process of evaluation sufficient to satisfy section 22 of the SOP Act by having regard to the matters specified in the SOP Act in the context of assessing the value of the work carried out.

In coming to this conclusion, the court held that:

- the adjudicator had expressly stated in the determination that he considered all of the principal's materials and subsequently rejected all of the principal's contentions, including that the amount claimed was *'grossly excessive'*; and
- having rejected the principal's contentions disputing the amount claimed, the adjudicator did not simply allow the claim in full automatically. Rather, the adjudicator expressly directed his attention to the matters required by the SOP Act by referring in the determination to the materials that were considered, such as submissions, statutory declarations and correspondence between the parties.

The court reiterated that it was not part of the court's function to determine whether the adjudicator's assessment of the *'reasonable value'* of the works was erroneous.

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QUEENSLAND

No 'internal Appeals Tribunal' to hear from the Appeal Tribunal of QCAT

Alderton & Anor v Wide Bay Constructions Pty Ltd [2019] QCA 84

Michael Creedon | Simon Smith | Ray Zhai

Key point

A refusal to grant leave to appeal to the Appeal Tribunal of the Queensland Civil and Administrative Tribunal (**QCAT**) can only be reviewed by the Queensland Court of Appeal under limited circumstances. The refusal to grant leave itself cannot be reviewed by the Appeal Tribunal.

Facts

The essential facts of the case were previously reported in the *July 2018 issue of the Construction Law Update*.

In summary, the Aldertons (**owners**) entered into a contract with Wide Bay Constructions Pty Ltd trading as Dixon Homes Hervey Bay (**contractor**) to build a home on their property.

The owners complained to the Queensland Building and Construction Commission (**QBCC**) about defects in the contractor's works. The QBCC found that there was insufficient evidence to support some claims concerning the alleged defects.

The owners commenced proceedings in QCAT seeking a review of the QBCC decision. After their claim was dismissed, the owners sought leave to appeal. In the course of the appeal the owners made an interlocutory application to the Appeal Tribunal of QCAT to rely on fresh evidence, which was refused. The owners then made an application for *'leave from the internal Appeal Tribunal to appeal an interlocutory decision of the Appeal Tribunal'*, which was refused by the Appeal Tribunal.

The owners then appealed to the Court of Appeal challenging the refusal to grant leave to appeal the interlocutory decision.

Decision

The Queensland Court of Appeal dismissed the appeal on the basis that the owners had no right of appeal.

Under section 150(1) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), a person may appeal to the Court of Appeal against a decision of the Appeal Tribunal to refuse an application for leave to appeal to the Appeal Tribunal.

The court found that the application for *'leave from the internal Appeal Tribunal to appeal an interlocutory decision of the Appeal Tribunal'* was misconceived as there was no such avenue of appeal available for which leave could have been given, as there was no *'internal Appeals Tribunal'*.

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Courts will not lightly grant an injunction to prevent a principal from calling on a security

Built Qld Pty Limited v Pro-Invest Australian Hospitality Opportunity (ST) Pty Limited as Trustee for the Pro-Invest Australian Hospitality Opportunity (BRF Springhill) Trust [2019] QSC 108

David Pearce | Mark Wheelahan | Samantha Byrne

Significance

It will be a significant hurdle for a contractor to prove that the balance of convenience favours the granting of an injunction to prevent a principal from calling on a security. This is particularly so where a construction contract contains a clause providing that the contractor will not to seek an injunction to prevent the principal from calling on a security. The court will interpret this clause as an indication of where the risk falls in the contract and who is to be out of pocket pending resolution of a dispute.

Facts

The applicant, Built Qld Pty Limited (**contractor**), was the contractor and the respondent, Pro-Invest Australian Hospitality Opportunity (ST) Pty Limited (**principal**), was the principal in a design and construct contract for the development of a Holiday Inn Express hotel in Spring Hill. As part of the contractual requirements, the contractor arranged for Insurance Australia Limited (**IAL**) to issue a performance bond as the security sum in the contract.

The works under contract achieved practical completion in March 2017. Following this, the contractor commenced proceedings against the principal for money payable under the contract or for damages as a result of variation and delay claims. In response, the principal counterclaimed for, among other things, damages for the contractor's failure to complete its defect rectification obligation. In February 2018, the Superintendent under the contract issued a direction to the contractor to rectify the defects, which it failed to do. On 11 April 2019, the principal:

- delivered a copy of a notice under section 67J of the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**); and
- delivered a demand to IAL for immediate payment of the security sum.

The contractor sought an interlocutory injunction to prevent the principal from having recourse to the security. IAL had not yet responded to the call made by the principal.

In order for the court to grant the interlocutory injunction, the contractor was required to demonstrate:

- that there was a serious question to be tried; and
- that the balance of convenience favoured the granting of an injunction.

Serious question to be tried

The contractor identified the serious question as being whether the principal was entitled to make the call on the security having regard to two matters:

- whether the principal complied with the notice requirements under section 67J of the QBCC Act; and
- whether the pre-conditions under the contract had arisen allowing the principal to validly call on the security.

The contractor argued that the principal had not complied with the notice requirements under section 67J of the QBCC Act. Section 67J requires that, before a security can be used, the party must first give notice in writing advising of the proposed use of the security, and the notice must be given within 28 days after the right to the security is accrued. The contractor contended that it did not receive notice from the principal until after the call had been made on the security.

The contractor also argued that the principal was not entitled to call on the security because there was no payment that was payable to the principal. Under the contract, clause 37.6 required that an amount be 'payable' before the principal could have recourse to the security. It was argued that an amount was only 'payable' when the Superintendent had first certified the moneys as due and payable.

Balance of convenience

In relation to the issue of balance of convenience, the contractor argued it would suffer significant reputational and other damage for which damages would not be an adequate remedy if the call made by the principal was not restrained.

Decision

The court held that there was no serious question to be tried in relation to section 67J of the QBCC Act. However, there was a serious question in relation to whether the pre-conditions under the contract had arisen. Even so, the court held that the balance of convenience did not favour the granting of an injunction to prevent the principal from calling on the security.

Compliance with section 67J of the QBCC Act

The court held that the evidence supplied by the principal supported the conclusion that the principal had complied with its notice requirements under section 67J of the QBCC Act. This evidence was that a copy of the section 67J notice was delivered to the contractor's office at 9.48am on 11 April. The call on the security was then made at about 10am on 11 April. Therefore, the court did not accept the contractor's contention that it did not receive notice until after the call on the security had been made.

Compliance with contractual requirements

The court considered that references to *'any amount which is payable by the contractor to the Principal'* under the contract appeared to be understood by the reference to *'the Principal's right to payment'*. The reference to a *'right to payment'* allows for an argument that the *'amount which is payable'* is something which is more than a mere assertion of money owing. On this issue, the court held there was a serious question about the proper construction of the relevant agreement.

Balance of convenience issue

The court considered clause 5.6 of the contract created a substantial hurdle for the contractor to overcome when dealing with the balance of convenience. That particular clause provided that the contractor had no entitlement to obtain an injunction preventing the principal from calling on the security. The court considered the existence of the clause provided a very strong argument that the contractor had given up any right to injunctive relief on that ground. The court should not too readily favour an interpretation of the contract which is inconsistent with an agreed allocation of risk as to who was to be out of pocket pending resolution of a dispute about breach. The court also considered that the reputational damage argument was not sufficient.

The court held the balance of convenience did not favour the making of the interlocutory injunction sought by the contractor, particularly due to the fact the contractor had agreed to the allocation of risk under the contract.

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Solar farms do not need to be installed by licensed electricians

Maryrorough Solar Pty Ltd v The State of Queensland [2019] QSC 135

Julie Whitehead | Luke Trimarchi | Ray Zhai

Key point

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

Significance

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

Facts

Section 73A(1) of the *Electrical Safety Regulation 2013* (Qld) (**Regulation**) required licensed electrical workers to perform work on solar panels at solar farms with rated capacity higher than 100kW. Any locating, mounting fixing or removing solar panels at solar farms was 'working' on a solar panel for the purpose of

section 73A. Section 73A(2) further required businesses to ensure that a person did not perform work in breach of section 73A(1). Section 73A was introduced by the *Electrical Safety (Solar Farms) Amendment Regulation 2019* (Qld) made under the *Electrical Safety Act 2002* (Qld) (**Act**) and commenced on 13 May 2019.

Maryrorough Solar Pty Ltd (**installer**) owned project rights to develop, build, connect and operate a solar project in the Darling Downs region of Queensland. The project involved locating, mounting, fixing and installing 104,690 solar panels. Prior to the commencement of section 73A, the installer had contracted for the work to be carried out by a workforce without electrical licences. If the installer had to use licensed electrical workers to perform the works, it would cost the installer an additional $2.6m to comply with section 73A.

The installer applied to the Queensland Supreme Court for a declaration that section 73A of the Regulation was invalid.

Decision

The court allowed the application and held that section 73A was invalid on the basis that it was not authorised by the Act.

The court considered the provisions in the Act which imposed duties on certain persons who may affect the electrical safety of others by their acts and found that none of those duties was expressed as a prohibition. The court held that section 73A(1), being a prohibition, was inconsistent with the way that those duties were expressed and rejected the argument that section 73A(1) could achieve the general purpose of the Act.

The court further found that section 73A did not prescribe a way of ensuring electrical safety. The court held that section 73A was a prohibition accompanied by a duty to ensure others did not breach the prohibition; therefore it did not establish a benchmark as authorised by section 5(b)(i) of the Act.

The court also considered section 14 of the Act and stated that solar panels were not electrical equipment due to their extra low voltage. Consequently, performing work on solar panels could not be electrical work as the work was not performed on electrical equipment. The court found that section 73A sought to require persons to comply with the Act when they were not doing the work regulated by the Act. The court therefore held that section 73A was inconsistent with the licensing and regulation-making provisions of the Act.

Further Note

The Queensland Government announced that it would appeal the decision made by the Supreme Court to invalidate section 73A of the Regulation and apply for a stay of the decision while the appeal is being heard.

The State of Queensland filed its Notice of Appeal on 30 May 2019 and Record of Proceedings on 3 June 2019.

We will monitor the appeal and provide further updates.

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VICTORIA

When is a building owner 'in the business' of building domestic buildings?

BWAY v Pasiopoulos [2019] VCC 691

Peter Wood | Tom Johnstone | Finn Douglas

Key point

The *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**) applies to progress claims regarding domestic buildings only if the building owner is in the business of building residences and the contract is entered into in the course of that business.

The case highlights that this test is made at the time that the contract is entered into and reiterates the matters that will be taken into account when carrying out the assessment.

Facts

In 2017, Mr Pasiopoulos (**owner**) entered into a construction contract with BWAY (**builder**) in respect of a property in Ringwood East. The contract was in relation to the building of domestic buildings (for the purpose of the *Domestic Building Contract Act 1995* (Vic)), being three townhouses on the property.

During the course of the works, the owner did not provide a payment schedule in response to a payment claim for $183,400 made by the builder and did not pay the claimed amount.

The builder sought judgment against the owner as a debt due under the Act.

In response, the owner claimed that the Act did not apply (and consequently the debt due could not be claimed under the Act) because the owner was not in the business of building domestic buildings, or, if he was, the contract was not entered into in the course of, or in connection with, that business.

Decision

The building owner was not 'in the business' of building residences

The court noted the decision of *Director of Housing v Structx Pty Ltd T/as Bizibuilders and Anor* [2011] VSC 410, where it was said that the expression 'in the business of building residences' connotes the construction of dwelling houses as a commercial enterprise on the basis of a going concern, that is, an enterprise engaged in for the purpose of profit on a continuous and repetitive basis.

The court held that whether domestic buildings are constructed under such an enterprise is to be determined by looking to the objective 'salient features' of the specific case, such as (i) the professional capacity of the owner; (ii) whether the purpose of the project is profit; (iii) whether the building of residences is on a continuous or repetitive basis; (iv) whether there is a commercial vehicle structured as its purpose to enable the building of domestic residences; and (v) the use of the domestic residences when completed.

Applying the 'salient features' analysis to the circumstances in this case, the court found that the owner was not in the business of building residences because:

(i) the owner took out a personal (not a business) loan to fund construction of the residences;

(ii) the owner's objective was to give a townhouse to each of his children as a gift;

(iii) at the time the contract was made, the owner had never entered into any other contract to construct a residence;

(iv) the property was held in the owner's personal capacity and not on behalf of any trust or vehicle with an ABN in respect of a property business; and

(v) nothing in the contract demonstrated that the owner had any plans to sell the residences.

The court held that the test is determined when the contract is entered into. The court therefore disregarded various statements made during the course of the works regarding the sale of the buildings for profit.

The contract was not entered in the course of, or in connection with, any such business

The court held that, even if it was wrong and the owner was 'in the business of building residences', it was not satisfied that the contract was entered into as part of any such business.

The court held that in order for the Act to apply, an owner must be in the business of building residences at the time the contract is entered, and the contract must be entered pursuant to that business (that is, for the purpose of furthering the business of the owner). In this case, the owner had entered the contract in 2017, and any subsequent property purchases made to carry on a business of building residences were irrelevant.

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WESTERN AUSTRALIA

The importance of pre-contractual negotiations as projects unfold

AGC Industries Pty Ltd v Karara Mining Ltd [2019] WASC 140

Tom French | Candice Lamb | Penny Bond

Key point

The Supreme Court of Western Australia has confirmed it will require compelling evidence of the words spoken to establish misleading or deceptive conduct in respect of verbal pre-contractual negotiations and in this case also required clear evidence that alternative contractual terms would have been the outcome of further negotiations.

Significance

Parties should make a concerted effort to record the contents of discussions, meetings and negotiations occurring prior to contract execution, whether that be in hardcopy or electronic form.

Facts

The Karara Iron Ore Project (**project**) comprises a large open pit mine, processing plant and associated infrastructure at the Karara Iron Ore Mine in Western Australia. Karara Mining Limited (**owner**) and AGC Industries Pty Ltd (**contractor**) entered into two contracts in respect of the project, an early works contract and then a main works contract (**contract**).

The case concerned alleged representations by the owner during negotiations of the contract.

Pursuant to the contract, the contractor was required to perform structural, mechanical and piping works at the project (**Overall Works**). The contract included incentives for the timely completion of specific dirty concentrate works (**DC Works**) which would enable the project to produce partially processed magnetic ore and generate revenue before full completion. Under the incentive regime, the contractor was entitled to higher rates of corporate overhead and profit if it completed the DC Works prior to certain milestone dates.

Misleading or deceptive conduct claims by the contractor

The contractor did not complete the DC Works by any of the milestone dates. The contractor alleged that the owner had made pre-contractual representations concerning the incentive regime and its capacity to complete the DC Works, which amounted to misleading or deceptive conduct.

The contractor pleaded that it would not have entered into the contract on the terms it did were it not for the owner's alleged representations.

Decision

Representations regarding the incentive regime

The first allegation of misleading and deceptive conduct concerned the contractor's corporate overhead and profit rate.

According to the contractor, the owner offered the contractor *'a base profit rate … of 11% of the costs of the works, with a structure for an incremental increase of 4% on the total cost of the works in particular*

conditions were met' [86]. Therefore, the contractor claimed the owner had represented a 15% profit rate would apply to the whole of the Overall Works, not just certain interim periods or for certain works.

His Honour Justice Allanson noted that proving misleading or deceptive conduct requires proof of the statements sufficient to enable the court to be reasonably satisfied that the words spoken were in fact misleading [83].

In this case, the contractor's representative's meeting notes did not capture the alleged statements in any detail. Considering all the evidence, his Honour concluded he was not satisfied that the contractor had proved what was said with sufficient certainty and rejected the contractor's claim.

Representations regarding works

In a pre-contractual meeting, the contractor and the owner negotiated the milestone dates for the DC Works.

The contractor alleged that the owner had made a number of statements in support of the contractor being able to meet the milestones, including that:

(1) additional accommodation would be available for personnel on site;

(2) float had been built into the construction program; and

(3) the owner's staff would be incentivised to ensure project timeframes were achieved.

As to the first allegation, the meeting notes of the contractor's representative did not record the proposed milestone dates, and the representative could not recall the specific detail of his discussion with the owner's representative including, significantly, whether all the milestone dates had been proposed. His Honour was therefore unable to determine what had actually been said during the meeting in respect of the proposed milestone dates.

His Honour accepted that, at best, a number of representations had likely been made, specifically in relation to the contract scope of works, incentives for the owner's staff, onsite accommodation and the construction program, but that these were not false or misleading.

Assessment of loss of opportunity

Further, even if the contractor had been successful in establishing misleading or deceptive conduct, its claim for compensation for loss of opportunity to be awarded a different contract would have been unsuccessful.

Justice Allanson noted that the contractor would have been required to prove there was a *'substantial, and not merely speculative, prospect'* that a different contract would have been awarded had it not been for the alleged representations. His Honour rejected the contractor's claim on the basis that none of its proposed alternative contracts were a remotely achievable outcome of further negotiations.

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Parent Company Guarantees and Performance Bonds: Are the lines blurred?

JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd [2019] WASC 177

Andrew Hales | Tom French | Alex Lowe | Adriaan van der Merwe |

Key point

In Australian law there exists no presumption in relation to the construction of parent company guarantees (**PCG**) and attention should be paid to the particular text, context and purpose of the instrument (as is the established principle in *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* (2014) 251 CLR 640 (***Verve Energy***)). Unless clearly intended and expressly provided for, a PCG is unlikely to be construed to operate as a performance bond.

Significance

A finding in favour of the plaintiff (**head contractor**) in this case would have had significant ramifications for companies providing PCGs for construction projects throughout Australia, as it would have meant they may be subject to immediate recourse much like a performance bond.

Background

This case concerns an application by the head contractor for a declaration on the proper construction of three separate PCGs which were provided to guarantee due performance of a subcontractor's obligations under a subcontract. Broadly, the subcontract allowed the head contractor to claim additional costs from the subcontractor in the event of termination.

The dispute centred around the wording in the following clauses of the PCG:

> *'2. **Guarantee***
>
> *Subject to Clause 9, the Guarantor unconditionally and irrevocably guarantees to Contractor the due and punctual performance of the obligations of the Subcontractor under the Subcontract including:*
>
> *(a) the discharge of the obligations and liabilities of the Subcontractor under the Subcontract; and*
>
> *(b) the payment of any amounts due and unpaid under the Subcontract.*
>
> *3. **Guarantor to perform***
>
> *If, in Contractor's reasonable opinion, the Subcontractor fails to perform any of the Subcontractor's obligations or discharge any of the Subcontractor's liabilities under the Subcontract, the Guarantor must upon receipt of written notice from Contractor requiring it to do so, perform or cause to be performed those obligations or discharge those liabilities (as the case may be) and thereafter continue to perform those obligations and discharge those liabilities (as the case may be) until the termination of the Subcontractor by the effluxion of time or otherwise.*
>
> *The Contractor is not required to enforce its rights against the Subcontractor prior to having recourse to its rights under this deed.*
>
> *9. **Limitation of Liability***
>
> *9.2 Notwithstanding anything to the contrary above, in the event of any claim under this Guarantee, the Guarantor shall be entitled to assert any defence, set-off or counterclaim that the Subcontractor could assert had such claim been made directly against any person under the Subcontract.'*

The head contractor contended that:

- clause 3 of the PCG creates, on its proper construction, a 'pay now' and 'argue later' provision, in addition to the more traditional guarantee of the subcontractor's performance in clause 2; and
- the liability of the defendants (**guarantors**) to respond to the claims under clause 3 of the PCG was not subject to the same rights of defence, set-off or counter claim as claims under clause 2.

The head contractor submitted that as clause 3 created a performance bond and was not expressed to be subject to clause 9, sums claimed from the guarantor by the plaintiff as owing under the subcontract were immediately payable on demand.

The guarantors argued that clause 3 merely sets out the mechanics of the guarantors' performance obligations under clause 2 of the PCG and that clause 9.2 applies to the document as a whole.

Decision

The application was dismissed. The court found that the purpose of the PCG was to provide security for the performance of the subcontractor's obligations and that clause 9.2 applied to the PCG in its entirety. Clause 3 was interpreted to be a mechanical provision which did not create a performance bond or 'risk allocation device'.

In arriving at its decision the court referred to *Verve Energy* which articulates the principles to be applied to the construction of commercial contracts, such as determining what a reasonable business person would have understood the terms to mean, and construing terms in a manner so as to not make commercial nonsense or working commercial inconvenience.

The court held that, where a commercial transaction is implemented by several documents, these documents have to be read together to ascertain their proper construction and legal effect. The court also distinguished between two broad purposes for which guarantees may be required, being:

- to provide performance security; and
- to act as a 'risk allocation device' to put a party in funds pending resolution of a claim or dispute.

The provision of performance security is generally the nature of a PCG; an on demand performance bond or bank guarantee being more appropriate as a 'risk allocation device'.

Each case will depend on the particular language and text of the instrument in question, having regard to its context and purpose. There is no presumption in Australian law in relation to the construction of instruments such as PCGs. This being said, the construction to be placed on an instrument will be affected by all aspects of the relevant commercial context, including the nature and identity of the guarantor and the nature of the obligations the subject of the guarantee. For example, the issue of a guarantee by a financial institution with no interest in the underlying contract may be indicative of a 'risk allocation' purpose, compared with a parent company's interest in ensuring proper performance by its subsidiary. The extent and duration of a guarantee may also be indicative of its nature.

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In the Hong Kong courts

Think twice before submitting an incomplete notice of claim

Maeda Kensetsu Kogyo Kabushiki Kaishaalso known as Maeda Corporation and another v Bauer Hong Kong Ltd [2019] HKCFI 916

Richard Crawford | Michelle Knight | Emily Miers

Significance

Parties should take care in ensuring that notices of claim comply with all requirements of the relevant contractual provisions – not just the time frames. A subcontractor was barred from pursuing a claim as it failed to incorporate all legal basis for the claim in the notice.

Facts

- MTR Corporation entered into a contract with Maeda Corporation (**head contractor**) for the construction of tunnels for the Hong Kong to Guangzhou Express Rail Link project.
- The head contractor was required to undertake diaphragm wall works and subcontracted this obligation to Bauer Hong Kong Ltd (**subcontractor**) under a subcontract agreement (**subcontract**).
- The subcontractor initiated dispute proceedings in accordance with the subcontract, claiming that it had encountered different ground conditions to those stated within geotechnical materials annexed to the subcontract.
- The subcontractor was required to give notice of an intention to claim for additional payment or loss and expense within 14 days after the event, occurrence or matter giving rise to the claim (clause 21.1 of the subcontract).
- Additionally, the subcontractor was required to submit a formal notice of claim in writing to the head contractor within 28 days of the notice of intention. Clause 21.2 of the subcontract stated:

  'if the Sub-Contractor wishes to maintain its right to pursue a claim for additional payment or loss and expense under Clause 21.1, the Sub-Contractor shall as a condition precedent to any entitlement, within twenty eight (28) Days after giving of notice under Clause 21.1, submit in writing to the Contractor… the contractual basis together with full and detailed particulars and the evaluation of the claim' (emphasis added).

- Unless clauses 21.1 and 21.2 had been strictly complied with, the subcontractor was not entitled to any claims for additional or extra payment, loss and expense, extension of time or damages. In that regard, clause 21.3 of the subcontract stated:

  'the Sub-Contractor shall have no right to any additional or extra payment, loss and expense, any claim for an extension of time or any claim for damages under any Clause of the Sub-Contract or at common law unless Clauses 21.1 and 21.2 have been strictly complied with' (emphasis added).

Decision

The Hong Kong Court of First Instance stated that the arbitrator wrongly held that the subcontractor had adhered to the notice requirements within clause 21.2. The arbitrator stated that *'the contractual basis of the claim stated in the clause 21.2 notice does not have to be the contractual basis on which the party in the end succeeds in an arbitration'*. Justice Chan corrected the arbitrator's belief that an expectation on the subcontractor to finalise its legal argument prior to issuing a notice of claim under clause 21.2 was too

onerous. The subcontractor's failure to incorporate the contractual basis ultimately pursued in arbitration in the notice of claim under clause 21.2 precluded it from making a subsequent claim on a new legal basis.

The plain and clear language used in clause 21 meant there could be no dispute that the service of notice of claims in writing referred to in clauses 21.1 and 21.2 were conditions precedent and must be strictly complied with. The result of the subcontractor's failure to comply with the clauses meant it had no entitlement or right to any additional or extra payment, loss and expense.

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