Construction Law Update

March 2019

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Legislative update

QUEENSLAND

Taskforce to investigate Queensland construction insolvencies

Andrew Orford | Petrina Macpherson | Hugh Pegler

On 28 February 2019, the Queensland government announced a special joint taskforce to investigate insolvencies in the Queensland construction industry.

The taskforce will conduct a forensic examination into Queensland construction companies that have collapsed since 2013 and its investigations will focus on white-collar crime and re-examining historical allegations of fraud.

Creation of the taskforce was one of the key outcomes sought by the 'Back our Subbies' campaign launched in regional newspapers in early February 2019. Around 7000 subcontractors and trade creditors allege that they are collectively owed over $500 million as a result of approximately 50 construction company insolvencies since 2013.

Retired Supreme Court Judge John Byrne will head the taskforce, which will involve Queensland Police, the Queensland Building and Construction Commission (**QBCC**) and the Office of the Director of Public Prosecutions.

The taskforce will also consider whether the QBCC's supervisory and investigative powers are sufficient to prevent misconduct in the future and will provide recommendations for reform.

The Government has yet to release the terms of reference for the taskforce or its contact information. However, we expect that construction industry participants will be invited to inform the taskforce of examples of:

- the non-payment of subcontractors due to corporate insolvency; and
- companies or businesses that have been forced into insolvency due to non-payment under a construction contract.

The taskforce may also call for submissions as to the issues sounding insolvency in the Queensland construction industry.

We will continue to keep our clients updated regarding the taskforce and its progress.

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In the Australian courts

COMMONWEALTH

Choosing the red pill or blue pill (or both): claims for breach of contract and negligence in construction

Sitzler Pty Ltd v GPT RE Limited as Responsible Entity of the General Property Trust [2018] FCA 1496

Richard Crawford | Nicholas Grewal | Adam Hanssen

Key point and significance

The court declined to entertain an application to strike out a pleading based on a concurrent duty in tort and contract. While acknowledging that there was some basis for the challenge (based on the High Court decision of *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36) (**Brookfield**), the court refused because the threshold test for strikeout is only when it is clear that there is no real question to be tried. This case will be an important one to track for all those interested in the existence (or not) of concurrent duties in tort and contract.

Facts

GPT RE Limited as Responsible Entity of the General Property Trust (**respondent**) entered into two separate contracts for the construction and assembly of a multi-storey modular building in Darwin.

It engaged CIMC Modular Development (Australia) Pty Ltd (**CIMC**) to design, manufacture and deliver the modules (**Construction Contract**) and Sitzler Pty Ltd (**applicant**) to assemble the modules on the site (**Assembly Contract**).

The applicant brought a claim against the respondent for breach of the Assembly Contract arising from the quality of the modules and cladding systems delivered to be used in the construction, as well as delays to the delivery.

The respondent brought a cross-claim against CIMC alleging, inter alia, breach of the Construction Contract and breach of the common law duty of care.

In response, CIMC sought to strike out the respondent's cross-claim on the grounds that it failed to make out a reasonable cause of action. CIMC alleged that the respondent did not have any right of action against it in negligence because the respondent's remedy relied on an obligation or duty which had been expressly defined by the Construction Contract. CIMC argued that the Construction Contract regulated its obligations to the respondent, and the extent of its liability for failing to meet those obligations, and that they could not be supplemented by further obligations in tort. They argued that the High Court's use of the vulnerability criteria for establishing the duty of care in recent decisions, including *Brookfield* and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16, (2004) 216 CLR 515, cannot exist in this case because of the contractual relationships between the parties.

Decision

The court dismissed CIMC's request to strike out the respondent's cross-claim. In giving reasons, White J noted that:

- the current formulation of the law in Australia was that a contractual obligation between the parties does not automatically preclude the occurrence of a tortious duty relating to the same subject matter; and
- in relation to the provision of professional services, the law currently recognises the existence of concurrent contractual and tortious duties of care.

Naturally, White J here was considering the strike-out application, and the high threshold for such an application to succeed, he was not considering the merits of the argument about concurrent duties outside of that context. It will therefore be interesting to track this case and how the High Court's position on duties is interpreted.

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NEW SOUTH WALES

An invalid or missing reference date may invalidate a payment claim

Castle Constructions Pty Ltd v N & R Younis Plumbing Pty Ltd [2019] NSWSC 225

Richard Crawford | Karen Hanigan | Kawshi Manisegaran

Significance

A valid reference date is crucial to enforce a progress claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**). Where a contract specifies a reference date and the contract is terminated before that date is reached, no further reference dates are available under the Act. Any further claims issued will not be enforceable under the Act. As always, this will depend on the facts and an exception may be where a contract explicitly specifies that a further claim will be made on a future date, for example, upon completion of the work under the contract.

Facts

Castle Constructions Pty Ltd (**Builder**) contracted N & R Younis Plumbing Pty Ltd (**Contractor**) under three different contracts for works in relation to a building project. The contract in question in this matter covered the provision of hydraulic services (**Contract**).

The dispute concerned a payment claim issued by the Contractor on 20 November 2018 for the completion of both works and variations (**Claim**). The Claim took the form of an invoice which stated in the description that the work was 'now complete' and that the invoice represented a payment claim for the purposes of the Act.

The Claim was rejected by the Builder, who in response issued a payment schedule to the Contractor refusing to make any payment. The dispute was referred to adjudication and the adjudicator reduced the amount of the Claim and awarded the whole of the reduced amount in the Contractor's favour.

Prior to the Claim being issued, on 3 October 2018, solicitors acting for the Builder issued a letter to the Contractor asserting that the Contractor had failed to comply with the Contract and its staff had left the site amounting to repudiation of the Contract, and purported to accept the repudiation by terminating the Contract. The Contractor responded asserting that the Builder's purported termination was invalid. After negotiations between the parties, an agreement was reached on 29 October 2018 that the Contract was 'reinstated and on foot' (**Agreement Letter**). The Agreement Letter provided that a further claim would be made upon completion of the work under the Contract.

However, on 12 November 2018 the Builder issued a second letter to the Contractor referring to 98 separate allegedly incomplete aspects of the work, and purporting to terminate the Agreement Letter (**Termination Letter**). The Contractor responded stating, among other things, that the matters raised by the Builder were matters for adjudication.

The Claim was subsequently issued on 20 November 2018.

Valid reference date essential

Section 8 of the Act provides that a contractor under a construction contract is not entitled to a progress claim unless there is an available reference date, which is defined in the Act as either a date specified under the contract or the last day of the named month in which the construction work was first carried out under the contract and the last day of each subsequent named month. This section of the Act has been reviewed by a number of recent decisions such as *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* [2017] NSWCA (analysed in our *Construction Law Update, November 2017 edition*) which held that a payment claim predating a reference date was invalid.

The adjudication

The Contract provided that payment claims are to be made 'by the 28th day of the month'. The adjudicator interpreted this to indicate that a payment claim can be served prior to such a date, and that any works claimed are to be calculated to the reference date of the 28th day of any month.

The adjudicator was not satisfied that the Builder was entitled to terminate the Contract but noted that, regardless of his finding in relation to valid termination, the Contractor *'by default has a reference date of 31 October 2018 available to it under the Act'*.

Challenge of the adjudicator's decision

The Builder challenged the adjudication on the basis that it terminated the Contract before the Claim was issued by the Contractor.

Alternately, that if the Contract was not terminated, then the relevant reference date was 28 November 2018, and that the Claim (dated 20 November 2018) was invalid because it was issued before the relevant reference date.

The Contractor disputed both arguments and in addition contended that the adjudicator had the power to resolve the issues so that there could be no jurisdictional error which would permit a court to intervene.

Decision: Appeal allowed on basis no valid reference date

The court upheld the Builder's appeal and set aside the adjudicator's determination in favour of the Contractor, including that the Contractor pay the Builder's costs of the proceedings.

The court relied on *Abergeldie Contractors Pty Ltd v Fairfield City Council* [2017] NSWCA 113 (analysed in our *Construction Law Update, September 2017 edition*) in finding that the court had jurisdiction to consider for itself whether the Claim was supported by a valid reference date.

The Contractor's Claim was invalid because it was lodged on 20 November 2018, predating the reference date of 28 November. However, the court noted that the outcome may have been different had it been put to the court that the Claim was valid after the explicit agreement in the Agreement Letter that a further claim would be made upon completion of the work under the Contract.

The court did not decide on whether the Contract was terminated prior to the Claim being issued.

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Principal v Agent: Who is personally liable for damages for breach of a contract?

Cincotta v Russo [2019] NSWSC 272

Richard Crawford | Claire Laverick | Nick Meyer]

Key point and significance

This case reinforces the established position on agency and serves as a reminder to agents executing contracts on behalf of a principal that all pre-contract communications and the contract itself must be clear that the agent is executing the contract as agent only and not as the contracting party. An agent's liability will turn on the parties' intention (determined by construing the terms of the contract and what a reasonable person with knowledge of the parties' communications and the surrounding circumstances would conclude that the parties had intended).

Facts

In January 2014 Mr and Mrs Cincotta (**owners**) contracted with Mr Russo (**Russo**) to carry out residential building work for the purposes of the *Home Building Act 1989* (NSW) (**Act**) (**Contract**). Russo was a 50% shareholder of Bespeak 3 Pty Ltd (**Bespeak**), a building company licensed for the purposes of the Act. Russo was employed by Bespeak as a building supervisor and did not hold a contractor licence in his own name for the purposes of the Act. Further, Russo's qualified supervisor certificate stipulated that he could not contract directly with consumers. The Contract stipulated that Russo was the builder, although

Bespeak's ABN number was included. The licence number included in the Contract was Russo's qualified supervisor certificate number.

At all relevant times the owners were under the impression that Russo was acting in his own capacity as a licensed builder and that they had an agreement with him, not Bespeak. In May 2014 the owners received a quotation report on the letterhead of 'S.E.R Constructions', the footer of which read 'A Nominee of Bespeak 3 Pty Ltd'. All subsequent invoices issued to the owners were from S.E.R Constructions, each of which included Bespeak's contractor licence.

The works had numerous defects and did not comply with either the Contract or the warranties implied by the Act.

Bespeak subsequently went into liquidation. Whilst leave was given to proceed against Bespeak, the liquidator indicated that those proceedings would not be defended, and the owners commenced proceedings against Russo for damages to be assessed on the basis that:

- Russo entered into the Contract as agent for Bespeak as undisclosed principal;
- Bespeak was the builder under the Contract; and
- both Russo and Bespeak were contracting parties under the Contract.

Decision

The court found in favour of the owners and held Russo personally liable for damages to be assessed.

Stevenson J applied *Cooke v Wilson* (1856) 1 CBNS 153 noting that a person who signs the written contract is to be considered the contracting party, unless it is clear that they are executing the contract as an agent only. Whether an agent is liable when contracting as agent for a named or unidentified principal will turn on the facts of each case, particularly the parties' intention (which is determined by construing the terms of the contract as a whole and what a reasonable person with knowledge of the parties' communications and the surrounding circumstances would conclude that the parties had intended).

In this case, whilst Russo's initial quotation provided prior to entry into the Contract referred to Bespeak and Russo included Bespeak's ABN in the Contract, Stevenson J saw no reason to conclude that reasonable people in the owners' position would have thereby understood that Russo was intending to execute as agent for Bespeak, particularly when coupled with Russo's representations that he had a contractor licence and that he was the person with whom the owners would be dealing. The court was satisfied that Russo entered into the Contract as agent for Bespeak as undisclosed principal given that Bespeak (under the business name S.E.R. Constructions) carried out the work and invoiced and was paid for that work.

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Contractors should exercise rights to relief rather than seeking two bites of the cherry

Icon Co (NSW) Pty Ltd v AMA Glass Facades Pty Ltd 2019 NSWSC 250

Richard Crawford | Claire Laverick | Brianna Smith

Key Point and significance

Contractors

The decision in *Icon Co (NSW) Pty Ltd v AMA Glass Facades Pty Ltd* is a stark reminder to contractors seeking judicial review of an unfavourable adjudication determination to ensure that they bring proceedings within the three month period prescribed by r 59.10 of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**), or otherwise risk being statute barred.

Adjudicators

This decision also suggests that the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SoPA**) requires adjudicators to follow the contractual interpretation adopted by earlier adjudicators in respect

of later new claims arising from clauses previously interpreted over the course of the same project, regardless of whether that contractual interpretation is erroneous. A failure to do so may constitute grounds to invalidate the determination if it can be shown that it gives rise to an issue estoppel.

Facts

In December 2015 Icon Co (NSW) Pty Ltd (**Icon**) and AMA Glass Facades Pty Ltd (**AMA**) entered into a construction contract for the installation of a façade and associated works (**Works**) on the Opal Tower in Sydney. In the course of the Works, Icon orally directed AMA to perform a series of variations, but did not confirm these directions in writing.

In three separate adjudications concerning variations (heard by 2 separate adjudicators), the adjudicators were required to determine:

1. AMA's rights to payment for the orally-directed variation works; and

2. Icon's rights to set off liquidated damages against AMA's payment claims.

First adjudication

In March 2018, the adjudicator determined that in respect of variations 2 to 24:

- AMA was entitled to have the contract sum adjusted;
- Icon was not entitled to set off liquidated damages as the works had not achieved practical completion; and
- the adjudicated amount was $1.9 million.

Second adjudication

In August 2018, the adjudicator determined that in respect of variations 26 to 31:

- AMA was not entitled to have the contract sum adjusted, as the variation directions were neither in writing nor confirmed in writing;
- Icon was entitled to set of liquidated damages against AMA's payment claims; and
- the adjudicated amount was $nil.

Third adjudication

In October 2018, the adjudicator was asked to consider a payment claim that was indistinguishable from the payment claim the subject of the second adjudication. The adjudicator determined:

- AMA was not barred from claiming for the variations;
- Icon was not entitled to set off liquidated damages against AMA's payment claims; and
- the adjudicated amount was $660,000.

These adjudication determinations gave rise to the following issues:

1. whether AMA was out of time to pursue judicial review of the unfavourable second adjudication determination pursuant to r 59.10 of the UCPR;

2. whether the payment claim the subject of the third adjudication amounted to an abuse of process on the basis that it was indistinguishable from the payment claim the subject of the second adjudication; and

3. whether adjudicators are required to follow the contractual interpretation adopted by earlier adjudicators in respect of later claims made in relation to the same project.

Decision

Time Barred

As the second and third adjudication determinations dealt with an identical payment claim, it was found that if the second determination was valid, then the third determination must be invalid. Because AMA did not

challenge the second determination within the time prescribed by r 59.10 of the *Uniform Civil Procedure Act,* the second determination was valid.

Abuse of process

The decision reaffirmed that the repetitious re-agitation of a payment claim will amount to an abuse of the processes of the SoPA.

Binding expressions of opinion

In obiter, Steven J stated that:

> *"…it was not appropriate for an adjudicator to, in effect, dissent from earlier adjudicative expressions of opinion in relation to the same provisions of the same contract between the same parties in adjudications arising from the same project."*

In support of this statement, Steven J referred to the intended operation of the SoPA, finding that such behaviour was inconsistent with:

1. the objective of the SoPA, which is to *"establish [a] coherent, expeditious and self-contained scheme, designed to act quickly and achieve the result that each party knows precisely where they stand at any point of time";* and

2. the intention of s 22(4), which should not be read as an exhaustive statement of the matters determined by an earlier adjudication that are binding on a subsequent adjudicator.

3. Steven J went on to opine that a failure to follow the contractual interpretation adopted by earlier adjudicators in respect of later claims will constitute grounds to invalidate a determination if it gives rise to an issue estoppel. He noted that an issue estoppel will arise in circumstances where the contractual interpretation of the disputed provision is "fundamental" in the sense that it is "legally indispensable to the conclusion". We consider that in most instances, the contractual interpretation of a disputed provision will be "fundamental" to the determination.

4. However, these comments were made in obiter, and whilst they are persuasive, they do not constitute binding precedent.

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Security of Payment – 'Fresh' Reference Dates

Impero Pacific Group Pty Ltd v Bonheur Holdings Pty Ltd [2019] NSWSC 286

Richard Crawford | Brianna Smith

Key Point

In circumstances where a principal terminates a contract for convenience, contractors have until recently been unable to rely on the provisions of the *Building and Construction (Industry Security of Payment) Act 1999* (NSW) (**Act**) to submit a progress claim for any works performed between the last accrued reference date under the contract and the date of termination, on the basis that no reference date has accrued for those works. However, the decision in *Impero Pacific Group Pty Ltd v Bonheur Holdings Pty Ltd* overturns this position, and provides that termination for convenience will generally give rise to a 'fresh' reference date which triggers the contractor's entitlement to claim for these works.

Significance

This decision has significant practical implications in circumstances where a principal terminates a contract for convenience.

Contractors

- Contractors should submit a progress claim for works performed between the last accrued reference date under the contract and the date of termination.

- If the termination for convenience clause does not expressly provide a reference date, contractors should rely on section 8(2)(b) which provides the reference date will be the last day of the relevant month.

Principals

- Principals should expect to receive a progress claim for works performed by the contractor between the last accrued reference date under the contract and the date of termination;
- Principals should check that the progress claim does not claim any amounts that are beyond the scope of the Act (including costs for the removal of labour and plant from site). If these items are claimed, the principal should raise this in its payment schedule.

However, both contractors and principals should be aware that upon the commencement of the *Building and Construction Industry Security of Payment Amendment Act 2018* (NSW) (**Amending Act**), termination of the construction contract by whatever means will entitle the contractor to a progress claim for work done up to the date of termination.

Facts

Bonheur Holdings Pty Ltd (**Principal**) entered into a construction contract with Impero Pacific Group Pty Ltd (**Contractor**) in relation to the construction of a residential building. The construction contract was similar to the Australian Standard AS4902-2000.

On 29 October 2018, the Principal exercised its right to terminate the contract for convenience pursuant to clause 39A of the contract.

On 27 November 2018, the Contractor issued a progress claim in respect of works performed between the last accrued reference date under the contract (being 25 October 2018) and the date of termination (being either 29 or 30 October 2018). The Principal did not serve a payment schedule within the time prescribed by the Act. Accordingly, the Contractor sought judgment for the claimed amount in the NSW Supreme Court.

The Principal resisted the entry of the judgment under the Act on the basis that:

- there was no available reference date for the progress claim pursuant to section 8 of the Act; and
- even if the Contractor did have a right to a progress claim, the right was limited to only part of the amount claimed because the Contractor had claimed for items beyond the scope of the Act. On this basis, it was contended that no judgment could be obtained for the full claimed amount.

Decision

Reference Dates for Termination for Convenience

Prior to the decision in *Impero Pacific Group Pty Ltd v Bonheur Holdings Pty Ltd*, the position at law was that the contract does not, after termination, continue to provide reference dates in respect of construction work carried out under the contract prior to its termination (see for example the decisions of Ball J in *Patrick Stevedores* and Dark J in *Omega House*).

This general position has been clarified, and now the termination of a contract for convenience will generally give rise to a 'fresh' reference date for the purposes of the Act on the basis that:

- the clear intent of clause 39A (and presumably similar clauses) was that the Contractor would be entitled to payment for the period up to termination in the same manner as it was entitled to progress payments; and
- the obligation under clause 39A.2 to pay costs associated with termination for convenience survives the termination, which means that the parties remain in contractual relations with each other, even though building work ceases. Therefore, reference dates continue to accrue.

Costs payable to the contractor following termination for convenience

The decision in *Impero Pacific Group Pty Ltd v Bonheur Holdings Pty Ltd* confirmed that a contractor may only claim for items that are within the scope of the Act, namely items that represent payment for construction work or the supply of related goods or services under the contract. Items that fall outside of this scope include costs of removing labour and plant from site, costs of plant or material that have been ordered but not supplied and damages for breach of contract.

If a matter proceeds to adjudication under the Act, and in the course of determining the amount of the progress payment to which the claimant is entitled, the adjudicator makes an error in interpreting the progress claim, the contract or in applying the Act, and erroneously awards costs for items outside the scope of the Act, this error will not be jurisdictional and therefore cannot be used to invalidate the determination.

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Adjudication applications – what are the true merits of the claim?

MMIR Pty Limited v Iskra [2019] NSWSC 35

Richard Crawford | Stephaine Skevington

Key Point and significance

An Adjudication Application must be determined on the merits of the claim set out in the payment claim and the adjudicator must be satisfied that the claimant has proved its assertions in the payment claim before they need to consider whether the respondent has proved the assertions set out in the payment schedule.

Facts

- The plaintiff, MMIR Pty Ltd (**respondent**) contracted the first defendant, Ganni John Iskra (**claimant**) to carry out works in relation to the upgrading and refurbishment of a restaurant and fitness centre under an oral 'do and charge' contract.
- The claimant submitted a payment claim to the respondent dated 4 September 2018, which included an amount for work carried out together with an amount for a 6% 'project management fee'. The payment claim was accompanied by various subcontractor invoices totalling a portion of the total amount claimed under the payment claim, with the remainder representing work carried out by the claimant himself and the project management fee.
- The respondent issued a payment schedule for a nil balance and the claimant subsequently filed an adjudication application in respect of the payment claim.
- In the adjudication application the respondent claimed that it had not had the opportunity to analyse and verify the claimant's payment claim and that the respondent believed the claimant had either made fraudulent claims, inflated its claim or acted negligently in carrying out the building works.
- In its determination, the Adjudicator noted:
    - that a party who makes an assertion has the onus of proof in proving such an assertion and as the respondent had provided no evidence in relation to their assertions or to any amounts previously paid, the respondent has failed to discharge its onus of proof in withholding the claim; and
    - the claimant had demonstrated an entitlement under the contract together with sufficient information and methodology as to how it arrived at the amount claimed.
- The Adjudicator awarded the claimant the full amount claimed in the payment claim.
- The respondent appealed the Adjudicator's determination.

Decision

Parker J allowed the appeal and quashed the Adjudicator's determination on the basis of jurisdictional error. Parker J concluded that the Adjudicator incorrectly determined the application on the basis of whether the respondent could prove the claims set out in the payment schedule rather than considering the validity of the claim made in the payment claim itself. Parker J noted that the time spent by the Adjudicator considering the application was not evidence that the Adjudicator has properly considered the validity of the claimant's claim and even if the Adjudicator has considered each individual invoice attached to the application, this would not be enough.

There was no evidence or inference that the Adjudicator considered the reasonableness of the claims made by the builder for the work done by the builder himself or the reasonableness of the 6% project management fee. For these reasons, the Adjudicator failed to form a view of what was properly payable having regard to the true construction of the contract and the true merits of the claim.

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Liquidators – get those payment claims and adjudications happening before the SOPA amendments commence

Seymour Whyte Construction Pty Ltd v Ostwald Bros Pty Ltd (In liquidation) [2019] NSWCA 11

Richard Crawford | Adriaan van der Merwe | China Waters

Key points and significance

The NSW Court of Appeal found that:

- payment claim adjudication applications under works contracts that are served outside out of the 20 business day time limit in section 17(3)(d) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) causes a resulting adjudication determination to be invalid;
- the failure to recover pursuant to an invalid adjudication determination under section 16(2)(a)(ii) of the Act does not preclude claimants from recovery of unpaid payment schedule amounts under section 16(2)(a)(i). This is as the recovery mechanisms in section 16(2)(a) of the Act operate as alternative recovery mechanisms, and while section 16(2)(a) requires claimants to choose a recovery mechanism, claimants who do not serve a valid adjudication application will still be entitled to recovery under section 16(2)(a)(i); and
- the Act is capable of operating for the benefit of a builder or subcontractor who has gone into liquidation. This is as the entitlement to a progress payment arises under the Act by reference to a contractual undertaking and not to the physical performance of work. Claims can be made even after a contract has expired, for example, in relation to final payments.

The finding that builders or subcontractors in liquidation may receive the benefit of the Act is contrary to the Victorian Court of Appeal's decision in *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 (**Façade**). The NSW Court of Appeal held that *Façade* is *'plainly wrong and should not be followed'*, creating a disparity between the NSW and Victorian positions.

***Note**, however, that recent amendments to the NSW Act will, when they come into force, expressly provide that a corporation in liquidation cannot serve a payment claim on a person or take action to enforce a payment claim (including making an adjudication application) (section 32B).*

Facts

Seymour Whyte Constructions Pty Ltd (**Seymour**) appealed the decision in *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq)* [2018] NSWSC 412 which concerned a claim for a progress payment made under a works contract between Seymour as contractor and Ostwald Bros Pty Ltd (**Ostwald**) as subcontractor.

Ostwald served a progress payment claim for $6,351,066.08, and Seymour in return provided a payment schedule for $2,505,237.58. Ostwald subsequently went into administration and was wound up, after which it submitted an adjudication application pursuant to section 16(2)(a)(ii) for $5,074,218.27. Seymour contended that the application was invalid as it was served outside the time limit in the Act, being 20 business days from the due date of payment.

Ostwald contended that the application was not made out of time due to a contractual error and sought the court to rectify the works contract by altering the payment due date. In the alternative, Oswald sought recovery of the payment schedule amount as a statutory debt under section 16(2)(a)(i). The primary judge held that the works contract could be rectified and validated the adjudication application. The primary judge also held that if the Ostwald adjudication application was invalid, it would be permitted to pursue a claim under section 16(2)(a)(i).

Seymour contended that by Ostwald's election so serve an adjudication application, Ostwald was precluded from seeking to recover the payment schedule amount as a debt pursuant to section 16(2)(a)(i), even if the adjudication application was considered invalid under the contract.

Seymour further submitted that the reasoning in *Façade* should be followed in holding that the Act does not apply to those in liquidation. It contended that this is contrary to the fundamental purpose of the Act, which is to ensure financial survival of builders.

The three issues on appeal were:

- whether the primary judge erred in rectifying the works contract by altering the payment due date;
- if found in the affirmative, whether Ostwald was then precluded from recovering the payment schedule amount as a statutory debt under section 16(2)(a)(i); and
- if Ostwald is not precluded, whether a builder or subcontractor in liquidation has the benefit of the Act as was held in *Façade*.

Decision

The NSW Court of Appeal held that:

- the primary judge erred in rectifying the works contract and that the adjudication application was served out of time;
- Ostwald was permitted to pursue the payment schedule amount as a statutory debt under section 16(2)(a)(i) as section 16(2)(a)(ii) was not utilised; and
- builders and subcontractors in liquidation are entitled to receive the benefit of the Act.

Rectification

The court held the works contract could not be rectified by construction under common law as, although there was arguably an inconsistency in the drafting, it could not be construed that the adjudication application was made in time. Rectification in equity was also not possible as there was no common intention between parties to allow for the extended time period. The adjudication application was made out of time and therefore invalid.

Recovering the payment schedule amount – section 16(2)(a)

Section 16(2)(a) provides claimants with two mutually exclusive alternatives for recovery when there has been a failure to pay a payment schedule amount. Claimants may choose to recover the unpaid portion as a debt or as an adjudication application, but not both. The court, however, held that a claimant will only be taken to have 'made' an adjudication application when complying with the requirements of section 17(3)(d), which include submitting the adjudication application on time. A claimant who has not met the requirements will not have utilised the provision and is still entitled to recovery under section 16(2)(a)(i).

As Ostwald's adjudication application was invalid, it was entitled to recovery of the statutory debt under section 16(2)(a)(i).

Claimants in liquidation

Section 8 of the Act establishes the right of persons to make a progress payment. The court held that the language of section 8(1), when read in the light of the analysis of *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR, created an entitlement to a progress payment on satisfaction of two conditions, being that:

- the person has undertaken to carry out construction work under the contract; and
- a reference date under the contract has arisen.

The court held there was nothing in the Act to imply that a progress payment could not arise unless the builder continued to carry out construction work. The entitlement is a reference to a contractual undertaking and not to the physical performance of work. Reference dates are also dates set by contractual force and can arise regardless of whether the claimant is actually carrying out work on that particular date.

Claims are therefore without any reference to physical work and may be made even after contracts have expired, for example, in relation to final payments. Ostwald's entitlement to a progress payment is therefore unaffected by its liquidation.

The court held that the conclusion in *Façade*, being that the payment regime of the Act is not available to companies in liquidation since such companies cannot carry out construction work and thus do not satisfy the requirements for 'a claimant', *'was plainly wrong and should not be followed'*.

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QUEENSLAND

Penalty interest unavailable for work done prior to contract novation

Australian Building Insurance Services Pty Ltd v CGU Insurance Limited [2019] QDC 18

David Pearce | Simon Smith | Hugh Pegler

Key point and significance

When a contract is novated, a right to issue invoices for work performed prior to the novation may accrue. This does not give rise to a right to claim penalty interest for the late payment of an invoice issued in respect of such work. Penalty interest can only be claimed by the party that was the contracted party at the time the work was performed.

Facts

Australian Building Insurance Services Pty Ltd (**ABIS**) purchased a building insurance claims repair work business from IW & CA Price Constructions Pty Ltd (**Price Constructions**). The business supplied various insurance-related services, under a preferred supplier agreement, to CGU Insurance Limited (**CGU**).

At the time of settlement, there were insurance repair works that Price Constructions had commenced but not completed. ABIS completed those works as well as other new works. CGU paid all invoices issued for these works; however, some payments were delayed until the Supreme Court declared that ABIS was entitled to the payments for the work done by Price Constructions.

ABIS then brought a claim for interest on the late progress payments pursuant to section 67P of the *Queensland Building Services Authority Act 1991* (Qld) (**Act**) (now section 67P of the *Queensland Building and Construction Commission Act 1991* (Qld)). Section 67P requires a contracting party for a building contract to pay the contracted party interest at a penalty rate of 10% plus the Reserve Bank's 90-day bill rate on unpaid progress payments.

There were four issues in dispute:

- whether the supplier agreement was a contract or other arrangement for carrying out building work;
- whether the relevant payment time had passed at the time that the payments were made in accordance with section 67P(1)(c) of the Act;
- whether the sale of the business and consent by all parties to the assignment of Price Construction's rights and obligations under the supplier agreement to ABIS effected a novation of the supplier agreement; and
- whether, by reason of the novation, ABIS was entitled to interest at the penalty rate in accordance with section 67P of the Act.

Decision

The court dismissed ABIS's claim for interest at the penalty rate.

The court held that the contract was a contract or other arrangement for carrying out building work and that the relevant payment time had passed. CGU conceded that a novation had been effected; however, the court held that ABIS was not entitled to interest as the amount claimed was in respect of work which was

done by Price Constructions when it was the contracted party. The fact that Price Constructions had novated the right to payment for those works to ABIS did not mean that ABIS was entitled to penalty interest. ABIS's entitlement to deliver invoices for the work did not retrospectively make it the contracted party for the purposes of the Act.

While some of ABIS's claim did relate to work done after the novation (to which they might be entitled to interest at the penalty rate), the quantum of that work could not be determined on the evidence available. Accordingly, ABIS's claim failed.

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Showing your working doesn't give rise to a right to recalculate

Crofts v Multisport Concepts Pty Ltd (in liq) [2019] QCA 26

Andrew Orford | Luke Trimarchi | Hugh Pegler

Key point

The standard form Deed of Covenant and Assurance (**Deed**) issued by the Queensland Building and Construction Commission (**QBCC**) provides that the sum to be paid by the covenantor on written demand is to be calculated pursuant to an independent audit report. Parties cannot rely on wording in the Deed which explains how such an amount is to be calculated to displace an ascertainable amount already published in the audit report.

Significance

Covenantors which are party to a Deed of Covenant and Assurance with the QBCC and are subject to a written demand will be held to their bargain to pay the sum calculated in accordance with an independent audit report (now called the *Minimum Financial Requirements Report*), even where the calculations under the audit report are incorrect.

Facts

The appellant, George Andrew Crofts (**Covenantor**), executed a Deed with Multisport Concepts Pty Ltd (**Licensee**) and the Queensland Building Services Authority, now the QBCC. The Deed was required to enable the Licensee to apply for a building licence and was in a form approved under the *Queensland Building Services Authority Act 1991* (Qld).

The Deed provided that if the winding up of the Licensee commenced, upon written demand, the Covenantor would pay a 'Defined Amount' to the Licensee.

The Deed stated that the Defined Amount was to be: *'as stated in the Independent Review Report or Audit Report provided to the* [QBCC] *from time to time. The amount is the difference between the Net Tangible Assets held by the Licensee and the Net Tangible Assets required for the Licensee's Allowable Annual Turnover'*.

On 2 November 2015, the winding up of the Licensee commenced and liquidators were appointed. On 12 February 2016, the liquidators demanded the Defined Amount, that being $170,000, pursuant to an Independent Review Report produced by a chartered accountant. No amount was paid. The liquidators then sought and were successful in obtaining summary judgment for the full amount plus interest. The Covenantor appealed that judgment.

The Covenantor submitted that the expert report had understated the amount of Net Tangible Assets, which led to an error in the calculation of the Defined Amount. The Covenantor argued that the second sentence in the extracted definition above acted as a qualifier to the first, whereby the first amount could be displaced if it was shown not to be the true difference between the Net Tangible Assets held by the Licensee and the Net Tangible Assets required for the Licensee's Allowable Annual Turnover. The respondent liquidator rejected this submission and contended, in accordance with the findings of the applications judge, that the second sentence in the definition did not offer a vehicle to challenge the amount stated.

Decision

The appeal was dismissed and the Covenantor was ordered to pay the liquidators' costs.

Gotterson JA (with whom Fraser and Burns JJ agreed) held that the Covenantor's interpretation lacked contextual support. The capitalised terms in the second sentence were defined in and were to be calculated in accordance with the policy governing the report referred to in the first, and so did not represent some alternative method of calculation. It was considered highly unlikely that parties would intend an amount stated in an Independent Review Report to be a provisional amount liable to displacement by some other unascertained sum.

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Adjudicator's interpretation of payment claim found to be unreviewable by court

Fulton Hogan Construction Pty Ltd v QH & M Birt Pty Ltd & Ors [2019] QSC 23

Michael Creedon | Sarah Ferrett | Nadine Eccleston

Key point

An adjudicator appointed under the *Building and Construction Industry Payments Act 2009* (Qld) (**BCIPA**) is now less likely to fall into jurisdictional error where he or she determines a claim which is not expressly itemised in a payment claim but is otherwise mathematically apparent. This decision provides support for the view that an adjudicator is empowered to determine the scope of the payment claim, and a reasonable but erroneous determination of this nature is not be reviewable by a court and will not amount to jurisdictional error. It is also authority for the proposition that an adjudicator may not determine an applicable rate for works otherwise than as submitted by the parties in the absence of clear explanation as to how the rate forming the basis of such a valuation is derived.

Significance

Claimants can breathe easier with the knowledge that adjudicators will feel more comfortable determining claims which are evident from a payment claim or arise for determination as a function of the payment claim and payment schedule, even if such claims are not individually itemised. This is particularly relevant to the adjudication of disputes over backcharges and set-offs where the value of such set-offs are not expressly claimed in the payment claim but, rather, are put into issue in the payment schedule.

Facts

Fulton Hogan Construction Pty Ltd (**Fulton Hogan**) engaged QH & M Birt Pty Ltd (**QBirt**) to undertake construction work within the meaning of the BCIPA.

On 2 March 2018, QBirt submitted a payment claim in the amount of $2,873,141.98 in accordance with the relevant construction contract (**January payment claim**). In the prior payment schedule of December 2017 (**December 2017 payment schedule**), Fulton Hogan had applied a number of set-offs in the amount of $426,362.16. Responding with its payment schedule to the January payment claim, Fulton Hogan expressly maintained those set-offs (**January payment schedule**). The January payment claim, which did not expressly refer to those set-off amounts, was ultimately referred to adjudication under the BCIPA.

The parties were in dispute as to whether the January payment claim took into account those set-off amounts. Fulton Hogan argued that the set-offs were outside the scope of the adjudication, as they were not items claimed in the January payment claim or the January payment schedule and therefore not subject for determination by the adjudicator. QBirt argued that its rejection of those set-off amounts was mathematically evident from the amount claimed in the January payment claim and Fulton Hogan's express reference to those set-off amounts in the January payment schedule.

On 30 July 2018, the adjudicator delivered a decision which held that *'by extension of the mathematics'* he was satisfied that both parties were aware that the set-offs were disputed. The adjudicator reversed the set-offs and required Fulton Hogan to pay QBirt a total of $1,300,608.14 including GST.

Fulton Hogan commenced proceedings to challenge the adjudication decision. One of the arguments advanced by Fulton Hogan was that an adjudicator was required to determine the value of the payment claim and that the adjudicator had exceeded his jurisdiction by determining the set-offs because they were not included as claimed items in the payment claim.

Fulton Hogan also argued that the adjudicator erred in the application of a corrected amount paid and in applying a rate to certain works which was not contended by either party without giving sufficient reasons for taking that course.

Decision

Ryan J found in favour of QBirt in relation to both the application of the amount previously paid and the set-offs but invalidated the part of the adjudication determination that applied the rate which was not contended for by either party.

Her Honour held that the adjudicator was empowered to determine whether the set-offs were disputed in the January payment claim.

In doing so, her Honour confirmed that the interpretation of a payment claim is a matter for the adjudicator and that it is *'for the adjudicator to determine the scope of claim and his decision in that regard in this case cannot be reviewed'*. It follows that there was no jurisdictional error and the adjudicator's decision was valid.

It seems likely that the same principles will apply where it is argued that an adjudicator has awarded more than the amount claimed or where it is argued that a claim *'has not been made at all'*.

Notably, her Honour left open the possibility that these principles may not apply to a case with sufficiently distinguishable facts.

Her Honour held that the adjudicator had acted beyond the scope of his jurisdiction in applying a rate not contended for by either party without sufficient explanation in the decision as well as in failing to afford the opportunity to the parties to make submissions on the rate that was applied and invalidated the relevant part of the decision infected by that error.

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Victoria

Liquidated damages: DBCA 'no fault' termination payments

Fullinfaw v Neil Fletcher Design Pty Ltd [2019] VSC 142

Owen Cooper | Tom Johnstone | Samantha Tyrrell

Key Point

Where an owner terminates a major domestic building contract using the section 41(1) 'no fault' provision of the *Domestic Building Contracts Act 1995* (Vic) (**Act**), the owner's right to accrued liquidated damages for delay can be taken into account when determining the builder's entitlement to payment under the contract.

Facts

Enid Fullinfaw and Nigel Fullinfaw (**owners**) appealed a Victorian Civil and Administrative Tribunal (**VCAT**) decision which dismissed their liquidated damages claim against Neil Fletcher Design Pty Ltd (**builder**). The owners validly terminated their major domestic building contract pursuant to section 41(1) of the Act. The owners submitted that clause 40.1 of the contract and section 8(d) of the Act allowed them to deduct liquidated damages for delay from the outstanding payments due to the builder.

The builder claimed that the owners were not entitled to deduct liquidated damages because the owners' underlying entitlement to the liquidated damages was still in dispute.

Tribunal's decision

The tribunal held that liquidated damages (as distinct from general damages) may be deducted from outstanding payments due to the builder under section 41 of the Act where the entitlement to such damages has crystallised prior to the date of termination.

However, the tribunal found that because the issue of an extension of time was in dispute, the owners had no crystallised entitlement. Accordingly, the tribunal dismissed the owners' claim.

Ground of appeal

The owners appealed the tribunal's decision on the basis that the tribunal erred in finding that the claim for liquidated damages had not crystallised.

Decision

The court set aside the tribunal's orders on the basis that the liquidated damages had crystallised.

Garde J found that clause 40.1 of the contract characterised the liquidated damages as a debt accruing on a weekly basis from the date the work should have been completed. Therefore, his Honour held that the liquidated damages crystallised before the termination of the contract.

His Honour held that in determining the builder's entitlements under section 41(6) of the Act, the builder's rights as well as its obligations under the contract needed to be considered. On this basis, the accrued liquidated damages were a relevant factor to take into account when determining the builder's entitlement to payment under the contract.

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Victorian Security of Payment legislation: Identification requirements for payment claims

John Beever (Aust) Pty Limited v Paper Australia Pty Ltd [2019] VSC 126

Peter Wood | Tom Johnstone | Isobel Carmody

Key point

The Victorian Supreme Court has confirmed that the context in which a payment claim is served (such as the background knowledge of the parties from their past dealings and prior exchanges of information) can be taken into account when determining whether a payment claim sufficiently identifies the construction work to which the claim relates – a requirement under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**).

This case also serves as a useful reminder that the requirement for a payment claim to expressly state that it is a 'payment claim made under the Act' will be strictly enforced.

Facts

The dispute related to whether payment claims made by John Beever (Aust) Pty Limited (**contractor**) on Paper Australia Pty Ltd (**principal**) complied with the requirements of the Act.

Identification requirement: description of the works

The principal challenged the first two claims on the basis that they did not meet the identification requirement in section 14(2)(c) of the Act, that is, that they must identify the construction work or related goods and services to which the progress payment relates. Each of the first two claims was a tax invoice which contained only a limited description of the construction works by reference to the relevant project number, contract, period of work and the amount claimed.

Statement requirement: statement that the claim is under the Act

The third claim was challenged on the basis that neither the claim nor the email which attached the claim contained a statement that the claim was a payment claim made under the Act, contrary to section 14(2)(e) of the Act.

Decision

The court granted summary judgment in respect of the first two claims on the basis that they satisfied the identification requirement under section 14(2)(c). However, the court denied summary judgment in respect of the third claim on the basis that the claim did not meet the statement requirement under section 14(2)(e).

First two claims: identification requirement

The court held that, while the information provided on the face of each of the first two payment claims was not, of itself, sufficient to identify the construction work to which the progress payment related, the court held that *'the objective context and circumstances'* in which the payment claims were prepared can be taken into account.

After reviewing the authorities, the court said the following principles are clear:

- the test of whether a claim is a payment claim under the Act is objective;
- compliance is not overly demanding and should not be approached in an unduly technical manner;
- the identification requirement is that the payment claim reasonably identifies the construction works such that the basis of the claim is reasonably comprehensible to the recipient when considered objectively; and
- in evaluating the sufficiency of that identification, the background knowledge of the parties and the past dealings may be taken into account.

Accordingly, the court was able to take into account email correspondence between the principal and contractor regarding the construction works that were the subject of each of the claims. On the basis of this information, the court found that the claims were able to reasonably identify to the principal the construction work to which they related.

Third claim: statement requirement

The court reaffirmed the notion that the statement requirement is of critical importance as it notifies the recipient that it must comply with the time requirements under the Act. Strict observance of the statement requirement under section 14(2)(e) is required of a person seeking payment under the Act.

As neither the third claim nor the email by which it was served contained a statement that the claim was made under the Act, the court found that the statement requirement was not met.

Interestingly, the court suggested that subsequent correspondence can remedy an earlier claim which would have otherwise failed to comply with the statement requirement. The court held that the test is whether, viewed objectively, the recipient would have reasonably concluded that a claim is a payment claim under the Act. In this case, the subsequent email sent by the contractor referred to various previous claims and was found to fail the statement requirement.

The court considered that it was not relevant that the principal had treated the third claim as a payment claim under the Act by providing a payment schedule as this only evidenced the subjective perception of one of the parties and not the objective circumstances.

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Western Australia

Pleading requirements for global claims in WA

Built Environs WA Pty Ltd v Perth Airport Pty Ltd [No 2] [2019] WASC 76

Tom French | Candice Lamb | Penny Bond

Key point

The Supreme Court of Western Australia has affirmed the law relating to global claims in a construction context in the recent decision of *Built Environs WA Pty Ltd v Perth Airport Pty Ltd [No 2] [2019] WASC 76*.

Where a party, such as a contractor, elects to run a global claim or total costs claim, the court has identified that it is necessary for:

- causation of loss to be properly particularised on the pleadings; and
- the party making the claim to plead that no alternate causes of loss apply, apart from matters the responsibility of the other party. such as the principal.

Significance

The Supreme Court of Western Australia has affirmed the line of authority on global claims set out in *DM Drainage & Constructions Pty Ltd as Trustee for the DM Unit Trust t/as DM Civil v Karara Mining Ltd* [2014] WASC 170 (***DM Drainage***) .

The case is significant because it suggests the court may expect a plaintiff to explicitly commit to running a global costs claim or modified total costs claim and will require diligent pleading of the matters the subject of the claim in terms of causation, loss and ruling out its own contribution.

Facts

Background

The decision of *Built Environs WA Pty Ltd v Perth Airport Pty Ltd [No 2] [2019] WASC 76* (**Built Environs [No 2]**) relates to a larger construction dispute between the plaintiff contractor, Built Environs WA Pty Ltd (**Built Environs**), and the defendant principal, Perth Airport Pty Ltd (**Perth Airport**), over works to terminals at the Perth Airport.

In this instance, the defendant sought to strike out certain paragraphs of the plaintiff's Statement of Claim (**SoC**) on the basis that those paragraphs were so deficient so as to be legally embarrassing.

Prior to this application, a number of practical procedural steps had been taken in an attempt to avoid striking out the relevant paragraphs of the SoC. The defendant originally raised concern about deficiencies in the plaintiff's SoC in October 2017. At that time, the court accepted the defendant's concern and, in December 2017, the plaintiff was ordered to provide an expert report to resolve what his Honour described as *'an obvious lack of reasonable detail'*.

This lack of detail was in respect of drawing deficiencies alleged by the plaintiff. The SoC had not identified the specific defects said to constitute the drawing deficiencies, the consequences of those defects or the cause of loss suffered by reason of specific defects, such as financial loss.

Broadly speaking, the result was that it was unclear whether the plaintiff was making a global claim for all of its additional costs in performing the contract, or a modified total costs claim for only those additional costs for which the defendant was responsible (accepting that some costs may have been caused by its own errors or inefficiencies).

This decision followed provision of the anticipated expert report, which the court described as 'threadbare'. The defendant claimed the report did not assist in properly particularising the deficient pleas and failed to explain causation of the plaintiff's claimed financial loss and damage.

Consideration

The court considered and affirmed the observations relating to global claims in *DM Drainage* as stating the law relevant to global claims in Western Australia.

In *DM Drainage*, the court defined a global claim as:

> [*O]ne in which a plaintiff claiming under a construction contract contends that there were multiple interacting events for which the defendant is responsible and, rather than attempting to identify (if it were possible) the precise loss from each event, the plaintiff pursues a claim for the global loss which the plaintiff says was caused by all the events for which the defendant is responsible.*

In that case, the court held that a global claim is only permissible where it is impractical to disentangle that part of the loss which is attributable to each head of claim, and where that situation has not been brought about by the delay or other conduct of the plaintiff. The court concluded that, for a total costs claim to succeed, the contractor must rule out any causes of losses and expense apart from matters the responsibility of the principal. The same is required of a modified total costs claim.

In light of the above, the court in *Built Environs [No 2]* considered the key issue in the current case was the viability of proceeding to trial *'where no detail at all about causation of financial damage is given'*. The court accordingly held that the offending paragraphs of the plaintiff's SoC should be struck out as embarrassing.

However, the court stated that the plaintiff would be allowed (in principle) to amend its SoC to correct the deficiencies on terms, those terms being that it:

- plead, and commit to, a global claim or modified total costs claim;
- have an accompanying plea which excludes alternative causes for its loss such that there were no operative causes of its loss apart from the matters which were the responsibility of the defendant; and
- if it is a global claim, provide proper particulars of causation of loss.

The court found that if the plaintiff was to seek leave to amend on these terms it should submit a minute of amended SoC to the court and the plaintiff was to confer with the defendant on that minute before presenting it to the court.

Decision

Ultimately, in the context of such a large and long-running dispute, the approach taken by the court affirmed the prior authority of *DM Drainage* and provided a clear, yet strict, way forward for the parties in light of multiple attempts to rectify a deficient SoC. Depending on the next steps taken by the parties, the court may well be moved to strike out the deficient paragraphs of the SoC at some point in the future.

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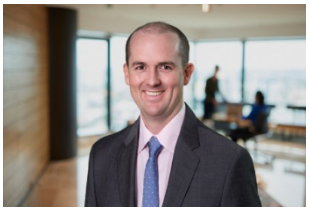

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