Construction Law Update

June 2020

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Legislative update (NSW)

A Double Act – new rules for NSW design and building practitioners and residential apartment developers

The *Design and Building Practitioners Act 2020* (NSW)

Andrew Hales | Carrie Metcalfe | Lauren Topper

The *Design and Building Practitioners Act 2020* (**D&BP Act**) received assent on 11 June 2020 and will have a significant impact on any person involved in property development and construction in NSW. The new regime applies at first to residential buildings but may be expanded to cover other buildings by the forthcoming Regulations. The D&BP Act introduces:

- a new duty of care for the benefit of owners of land; and
- a new system for regulating design and building work, including registration of designers, engineers, builders and other specialist practitioners.

Duty of Care

Who owes the duty and who benefits from it?

The new duty of care regime came into force on 11 June 2020. A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects:

- in or related to a building for which the work is done; and
- arising from the construction work.

The duty of care is owed to each owner of the land in relation to which the construction work is carried out, including all subsequent owners. The duty is owed by any person who carries out construction work. It is non-delegable and parties cannot contract out of it.

The classes of buildings to be covered by the duty of care will be prescribed in the Regulations but will as a minimum include residential buildings. Residential building work as defined in the *Home Building Act 1989* (NSW) is now subject to the duty of care.

Retrospective application

The duty of care applies retrospectively and applies to buildings less than 10 years old. The new duty is an additional cause of action and is available to claimants even where breach of a common law duty of care has already been pleaded.

The new duty is in addition to the rights and obligations under the *Home Building Act 1989* (NSW), other legislation and the common law. The duty does not limit any of those rights or obligations.

System for regulating design and building work

The D&BP Act provides a comprehensive system for:

- the declaration of regulated designs by registered designers;
- the declaration of building work by registered builders (prior to application for an occupation certificate);
- insurance requirements for designers, engineers and builders (to be further detailed in the forthcoming Regulations);
- registration of designers, engineers, builders and other specialist practitioners (including those performing maintenance); and
- investigation and enforcement including issuing stop work orders.

The system drives compliance with the Building Code of Australia, among other things.

Next Steps

With the exception of the duty of care regime (currently in force), the majority of the provisions of the D&BP Act come into force on 1 July 2021; however, the industry should start planning now so that full compliance

is achievable on 1 July 2021. The D&BP Act will apply to existing contracts if application for a complying development certificate or a construction certificate is made on or after the date prescribed in the Regulations.

Indications are that the Regulations setting out further detail and operational aspects of the D&BP Act will be introduced later this year.

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The *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW)

Andrew Hales | Carrie Metcalfe | Lauren Topper

The *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (**RAB Act**) received assent on 10 June 2020 and commences on 1 September 2020. The RAB Act applies only to residential apartment buildings and is intended to prevent developers from carrying out building work that may result in serious defects or result in significant harm or loss to the public or current or future occupiers. The RAB Act introduces:

- a requirement for developers to give advance notice before applying for an occupation certificate;
- the power for the Department to:
  - prevent issue of an occupation certificate or registration of a strata plan (eg if there is a 'serious defect', or the building bond required under the *Strata Schemes Management Act 2015* has not been lodged);
  - investigate building work (eg to investigate serious defects and compliance with the Building Code of Australia and Australian Standards);
  - issue stop work orders and building rectification work orders to developers; and
  - require developers to pay for the Department's compliance costs in respect of building rectification work orders.

A 'Developer' is defined broadly under the Act and includes a head contractor. The Act applies retrospectively with a 10 year limit.

Next Steps

The transitional provisions of the RAB Act provide that if a developer intends to apply for an occupation certificate during the 'transitional period' (1 September 2020 to 28 February 2021), then the developer must notify the Department within the first 2 weeks of the RAB Act's commencement (1-September to 14 September 2020).

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In the Australian courts

COMMONWEALTH

Contribution claims in a class action for defective building work and flammable cladding

The Owners - Strata Plan No 87231 v 3A Composites GmbH (No 3) **[2020] FCA 748**

Andrew Hales | Karen Hanigan | Caitlin Ford

Key point and significance

This decision illustrates the procedural difficulties that can occur in class action claims for defective building works, in this instance a claim concerning combustible cladding. Where a large and unidentified group of potential claimants are seeking damages for defective building work, a court has the power to invite or request potential claimants to register their interests and provide information concerning their claims. This would assist defendant product manufacturers and suppliers in identifying potential cross-defendants before longstop limitation periods for making claims for contribution expire. However, a court will not make an order which effectively bars potential claimants who do not register their claims or interests by a particular date, because they would miss out on being able to receive a share of a future settlement or judgment.

Background

The applicant in this proceeding, The Owners – Strata Plan No 87231 (**Owners**), claims that the manufacturer of Alucobond aluminium cladding panels, 3A Composites GmbH (**3A**), and the Australian importer, Halifax Vogel Group Pty Limited (**Halifax**), are liable to pay it, and the group members on whose behalf the proceeding has been commenced, statutory compensation and damages under the Commonwealth consumer protection legislation (the *Trade Practices Act 1974* (Cth), the *Competition and Consumer Act 2010* (Cth), and the Australian Consumer Law).

The basis of the claim is that the aluminium panels affixed to the common property on the Owners' apartment buildings were not fit for purpose due to fire risk and may be banned by regulatory agencies. The loss or damage claimed is the cost of removing and replacing the aluminium panels, or otherwise rectifying the issues caused by them, or the reduction in the value of the building.

The interlocutory issue

A separate interlocutory issue was the focus of these proceedings. 3A contended that it is likely to have potential contribution claims against various third parties in respect of the case brought against it by the Owners and the group members, who may at some point in time owned one of the affected apartments. The potential contribution claims include claims against developers, builders, façade subcontractors, architects, private certifiers, fire or fire safety engineers or consultants, and other building consultants who were engaged in relation to the planning, development, construction, and certification of buildings to which the aluminium panels were affixed.

The difficulty in investigating the potential contribution claims is that 3A needs information from the group members concerning the third parties against whom it has potential contribution claims. The issue is made even more complex by the fact that 3A does not know who all of the group members are.

To remedy this situation, 3A applied for the approval of a notice to group members which would request them to register their claims and provide the information which 3A needs to explore the potential contribution claims. However, 3A claimed that a registration regime alone was not sufficient. 3A was concerned that limitation provisions in various state and territory statutes may apply to its potential contribution claims and therefore there was a real risk that some of its contribution claims may become statute barred if it did not take immediate action.

To avoid this, 3A sought a further order which had the effect of 'closing the class' (**class closure order**). This would mean group members who had not registered their claims and provided the requested information within a specified period would not be able to receive any distribution from any later settlement or judgment. Those non-registering group members would nevertheless be bound by the terms of the settlement or judgment. The Owners strongly opposed the making of any such order.

Decision

Potential contribution claims

The court considered the differing statutory provisions in each of the states and territories and found that there was a legal basis for 3A to make claims for contribution against relevant third party professionals in Victoria, South Australia, Tasmania and the Australian Capital Territory, and arguably New South Wales.

Limitation issues

The court analysed the limitation provisions for defective building work across the states and territories, which are not all the same The court concluded that there is at least a risk that some of the provisions may apply and the time periods meant that at least some of those claims may become statute barred before 3A is able to bring them. However, the court concluded that, for the purposes of this application, it was neither necessary nor desirable to finally determine the limitation issues.

The order requiring the Owners to provide information

The court held that it would be appropriate to make an order requiring the Owners to provide the requested information and documentation to 3A relating to the design, construction and certification of its building; however, it was up to the parties to confer and agree on the scope of the information and documents to be provided.

The order requiring registration

3A also sought an order inviting group members to register their claims or interests in the proceedings and provide information. 3A contended that the court was empowered to make this order under section 33ZF of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), which gives the court a general power to *'make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding'*. The court agreed that it can and should make an order. The early identification of group members would assist the proceeding to be brought fairly and efficiently to a just outcome. It would also enable 3A to investigate potential contribution claims and thereby reduce the risk of any prejudice that 3A may suffer if limitation periods barred them from making those claims.

The class closure order

The most contentious issue was the class closure order. 3A contended that the court had ample power to make this order and 'close the class' under the FCA Act. The court disagreed and would not make such an order at a very early stage in proceedings, as it would have the effect of barring group members who do not register by a particular date from making any claim against the respondents and disentitle them from receiving any distribution from any future settlement. This was disproportionate to the risk that 3A may be deprived of some potential claims for contribution if it is not able to investigate and prosecute any such claims in the relatively near future.

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NEW SOUTH WALES

A weighted coin: SOP favours cashflow to builders even if the developer may go bust

TFM Epping Land Pty Ltd v Decon Australia Pty Ltd [2020] NSWCA 118

Andrew Hales | Claire Laverick | Devpaal Singh

Key points and significance

When seeking a stay of execution of a judgment debt under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) the onus is on the party seeking relief to demonstrate a real risk of irreparable prejudice flowing from refusal of the stay, given this relief would detract from the purpose of the Act of enabling a builder to be paid.

Section 32 of the Act, which preserves rights under a construction contract and in civil proceedings, speaks to the legal rights of the parties only and not the practical effect on them. The operation of section 32 does

not depend upon whether a developer is in a liquidity crisis or alternatively has deep reserves of liquid assets as that would cause uncertainty in the application of the section.

Facts

TFM Epping Land Pty Limited and Katoomba Residents Investment Pty Limited (together, **developers**) are judgment debtors of Decon Australia Pty Ltd (**builder**). The judgment debt is founded on the failure of the developers to serve a payment schedule in response to a payment claim made under the Act.

Procedural history

Following the issue of a payment claim for an amount of $6,355,352 (**claimed amount**), the builder commenced two proceedings against the developers. The first proceeding was commenced on 27 May 2019 for the claimed amount (**Construction List Proceeding**). The second proceeding was commenced on 3 July 2019 for the claimed amount following the developers' failure to serve a payment schedule in response to the payment claim (**SOP Proceeding**).

The primary judge in the SOP Proceeding found that the builder was entitled to the claimed amount. This was upheld in the Court of Appeal and recently considered in our *May 2020 Construction Law Update*.

Following the developers' failed appeal in the SOP Proceeding, the developers filed a cross-claim in the Construction List Proceeding alleging that the builder was not entitled to its retention or variation claims and was additionally liable for defects in an estimated amount of $4,787,810 and general damages in an unquantified amount.

The developers sought a stay of execution of the SOP Proceeding judgment, which was refused. In these proceedings, the developers appealed the refusal on the basis that they would become insolvent if obliged to pay the claimed amount, and that their defences to the claims giving rise to the judgment debt and their cross-claim would be prejudiced as a result. The failure to grant a stay in such circumstances was, they argued, contrary to the statutory purpose of section 32 of the Act of not permitting interim rights to become final rights. The developers also asserted this was an instance of, or analogous to, a *'Grosvenor stay'* (by reference to *Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico* [2004] NSWSC 344).

Decision

The Court of Appeal refused leave to appeal.

In reaching this decision, the court considered the applicability of a 'Grosvenor stay' and affirmed the comments of McDougall J in *Veolia Water Solutions & Technologies (Australia) Pty Ltd v Kruger Engineering Australia Pty Ltd (No 3*) [2007] NSWSC 459, that the granting of a stay requires a balancing exercise between the policy of the Act that successful applicants be paid promptly, and the likelihood of a real risk of irreparable prejudice flowing from refusal of the stay because a cross-claim would be rendered worthless. Ultimately, the court rejected the applicability of Grosvenor. It held that the *Grosvenor stay* was designed for circumstances where a cross-defendant, which had received a payment under the Act, would be unable to meet the judgment following determination of the cross-claim, and not for circumstances where a judgment debtor cannot pay a judgment ordered pursuant to rights created by the Act.

In response to the developers' argument regarding section 32 of the Act, the court found that section 32 only speaks to the legal rights of the parties and not the practical effect on them. The appointment of a liquidator would not prejudice the developers' legal rights to prosecute the cross-claim. Further, accepting the developers' argument would mean that the qualifications in section 32 would have a varied operation depending upon the financial circumstances of the parties (which might not be known to each other).

The court commented that the purpose of the Act is to promote speedy determinations and ensure that progress claims are dealt with and paid promptly. This regime necessitates that rights created under it are enforceable as if they were final determinations of a court. The statutory consequence is that in some cases the statutory entitlement will lead to a judgment debt, which is no less enforceable than any other judgment.

Whilst the court may intervene where there is the likelihood of irreparable prejudice (including where the practical effect is to make an interim right permanent), given that relief detracts from the purpose of the Act and would prevent the ordinary operation of the processes authorised by the Act, the onus is on the party seeking relief. In this case, the developers did not meet this threshold and could not establish that a failure to obtain a stay would have the practical effect of stultifying the litigation of the cross-claim.

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You cannot 'granny' around – damages for late completion will be awarded despite alleged contractual uncertainty

DB Homes Pty Ltd v D'Souza [2020] NSWCATAP 104

Andrew Hales | Nicholas Grewal | Ashleigh Blumor

Key point and significance

This decision emphasises the importance of understanding contractual obligations to complete building works by an ascertained time and any liability for breach of those obligations. Even if a contract does not refer to the availability of damages (or have any liquidated damages mechanism), this will not necessarily operate to prevent the owners from obtaining damages for late completion.

Facts

This case was an appeal from a decision in the NSW Civil and Administrative Tribunal (**Tribunal**) which awarded the D'Souza's (**owners**) damages of $9,800 for the late completion of a granny flat by DB Homes Pty Ltd (**builder**).

The parties entered into a non-standard contract on 30 October 2017 for the construction of the granny flat. This contract set out a schedule of payments to be made for completion of seven stages of work. The special conditions to the contract allowed extensions of time for rain and inclement weather and importantly stated:

> *'Construction period – Estimate 84 business days from Concrete Slab State. (A four week period of Christmas and New Year is excluded from the above Construction Time frame).'*

The Tribunal at first instance decided that the builder was 35 weeks late in completing the granny flat and the appropriate weekly rate of damages was $280.

On appeal, the builder claimed that the Tribunal:

- failed to determine the correct contractual start and finish dates of the project;
- failed to determine the actual construction duration; and
- was not fair and equitable in making its decision.

Decision

The Appeal Panel upheld the Tribunal's decision awarding $9,800 to the owners and dismissed the appeal.

The Panel held that the Tribunal was fair and equitable in making its decision, and that whilst the contract did not refer to the availability of damages (or have any liquidated damages mechanism), that did not operate to prevent the owners claiming or obtaining a damages order, nor did the that fact that the builder did not include in its contract price a risk allocation amount for such an eventuality.

The Panel also held that the Tribunal Member did not fail to determine the correct contractual start and finish dates of the project, or the actual construction duration.

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Swimming in major defects

Jamie Beyer t/as Leisure Pools & Spas Newcastle v Palazzi [2020] NSWCATAP 109

Andrew Hales | Lachlan Williams | Brianna Smith

Key points

Procedural fairness: where a denial of procedural fairness is alleged in an appeal, and the circumstances giving rise to that denial of procedural fairness are not apparent from the decision of the tribunal or the record of the hearing, it is generally appropriate to lead evidence on the appeal to establish those circumstances.

Major defects: the definition of a 'major defect' in section 18E(4) of the *Home Building Act 1989* (NSW) (**HBA**) includes *'a defect in a major element of a building…that causes or is likely to cause destruction of the building or any part of the building'*. To be categorised as a major defect in this context, a person must establish that there is a real possibility of destruction and not merely incidental damage or superficial deterioration of a building. These elements must be established by probative evidence of what the impact has actually been, or what it probably will be.

Significance

In considering whether the defects complained of were major defects, the Tribunal analysed the effect of the oft-cited appellate decision in *Ashton v Stevenson* [2019] NSWSC 1689 on a passage in the first instance decision concerning the evidence required to establish that there is a real possibility of destruction.

Facts

This was an appeal from the decision of the NSW Civil and Administrative Tribunal (**Tribunal**). The builder, Jamie Beyer t/as Leisure Pools and Spas Newcastle (**builder**), installed a swimming pool at Mr and Mrs Palazzi's residence (**owners**) between November 2012 and March 2013. Sometime later, the area surrounding the pool experienced subsidence, resulting in a vertical crack in the corner of the pool above the waterline.

The owners commenced proceedings in the Tribunal on 9 September 2018 alleging that the work carried out by the builder was defective and in breach of the statutory warranties set out in section 18B of the HBA.

Original Decision

Expert evidence

The major issue between the parties was the cause of the movement of the pool:

- the owners alleged that the movement was caused by defective building work by the builder. The owners obtained an expert report from Mr Phillips dated 19 June 2018, an expert report from Dr Savage dated February 2019 (**Original Report**) and a supplementary report from Dr Savage dated 27 June 2019 in support of their position; and
- the builder alleged that the movement was caused by inadequate construction and engineering detail of a retaining wall. The builder obtained a single expert report from Mr Skelton in support of his position.

On the day of the hearing, the builder, under some confusion as to whether he had been served the Original Report, claimed that:

- he had not been given the opportunity to reply to the Original Report; and
- was not aware that the matter had been set down for the final hearing and, as a result, had not arranged for his expert, Mr Skelton, to give evidence.

The Tribunal declined requests for the matter to be adjourned to allow the builder to obtain further expert evidence. In these circumstances, the Senior Member accepted Dr Savage's evidence and determined that the damage to the swimming pool was caused by defective work by the builder.

Major Defect

The HBA provides that a person has six years to commence proceedings in relation to a 'major defect' and two years to commence proceedings for all other defects. If proceedings are not commenced within the relevant time period, the Tribunal does not have jurisdiction to make a determination.

As the owners commenced proceedings more than 5 years after the works were completed, the Tribunal would only have jurisdiction to determine the matter if the owners could establish that the relevant defect was a 'major defect' pursuant to the HBA.

The Senior Member determined that the work performed by the builder had caused a defect in two major elements of the pool:

- the cracking of the shell of the pool above the waterline, because it was load bearing and was essential to the stability of the core; and
- the inadequate slab and piers, because they were load bearing components of the pool and were essential to its stability.

The Senior Member found that the defect in the major elements of the pool:

- had caused destruction of part of the pool (by causing a significant crack); and
- was likely to cause the inability to use the pool for its intended purpose, as it was likely that the crack would worsen over time.

The Senior Member determined that he had jurisdiction to make a determination and found in favour of the owners.

Appellate Decision

The matter was appealed by the builder on two grounds, which were ultimately dismissed.

Procedural Fairness

The first ground of appeal arose from an alleged denial of procedural fairness, as the builder was not given an adjournment when he should have been, nor given a reasonable opportunity to present his case.

The builder contended on a number of bases that he was not provided with the Original Report before the hearing, and therefore had not been given an opportunity to obtain expert evidence in reply.

However, the Appeal Panel was unable to conclude that the builder did not receive a copy of the report before the hearing, because:

- it was not apparent from the decision or the record of the hearing that the Original Report had not been served;
- the assertion that the Original Report was not received was at odds with the builder's response at the hearing that he had read Mr Savage's reports; and
- the builder failed to put on any evidence in support of his assertion.

Lack of Jurisdiction

The second ground of appeal was that the Senior Member made a decision which he did not have the jurisdiction to make given there was insufficient evidence to satisfy the Senior Member that the defect was a 'major defect' for the purposes of the HBA (and therefore the relevant limitation period for the claim had expired).

The builder submitted that there was no evidence to support the Senior Member's conclusion that:

- the defect caused the destruction of a part of the pool as it is responsible for a significant crack; and
- the crack would increase over time and be quite likely to cause the inability to use the pool for the intended purpose.

The Appeal Panel:

- agreed with the builder that the existence of the crack did not constitute the 'destruction' of the pool or part of the pool; and
- notwithstanding that finding, determined that on the evidence available at hearing, it was reasonably open to the Senior Member to determine that the crack would increase over time. On this basis, the Appeal Panel was not persuaded that there was an error of law in the Senior Member's conclusion that the defect was a 'major defect' within the meaning of the HBA.

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QUEENSLAND

New reasons are treason for unwary adjudicators

Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd [2020] QSC 133

Andrew Orford | Matt Hammond | Cameron Gee

Key point and significance

Respondents must be thorough when including reasons in their payment schedule for withholding payment to avoid being barred from relying on a particular reason in a subsequent adjudication. Adjudicators should also be wary to identify and ignore any new reasons raised in the adjudication response in order to avoid falling into jurisdictional error.

Facts

Monadelphous Engineering Pty Ltd (**Monadelphous**) and Acciona Agua Australia Pty Ltd (**Acciona**) were parties to a contract under which Acciona agreed to carry out engineering services, and supply equipment and materials to Monadelphous, for the upgrade of the Kawana Sewage Treatment Plant in Queensland.

Acciona's application before the Supreme Court concerned the adjudicator's decision in an adjudication under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**Act**). The adjudicator determined that Acciona was entitled to receive a payment of approximately $1 million. However, Monadelphous had also made out an entitlement to a claimed set-off of $4,424,904 which reduced the payment owing to Acciona to $NIL.

Acciona argued that the part of the adjudicator's decision which dealt with the claimed set-off fell into jurisdictional error because the adjudicator had:

- considered reasons advanced by Monadelphous in its adjudication response which were not included in its payment schedule, in breach of section 88(3)(b) of the Act;
- failed to give proper reasons for his decision that Monadelphous was entitled to its set-off claim, in breach of section 88(5) of the Act; and
- failed to apply the construction contract properly, in breach of section 88(2) of the Act.

Decision

Ground 1 – the adjudicator considered something he was required to ignore

In its adjudication response, Monadelphous claimed that Acciona had breached the collaboration deed so Monadelphous was entitled to recover damages on two alternative bases, in the form of contributions, which could be used to set off the claimed amount payable. Neither of the two alternative bases were included in the payment schedule as reasons for withholding payment. Consequently, the court found that the alternative bases were 'new reasons' as contemplated by section 82(4) of the Act and Monadelphous was prohibited from including them in its adjudication response within the meaning of section 88(3)(b) of the Act.

The court found that not only had the adjudicator considered the new reasons contrary to section 88(3) of the Act, he had also used them to justify the set-off. Accordingly, after providing useful guidance as to the application of jurisdictional error in Queensland, the court held that the adjudicator had fallen into jurisdictional error.

Ground 2 – inadequacy of the adjudicator's reasons

Acciona contented that the adjudicator's finding regarding set-off was not supported by any demonstrable process of reasoning. The court agreed, finding that the adjudicator's reasons were deficient as his decision did not indicate which of the two alternative bases he accepted, nor why he accepted whichever one he had accepted. The court held that the adjudicator had not discharged the task required of him under the Act and had not carried out the active process of intellectual engagement with the issues and the submissions that the Act required. Again, for this reason, his decision was attended by jurisdictional error.

Ground 3 – jurisdictional error by failing to apply the construction contract properly

Acciona submitted that the adjudicator had, contrary to section 88(2)(b) of the Act, failed to properly apply the terms of the construction contract. While the court acknowledged there were logical inconsistencies in the adjudicator's decision, it was more appropriate to make a finding of jurisdictional error under earlier grounds.

Order

The court declared the parts of the adjudicator's determination affected by jurisdictional error void, but found it was permissible to allow the remainder of the determination to stand, and this part (in which Acciona was awarded approximately $1 million) remained binding on the parties.

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Causation and particulars still the cornerstone of good pleadings

Alexanderson Earthmover Pty Ltd v Civil Mining & Construction Pty Limited [2020] QSC 122

Michael Creedon | Allie Flack | Alicia Beggs

Key point and significance

This case, arising from a strike out application, considered whether a global claim can be pleaded as an alternative, where the primary pleading fails to demonstrate causation. Whilst silent on the point as a matter of law, the court suggested that as a matter of principle it would be difficult for a global claim to be pleaded in the alternative. In another aspect of the case, the court determined that if a party is pleading a 'reasonable cost' as a basis for payment under a claim, particulars of that reasonable cost are required by the court.

Facts

Alexanderson Earthmover Pty Ltd (**subcontractor**) was subcontracted to Civil Mining & Construction Pty Ltd (**head contractor**) to undertake civil works under a schedule of rates contract in relation to the Wiggins Island Coal Export Terminal Project. A dispute arose in relation to payment, and Alexanderson commenced proceedings against CMC.

The head contractor brought a strike out application in relation to the subcontractor's fourth further amended statement of claim (**4FASOC**) and the reply (**Further Amended Reply**). The application raised three categories of complaint, which meant that the 4FASOC and Further Amended Reply:

- failed to disclose a reasonable cause of action;
- did not sufficiently inform the head contractor of the case to be met; and
- would, if permitted to proceed at trial, impose an unreasonable and unfair burden on the head contractor which would prejudice, embarrass or delay a fair trial, in contradiction of the Uniform Civil Procedure Rules.

The first complaint related to the pleading of a partly oral and partly written agreement said to have arisen on 13 October 2011, before the signing of the formal contract in November 2011. The formal contract contained an entire agreement clause. The subcontractor pleaded in the 4FASOC that the formal contract only replaced the terms of the earlier contract *'to the extent of the inconsistency only'*. The subcontractor claimed that this was a first or fourth category contract of *Masters v Cameron* (1954) 91 CLR 353. The head contractor opposed this, suggesting the 4FASOC and Further Amended Reply were inconsistent, vague and untenable given the entire agreement clause.

The second complaint related to the subcontractor pleading an entitlement to standby rates, damages for delayed completion and consequential damages, which the subcontractor said were caused directly or indirectly by access delays to various parts of the site. The court reiterated the findings of a previous court proceeding, in which Ryan J struck out parts of the subcontractor's previous statement of claim with leave to re-plead a number of paragraphs related to causation. More specifically, Ryan J required the subcontractor to identify in relation to each item of standby, the access delay it asserts caused it. The head contractor complained that the 4FASOC had not remedied the defect, with the subcontractor's claims for standby rates and damages still being global in nature. That is, they failed to draw any causal link between a particular contract breach and a consequence such as:

- any particular personnel or plant being placed on standby;
- any particular delays to completion; and
- the incurring of any cost claimed as damages.

The head contractor argued that the pleading could not be maintained unless it was repleaded to accord with the requirements of a global claim pleading. Paragraph 47A pleaded *'… in the alternative … the facts linking the causative events … are interwoven to the extent that it is impractical to further disentangle more than has already been pleaded in paragraphs 28 to 47 …'*.

The third complaint was that the subcontractor failed to particularise the *'reasonable cost at fair market rates'* relating to an additional haulage claim. Whilst the subcontractor argued that the rates were *'reasonable'*, the head contractor argued the rates pleaded appeared to relate to variation claims only and identified no coherent basis upon which a reasonable rate for excavation and fill was determined.

Decision

In relation to the first complaint, it was determined that it was not appropriate for the court to decide whether the entire agreement clause precluded the pleading, and this should be left for trial. However, the court did determine a number of smaller matters including that:

- to the extent the 13 October agreement was said to be partly oral, the material facts relied upon needed to be pleaded; and
- the reference *'to the extent of any inconsistency only'* and *'and which was thereafter varied from time to time'* by the matters particularised in the 4FASOC and Further Amended Reply be struck out.

Overall in relation to this complaint, the court determined the parties should formulate appropriate orders for the court to consider, other than for striking out.

Turning to the second complaint, the court stated it was uncontentious that a plaintiff, generally, must plead the causal connection between an alleged breach and a loss or contractual entitlement, except for certain cases when a global claim is permissible to be pleaded. Such a case arises where it is impractical to disentangle which part of the loss is attributable to each head of claim. The court emphasised that the head contractor must be informed of the causal link between the compensable event and the loss claimed, and therefore the subcontractor must plead what each standby was caused by and that those reasons were beyond the subcontractor's control.

The court determined pleading the preconditions to a contractual entitlement to standby does not relieve the party from having to establish a causal link to the amount claimed as compensation. That is, the court determined that the primary pleading was defective for failing to plead the requisite causal link between the access delays and the plant, equipment and personnel being placed on standby as a consequence of the delays. The same defect arose in relation to the delays to completion and the incurring of any particular cost claimed as damages.

To the extent the subcontractor relied on the causation being a global claim, the court suggested it did so in the alternative, such that the pleading of causation was global. Therefore, the primary pleading was defective for failing to plead the requisite causal link. The court pointed out that, although the subcontractor was candid in suggesting it was unable to disentangle which particular access delay caused which plant, equipment or personnel to be on standby, in this case the subcontractor had to rely on the principles relating to global claims. The court stated the subcontractor had not, in the 4FASOC, rectified the issues which caused the initial striking out of this part of the pleading.

Paragraph 47A, which was pleaded in the alternative, was defective insofar as it sought to apply to different heads of claim, namely the standby claim, claim for consequential damages and damages for delay in completion. It further sought to only apply to the extent that it had not pleaded causative links in a number of proceeding paragraphs which had nothing to do with causation, contrary to what is required to plead a global claim.

Following from this, the court made an observation that the subcontractor appeared to be in a position where it could only plead a global claim in relation to causation for the claims in question, therefore considering it unnecessary to consider as a matter of law whether a global claims could be pleaded in the alternative. However, the court stated that, as a matter of principle, it would be difficult for a global claim to be pleaded in

the alternative, given the matters which must be satisfied to plead such a claim. The court struck out paragraph 47A, with liberty given to the subcontractor to re-plead.

Finally, under the third complaint, the court struck out the particulars regarding rates and costs for failing to comply with the rules regarding providing sufficient particulars. The court emphasised the subcontractor should be able to provide some particulars as to the basis upon which it contends its rates are reasonable and therefore which represent the *'reasonable cost'* to a person in the position of the head contractor. Further, particulars of the costs of the work actually performed should also be provided. As such, the court did not strike out this complaint, rather ordered the subcontractor to provide further and better particulars of the *'reasonable rates'* and work actually performed.

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Ambiguous contract terms cost cement deal in Queensland

Wagners Cement Pty Ltd & Anor v Boral Resources (Qld) Pty Ltd & Anor [2020] QSC 124

David Pearce | Mark Wheelahan | Danielle le Poidevin

Key point

In resolving disputes between parties to an agreement, the court will look to the terms of the agreement to determine its proper construction. In order to minimise the risk of a dispute, parties ought to ensure that the terms of an agreement are unambiguous.

Facts

Prior to 2011, Wagners Cement Pty Ltd (**Wagners**) operated a cement plant at Pinkenba (**Pinkenba plant**) (where cement products were manufactured) and various concrete plants (which produced concrete from the cement supplied by the Pinkenba plant). In April 2011, Wagners sold the concrete plants to Boral Resources (Qld) Pty Limited (**Boral**), however, retained the Pinkenba plant (being only one of three established suppliers of bulk cement in South East Queensland).

On 8 December 2011, Wagners and Boral entered into formal written agreement by which Boral agreed to purchase a minimum quantity of cement from Wagners' Pinkenba plant on a take-or-pay arrangement for a 10-year fixed term (with an option to extend for a further 10 years) (**agreement**). If Boral did not purchase the requisite minimum quantity of cement, the Agreement provided that Boral had to pay to meet its take-or-pay obligations to Wagners.

The agreement specified that Boral was to pay for the minimum quantities of cement at a specified 'List Price'. The List Price was not static as the agreement provided for annual and ad hoc adjustment mechanisms.

The second of these contractual adjustment mechanisms, the ad hoc adjustment mechanism, required an adjustment of the List Price if Boral could provide evidence that it could purchase cement at a lower price elsewhere in south-east Queensland (**price notice**). If Boral could prove that the market price for cement had lowered, Wagner could elect to:

- accept a reduction to the List Price (**reduction**); or
- suspend supply of cement for a six-month suspension period (relieving Boral from its take-or-pay obligations and allowing it to purchase cement from a third party) (**suspension period**).

Several disputes arose between Wagners and Boral when Boral attempted to invoke the ad hoc adjustment mechanism. The essence of the dispute, which turned primarily on the proper construction of the agreement, was whether the agreement had been properly suspended when Boral invoked the ad hoc adjustment mechanism such that Boral had/had not failed to take or pay for the minimum quantity of cement under the Agreement. Bond J had to determine:

- whether Boral's price notices in March, April and October 2019 were valid and effective to invoke the ad hoc adjustment mechanism;
- whether Wagners' notices suspending supply (**suspension notice**) in March and May were valid and effective, or whether instead it constituted a waiver; and

- if the suspension was valid, whether a suspension period was created so Boral had to resume purchasing cement from Wagners at the end of that period.

Decision

Bond J reiterated that the principles of construction of commercial contracts were sufficiently identified in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104. His Honour considered that, applying the principles from that case, in order to determine the proper construction of the agreement, recourse may be had to:

- the text of the terms;
- the internal context within which that text occurred, namely the entire text of the agreement as well as the particular documents referred to in the text of the agreement; and
- evidence of events, circumstances and things external to the agreement which were known to the parties or which assist in identifying the purpose or object of the transaction.

Regarding this final category, evidence, which amounted to subjective intention or opinion, or of things said in pre-contractual negotiations, was not admissible in the aid of construction.

Were the March price and suspension notices valid and effective?

In March 2019, Boral submitted a letter attaching a quote from Cement Australia which appeared to be a contract for the supply of cement from May 2019 (two months after the price notice) at a price lower than the List Price under the agreement (**March price notice**). Bond J determined this notice was defective as the language of the agreement suggested that, to satisfy the ad hoc adjustment mechanism, Boral was required to provide evidence of a lower price that was current as at the date of the March price notice and not available at some time in the future.

Despite treating Boral's price notice as invalid, Wagners nevertheless issued a suspension notice on 18 March 2019 (**March suspension notice**). Boral argued that the March suspension notice must be regarded as valid and effective, enlivening the suspension period from this date. According to Boral, Wagners waived the irregularities in the March price notice and, in doing so, had made an unequivocal election between inconsistent rights. Wagners argued that the election was not unequivocally made.

By reference to the agreement as evidence of the contractual intention of the parties, Bond J determined that:

- proper construction of the agreement permitted waiver of the irregularity in the notice;
- the fact that there were contractual consequences to the choice Wagners made regarding the March price notice did not mean that Wagners was 'forced into anything'; and
- the March suspension notice was unambiguously a notice of suspension and Wagners' reservation of its rights regarding the invalid March price notice constituted a reservation of inconsistent rights and was ineffective.

As such, the March suspension notice was valid and effective and created a suspension period from 18 March 2019 (**March suspension period**), unless it was brought to an end at some earlier time.

During the March suspension period, Boral acquired cement from:

- Cement Australia variously for the price specified in the March price notice, but for amounts that were less than the minimum quantities prescribed by the agreement; and
- two other suppliers for a price which was higher than the price specified in the March price notice (**other suppliers**).

Wagners argued that by doing so Boral had indicated it could not meet its minimum quantity obligations even at the lower price, had indicated its intention not to comply with the March price notice and had therefore brought the suspension period to an end. Bond J considered this argument to be a *'substantial overreach'*. On proper construction of the agreement, his Honour concluded that the March suspension period had not been brought to an early end because:

- the question was whether the Purchaser had an ability to procure supply at the lower price (no evidence had been presented to prove this wasn't the case), not whether it was actually doing so; and

- the fact that Boral had made some acquisitions from third party suppliers (at a higher price) while finalising negotiations with Cement Australia did not mean that Boral did not intend to comply with the March price notice. Certainly, a 'reasonable businessperson' would not make this conclusion.

Were the April price notice and May suspension notice valid and effective?

In April 2019, Boral submitted a further price notice attaching a contemporaneous contract that Boral had entered into with Cement Australia for the supply of cement at a price lower than the List Price (**April price notice**). Bond J determined this notice was also invalid as the agreement did not contemplate a price notice being given during an active suspension period (which was enlivened with the March price notice). The effect of suspension under the agreement was one which only permitted further price notices to be served after the suspension had ended.

Boral's April price notice was followed on 1 May 2019 by a second suspension notice (**May suspension notice**). The May suspension notice and any suspension period created by it were invalid as the March suspension period continued.

Was the October price notice valid and effective?

In October 2019, Boral submitted a final price notice attaching a further, contemporaneous contract with Cement Australia for the supply of cement at a price lower than the List Price (**October price notice**). Because there was not a suspension period in effect, Bond J concluded that the October price notice was valid and effective to invoke the ad hoc adjustment mechanism.

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VICTORIA

Mixed-use developments under DBCA

Bayside Design & Construct Pty Ltd v Kanbur [2020] VCC 691

Peter Wood | Tom Johnstone | Chris Grant

Key point and significance

This case confirms that builders will find it difficult to show that mixed-use developments, which include a domestic component, fall within the application of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**SoP Act**).

Facts

Bayside Design & Construct Pty Ltd (**builder**) brought a claim against the owner Mr Kanbur (**owner**) in respect of unpaid payment claims under a contract for the construction of a mixed use development, comprising a first-floor residential unit and terrace and two ground floor shops (**property**).

The main question at the hearing was whether the building contract was excluded from the application of the SoP Act because it included a domestic component.

Under section 7(2)(b) of the SoP Act, the SoP Act will not apply to a *'domestic building contract'* within the meaning of the *Domestic Building Contracts Act 1995* (Vic) (**DBCA**) for the carrying out of domestic building work, other than a contract where the building owner is in the business of building residences and the contract is entered into in the course of, or in connection with, that business.

The builder argued three main points against the application of section 7(2)(b) of the SoP Act, namely:

- that the owner was in the business of building residences and the building contract was entered into in the course of, or in connection with, that business;
- that the building contract was not a domestic building contract within the meaning of the DBCA because of the mixed use nature of the development; and
- that the builder could overcome the difficulty presented by section 7(2)(b) of the SoP Act by claiming only those items in its payment claims that relate solely to the commercial component of the development.

Decision

His Honour dismissed the claim that the owner was in the business of building residences on the basis that the owner was in full-time employment (in a profession not related to the construction industry), purchased the property primarily to provide a replacement residence and was not involved in any other property or construction transactions of any kind (let alone residences). In reaching this conclusion, his Honour disregarded other factors raised by the builder, such as the fact the owner secured an ABN and that the land was zoned as Commercial Zone 1.

Turning to the question of whether the mixed use nature of the development meant that the building contract was not a domestic building contract within the meaning of the DBCA, his Honour noted that no authorities had previously considered the application of section 7(2)(b) of the SoP Act to a mixed use development.

His Honour stated that there is nothing in the SoP Act or the DBCA to support a construction that requires that all (or even most) of the work under a building contract to be the erection or construction of a home. Instead, his Honour held that the DBCA suggested that a building must be used for only business purposes before it is disqualified. On this basis, his Honour was satisfied that the building contract was a domestic building contract within the meaning of the DBCA for the carrying out of domestic building work and therefore attracted the operation of section 7(2)(b) of the SoP Act.

Finally, his Honour held that the builder could not sever just the commercial component from its payment claim and therefore avoid the exclusion in section 7(2)(b) of the SoP Act in respect of the commercial works. His Honour held that, contrary to section 12 of the DBCA, the building contract failed to clearly delineate between the domestic building work and the commercial building work, particularly as to the amount the builder was to receive.

Interestingly, his Honour held that, even if the building contract has complied with section 12 of the DBCA, it was unclear that doing so would avoid the operation of section 7(2)(b) of the SoP Act for the non-domestic building work. In the case of mixed use developments with owners that are not in the business of building residences, his Honour's view was that the consequences of section 7(2)(b) could only be avoided by entering into two contracts (being one for the domestic building work and one for the commercial building work).

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Seeking an injunction? Be prepared to pay for it

Launch No. 4 v Southstar Homes [2020] VSC 299

Nikki Miller | Tom Johnstone | Gary Yang

Key point and significance

This case reiterates the usual approach taken by courts regarding the granting of an injunction suspending and deferring a party's entitlement to recover an adjudicated amount which has been challenged, namely that, as a balancing condition for the issuing of such an injunction, the party seeking the injunction should be required to provide security in respect of the adjudicated amount.

In seeking an injunction of this type, parties should be acutely aware of the merits of their case, especially in respect of whether there is a serious issue to be tried, and be prepared that the granting of the injunction will likely come at the cost of providing security (usually totalling the adjudicated amount) to the court.

Facts

Launch No. 4 Pty Ltd (**owner**) and Southstar Homes Pty Ltd (**builder**) entered into a contract for the design and construction of a residential and retail development (**contract**). The builder submitted a number of payment claims, to which the superintendent under the contract issued a payment schedule for a lesser amount. The builder went into administration, and the owner served notice that the whole of the remaining work would be taken out of the hands of the builder. A revised payment schedule was issued, with the scheduled amount being $NIL.

The builder made an adjudication application under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**SoP Act**) and the adjudicator determined an adjudicated amount of $222,570

(including GST) plus interest and adjudication costs. The owner sought judicial review to quash the adjudication determination as void and unlawful.

As an interlocutory step, the owner sought an injunction preventing the builder from relying on or enforcing payment of the adjudicated amount. The owner also sought leave pursuant to section 440D of the *Corporations Act 2001* (Cth) to begin and proceed with its application for the injunction and to continue its judicial review process despite the builder being in administration.

Decision

The court granted an injunction to preserve the status quo until the determination of the judicial review on the condition that the owner pay to the court the adjudicated amount as security.

Application of section 440 of the *Corporations Act 2001* (Cth)

The court held that the proceeding fell within the language and intent of section 440 of the *Corporations Act 2001* (Cth), as this was a proceeding against a company in administration and in respect of its property (**the adjudication determination**). Leave was granted on the basis that (among other reasons) the owner was essentially defending itself from being required to pay the adjudicated amount, the application was made early in the process and the owner would suffer disadvantage and prejudice if leave was not granted.

Interim injunction

The owner argued there was a serious issue to be tried in two respects: principally, that the adjudicator had acted beyond jurisdiction in concluding that there was a relevant reference date available in relation to the payment claim and had erred in concluding that the SoP Act was applicable, notwithstanding the builder was in voluntary administration and not able to perform the contract works.

The court agreed that there was a serious issue to be tried, though did note that, in its view, the issues were no stronger than arguable. The court found that the builder's arguments were stronger, and this informed the balance of convenience in the builder's favour.

On the provision of security, the court reiterated that, as a balancing condition for the granting of an injunction of this kind, the owner should provide security in respect of the disputed adjudication amount. It was not submitted that giving security would stultify the owner's ability to proceed with judicial review, and it was found non-provision of security would give rise to likely prejudice to the builder in that it would likely delay the recovery of the adjudicated amount (which the builder was presently entitled to) and may give rise to the risk of non-recovery.

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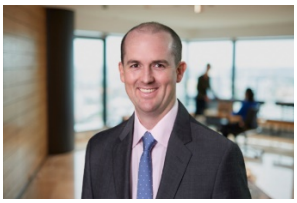

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