Construction Law Update

March 2020

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Legislative update

NEW SOUTH WALES

The NSW Building and Development Certifiers Regulation 2020: What you need to know

Building and Development Certifiers Regulation 2020

Andrew Hales | Lauren Topper

The NSW Government has finalised the *Building and Development Certifiers Regulation 2020* (**Regulation**) to support the *Building and Development Certifiers Act 2018* (**Act**). The Act and Regulation will both commence on 1 July 2020.

Upon commencement, the Act and the Regulation will abolish the Building Professionals Board by replacing the existing framework under the *Building Professionals Act 2005* and the *Building Professionals Regulation 2007* and move the regulation of certifiers to Fair Trading NSW.

Key changes

- Certifiers will no longer be accredited; instead, certifiers must be registered by the Secretary of the Department of Finance (**Secretary**).
- There are new classes of registration for certifiers authorising the performance of different classes of certification work. An applicant must satisfy the prescribed qualifications and experience requirements regarding the relevant class (schedule 3 of the Regulation). First time applicants must complete a registration exam conducted by the Secretary, whilst registered certifiers must satisfy the continuing professional development requirements (schedule 4 of the Regulation).
- Certifiers must have in place professional indemnity insurance which complies with the Regulation and indemnifies the certifier for all certification work performed by that individual.
- Before being engaged, certifiers must provide consumers with consumer information explaining the functions certifiers must perform and what is expected of them.
- Certifiers may only carry out certification work under a written contract which complies with the Regulation.
- The powers of the Secretary will be expanded, so the Secretary may:
  - place conditions on a certifier's licence, including to issue a standard or methodology (ie a practice guide) as a condition of the certifier's licence;
  - reward low-risk certifiers by extending the duration of their licence registration from one year to five years; and
  - issue a written notice on the certifier to show-cause as to why disciplinary action should not be taken.
- Certifiers will be prohibited from providing professional services regarding design and compliance under the Building Code of Australia, and acting as the principal certifier for the same development.
- In certain circumstances, a principal certifier is to be appointed by the Secretary (or under the Regulation) to ensure greater independence of certifiers
- Certifiers must comply with the new Code of Conduct (schedule 5 of the Regulation), which contains the standard of conduct and professionalism expected from registered certifiers when performing certification functions. A failure to comply with the Code of Conduct carries a maximum penalty of $11,000 for an individual and $22,000 for a body corporate per offence.

Note: A reference to a 'certifier' in this article means any person undertaking certification work, in New South Wales, within the meaning of the Act and the Regulation. A registered certifier includes those who were accredited under the *Building Professionals Act 2005* or the *Environmental Planning and Assessment Act 1979* (or both).

Looking forward

Industry participants must make sure they are prepared for the 1 July 2020 commencement date.

Whilst there is no immediate impact by the new regulatory framework, we anticipate that these regulatory reforms will cause delays to the delivery of services by certifiers as the industry adjusts to the new landscape arising from their new obligations. This will involve coming to terms with the new restrictions on providing professional services regarding design and compliance under the Building Code of Australia for a development and acting as principal certifier for the same development.

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In courts around the world

ENGLAND & WALES

COVID-19 – a valid reason to postpone an adjudication?

MillChris Developments Ltd v Waters [2020] 4 WLUK 45

Andrew Hales | Jessie Jagger | Jack McFadden

Key point and significance

This Technology and Construction Court (**Court**) decision is the first decision we have seen which directly addresses the consequences of COVID-19 in a construction context. The Court's ruling suggests that the construction industry and associated dispute resolution mechanisms will not simply stop or be postponed until lockdown measures are lifted.

Participants in the construction sector in the UK cannot use COVID-19 as a panacea for non-compliances (or anticipated non-compliances) with court orders and alternative dispute resolution timeframes. Those seeking relief should be able to substantiate, with explanation and evidence, how the COVID-19 pandemic has actually prevented compliance.

Facts

MillChris Developments Ltd (**contractor**) had carried out works on Waters' (**home owner**) property. On 23 March 2020, the home owner commenced adjudication. The adjudicator directed that evidence was to be submitted by 3 April and a site visit to occur on 14 April.

The contractor, who had ceased trading in November 2019, wrote to the adjudicator advising that it could not comply with the proposed deadlines because of the COVID-19 pandemic and the associated lockdown measures enacted by the government. The contractor proposed that the adjudication should be postponed until the lockdown had been lifted.

The adjudicator rejected the application to postpone but proposed a two-week extension to the timetable. This was rejected by the contractor.

The contractor applied to the Court for an injunction restraining the home owner from proceeding with the adjudication, arguing that if the adjudication went ahead, this would be contrary to the rules of natural justice because:

- the contractor did not have sufficient time to prepare due to the COVID-19 pandemic and it was no longer trading;
- its solicitor had been directed to self-isolate making it difficult to obtain the required evidence; and
- it would be unfair to proceed with a site visit as its representatives could not attend and there was insufficient time to appoint an independent surveyor.

Decision

Jefford J refused the application for injunctive relief, deciding that the adjudication would proceed.

The Court noted that it should only exercise its discretion to grant an injunction in exceptional circumstances. The Court had to be satisfied there was a serious issue to be tried in that the adjudication would be conducted in breach of natural justice, with the inevitable result that it would be unenforceable. The Court acknowledged that granting an injunction on this basis would be unprecedented but considered this may be warranted where, for example, the adjudicator had demonstrated that she or he only intended to hear from one party in the adjudication.

Considering the contractor's submissions, the Court acknowledged the tight timeframes in which issues had to be addressed in any adjudication. However, the contactor had not addressed why the documents could not be delivered or scanned to its solicitor or others or accounted for why it had not attempted to contact witnesses in relation to the adjudication. The Court noted that the issues that the contractor was experiencing in obtaining evidence and contacting witnesses could have been overcome had the adjudicator's reasonable two-week extension of the time frame been accepted.

Further, the parties to an adjudication had no right to be present at a site visit. While it was likely that the home owner would be present at the site visit as the owner of the property, arrangements could be made for the site visit to be recorded or for the contractor to draw specific matters to the adjudicator's attention before the site visit.

In summary, the contractor's application for injunctive relief failed because it had not demonstrated that the COVID-19 crisis and resulting effects would render the adjudication process and determination a breach of natural justice. There was no serious issue to be tried which would require the adjudication to be halted.

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In the Australian courts

COMMONWEALTH

Knowing the relevance of a question before it is asked

Ehrke v Australian Building and Construction Commissioner [2020] FCA 267

Andrew Hales | Jessie Jagger | Lauren Topper

Key point and significance

The Federal Court gave some guidance in relation to the validity, or otherwise, of examination notices served by the Australian Building and Construction Commissioner (**Commissioner**) requiring a person to attend to answer questions.

Facts

On 11 October 2018, the Administrative Appeals Tribunal (**tribunal**) issued an examination notice directed to Millie Ehrke (**applicant**). The examination notice required the applicant to attend before the Commissioner to answer questions relevant to an investigation.

The applicant made an application seeking a declaration that the examination notice was invalid because it:

- failed to comply with the principles developed in a series of cases about coercive notices;
- was not in the form prescribed by section 61C of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (**BCI Act**); and
- failed to allow her to ascertain whether any questions asked were relevant to the investigation.

The full text of the examination notice can be found *here*. The examination notice provided that:

> 1. *The investigation relates to whether, between 04 July to 06 July 2018, Mr Edward Bland and the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) through its officials, officers, employees or agents contravened:*

a. *Section 348 of the Fair Work Act 2009 (**FWA**) by organising or taking action against Mutliplex [sic] Constructions Pty Ltd (**Multiplex**) with intent to coerce Mutliplex, or a third person, to engage in an industrial activity, namely to comply with a request made by the CFMMEU to remove Mr Christopher Cray from his position at the Brisbane Quarter Project.*
b. *Section 46 of the BCI Act by organising or engaging in unlawful industrial action at the Brisbane Quarter Project.*

The applicant complained that her connection with the named participants or the Brisbane Quarter Project, was not clear from the examination notice and that the notice particulars were inadequate. The Commissioner denied that inadequate particulars had been provided but gave additional details (again, please see *here* for the full text).

The regulations made under the BCI Act provide the form that an examination notice must take (**Form 3**). Form 3 states that the recipient of an examination notice is only required to answer questions 'relevant' to the investigation into the suspected contravention.

The applicant's argument that the notice was invalid was based on a body of authorities dealing with coercive notices issued under other statutes including the *Trade Practices Act 1975* (Cth), the *Workplace Relations Act 1996* (Cth) and the *Fair Work Act 2009* (Cth) (**coercive notice caselaw**). The applicant argued the coercive notice caselaw provided that a person who receives an examination notice should:

- be able to ascertain from the face of the notice whether it is a notice that the Commissioner could issue; and
- whether the questions asked are 'relevant' to the investigation into the suspected contravention.

Based on the applicant's submission, the examination notice did not give the requisite insight.

Decision

The court held that the examination notice was valid.

The coercive notice caselaw principles did not apply. The statutes referred to in those cases did not mandate specific forms to be used, whereas the applicant could ascertain validity as a notice because the examination notice was in the required Form 3, despite adding non-standard information.

Further, the coercive notice caselaw dealt with production of information and documents, as opposed to answering questions. Therefore, the principles did not apply. The court held that only upon attending and hearing the questions can it be judged whether the particulars in the examination notice are adequate to demonstrate that the questions relate to the investigation.

The court noted as a word of warning to the Commissioner that by preparing an examination notice which contained only vague particulars of the suspected contravention, the Commissioner may have created 'a rod for his own back' because a person called for questioning may find it more difficult to refuse to answer a question on the grounds of relevance if a notice is more particularised.

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NEW SOUTH WALES

A take on take out notices and show cause notices

Duffy Kennedy Pty Ltd v Galileo Miranda Nominee Pty Ltd [2020] NSWCA 25

Andrew Hales | Maciej Getta | Jenny Cohen

Key points and significance

Before issuing a take out notice a principal and principal's representative (or superintendent depending on the powers conferred in a contract) should ensure that thorough steps are taken to comply with contractual procedures before issuing a show cause notice and subsequently should carefully consider a contractor's response.

The following points are relevant for such notices:

- Where a contract confers on a principal's representative the power to issue a show cause notice, this does not require independent involvement from the principal, as this would be uncommercial.
- A principal's viewpoint on a contractor's response to a show cause notice may be informed by statements made during a without prejudice meeting, as this privilege only applies as a rule of evidence.
- A principal's genuine consideration of a contractor's response to a show cause notice is not jeopardised if a principal makes plans about issuing a take out notice before receiving the contractor's response.
- Security covers liabilities up to the take out notice and in the period following the take out notice.

Facts

The facts were reported in our September 2019 edition of *Construction Law Update*.

In summary, Duffy Kennedy Pty Ltd (**contractor**) entered into a design and construct contract with Galileo Miranda Nominee Pty Ltd (**principal**) for developing residential apartments in Miranda in New South Wales. The contractor suspended works because interest that had accrued on overdue progress payments remained unpaid to the contractor. The principal issued a notice to show cause (**show cause notice**) under the contract due to the suspension and the contractor's failure to meet practical completion. The principal issued a notice taking out the work from the hands of the contractor (**take out notice**) after being unsatisfied with the contractor's response. The contractor claimed that the principal's conduct was repudiatory and purported to terminate the contract.

The proceedings turned on a consideration of these questions:

1. Was the contractor entitled to suspend works due to the non-payment of interest?
2. Was the show cause notice validly issued under the contract having regard to the involvement of the principal's representative?
3. Was the take out notice validly issued?
4. Was the principal's representative precluded from relying on information obtained during a without prejudice meeting?
5. Was the contractor entitled to the return of the security after the take out notice was issued?

Decision

The Court of Appeal unanimously dismissed the contractor's appeal and affirmed the primary judge's findings in favour of the principal on the above questions. As the findings on the first question were summarised in the *September 2019 edition*, this summary will focus on the second question onwards.

Validity of show cause notice

The show cause notice was issued on the principal's letterhead, rather than the principal representative's letterhead, where the contract granted this right to the principal's representative. Despite this, the court held that the show cause notice was validly issued and was satisfied that the principal's representative had formed its own view as evidence was led which revealed that the principal's representative provided comments and edits to the show cause notice drafted by the principal. The court noted however that the principal's representative did not have to exercise its judgement independently of the principal and that it would be an 'unbusinesslike construction' to preclude the involvement of the principal.

Validity of take out notice

Evidence was led which revealed that the principal instructed the principal's representative to prepare for next steps once the work had been taken out of the contractor's hands, before receiving the contractor's response to the show cause notice. The court held that making plans in advance against the possibility that the show cause notice would be unsatisfactory did not mean that the principal did not genuinely consider the contractor's response to the show cause notice once it was received. That there was no written communication or record from the principal's representative proving it had reviewed the contractor's response did not change the court's view.

Information obtained from without prejudice meeting

Before the contractor responding to the show cause notice, the contractor stated at a without prejudice meeting which indicated it did not intend to comply with the principal's directions unless they were accepted

as variations to the contract. After reviewing authorities on this principle of law, the court held that the principal could rely on these statements in considering the contractor's response to the show cause notice, despite the meeting being on a without prejudice basis. This is because without prejudice privilege only applies as a rule of evidence when objections are made during proceedings. The rule does not extend beyond this scope and has no application when considering the operation and compliance with a contractual provision, or in considering objective facts ascertained during negotiations.

Release of security after take out notice

While the contract was silent about the return of security once work had been taken out of the contractor's hands, the contractor claimed that it was implied that the security would be released given that the contractor no longer had obligations of performance under the contract. The court disagreed and held that while the contractor's obligation to execute the works had ceased, it was still in a contractual relationship, with ongoing obligations to the principal. Security was to cover liabilities accrued up to the point of the take out notice and during the period after the take out notice.

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Construction sites – Who is really in control?

Hallmark Construction Pty Ltd v Brett Harford; Copeland Building Services Pty Ltd v Hallmark Construction Pty Ltd; Hallmark Construction Pty Ltd v Harford Transport Pty Ltd [2020] NSWCA 41

Chern Tan | Terri Raciti | Stephanie Screnci

Key points and significance

This decision reinforces past decisions of the courts to closely scrutinise the roles of parties on construction sites to ascertain precisely which entity had control and direction over the area and the works being performed. There appears to be a gradual shift away from the notion that employers' non-delegable duty to its employees are paramount. Courts will hold those entities with the control, direction and supervision of a worker at the relevant time liable. This includes through vicarious liability even if the negligent worker was not employed by the entity, but was otherwise within its control so a master/servant relationship existed in substance.

The decision also illustrates that Courts of Appeal may be prepared to overturn apportionments of liability determined by the trial judge, in the appropriate case.

Facts

On 24 May 2013, Brett Harford drove a truck laden with pallets containing building blocks to a construction site in West Homebush (**Site**). At the time, Mr Harford was employed by Harford Transport Pty Ltd (**Harford Transport**). Mr Harford was directed, by the Site supervisor, Mr Isaia, to unload the pallets on a dirt roadway on the Site. Prior to unloading his truck, Mr Harford observed an unladen pallet lying on the ground. Unknown to him the unladen pallet was covering a four metre deep drainage pit. While in moving the pallet, Mr Harford stepped forward and fell into the drainage pit, suffering serious injury.

Mr Harford commenced proceedings in the NSW Supreme Court for damages against the principal contractor, Hallmark Construction Pty Ltd (**principal contractor**). The principal contractor cross-claimed against the subcontracted builder, Copeland Building Services Pty Ltd (**builder**); Mr Harford's employer, Harford Transport; and two insurance companies responsible for the liabilities of ANM Building Services Pty Ltd (**ANM**), the deemed employer of Mr Isaia.

At first instance, the primary judge handed down judgment for Mr Harford as against the principal contractor and the builder, with liability being apportioned equally between them. The claims against ANM and Harford Transport were dismissed and Mr Harford was not found to have been contributorily negligent.

The principal contractor and the builder appealed to the NSW Court of Appeal.

Decision

The builder's liability (including vicarious liability)

While the builder had no contractual relationship with Mr Harford or Harford Transport, the evidence established that it was a joint occupier of the site (with the principal contractor) and exercised *'dominion and control'* over the area where Mr Harford's incident occurred. The NSWCA held that a reasonable person in the builder's position had to take precautions against the risk of harm arising from the uncovered penetration into the drainage pit.

The trial judge found that Mr Isaia, acting in his capacity as Site manager and therefore the builder's agent, meant that the builder was liable for the negligent acts of Mr Isaia, in particular, his failure to warn Mr Harford of the unprotected penetration in the drainage pit. On appeal, the NSWCA held that the trial judge erred in attributing direct liability, through agency, to the builder, because of Mr Isaia's conduct, as Mr Isaia did not have authority to bind the builder. However, the NSWCA held that the trial judge did not err in the alternative finding that Mr Isaia was a part of the builder's workforce and under its control, so the builder was vicariously liable for Mr Isaia's conduct.

Apportionment of liability

At first instance, the trial judge adopted a 50/50 apportionment of liability between the principal contractor and the builder. On appeal, the principal contractor challenged the apportionment because the builder was in *'de facto control'* of the area in which the delivery took place and its representative (Mr Isaia) instructed Mr Harford as to where to deliver the load. The principal contractor argued that, in those circumstances, a greater portion of responsibility ought to be attributed to the builder.

The NSWCA agreed with the principal contractor's submissions, noting that the primary judge's basis for treating the principal contractor as having equal liability with the builder was flawed. The NSWCA held that the immediate level of control available to the builder and the responsibility of the builder for Mr Harford's presence on site and near the unguarded penetration required a greater allocation of responsibility to it. The NSWCA varied the apportionment to allocate 25% against the principal contractor and 75% against the builder.

Hartford Transport's liability

It was not in dispute that Harford Transport, as Mr Harford's employer, had a duty to take reasonable steps to provide Mr Harford with a safe system of work. However, if Mr Harford was the employee and the person responsible for implementing and devising safe working conditions, the NSWCA considered it artificial to distinguish the actions of Mr Harford in each of his two roles. In those situations, the NSWCA considered that the preferable course is to stand back from the known events and ask, in a prospective, objective way, what a reasonable employer would have done in the circumstances (under section 5B of the *Civil Liability Act 2002* (NSW) (**CLA**).

In the circumstances, the NSWCA held there was no causal connection between any breach of duty by Harford Transport and Mr Harford's injuries and the principal contractor's claim against Harford Transport was dismissed.

Contributory negligence

On appeal, the principal contractor submitted that the trial judge had erred by failing to make a reduction for contributory negligence where Mr Harford knew, amongst other things, that the Site was dynamic, large, and complex; and that building sites are inherently dangerous and may contain penetrations. The principal contractor further submitted that, at the time of delivery, the Site was dark and was absent of any artificial light source, meaning that Mr Harford ought to have exercised more care and caution in performing his duties.

The NSWCA rejected this argument, stating that Mr Harford's general knowledge of building sites would not have alerted him to the possibility that a penetration might be concealed under a wooden pallet at this site. There was no basis to conclude that a reasonable person, in Mr Harford's shoes, would have known or ought to have known that the unsecured wooden pallet was covering a penetration. The NSWCA agreed not to make any allowance for contributory negligence.

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Suspension does not affect accrued rights to a progress payment

Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd [2020] NSWSC 208

Andrew Hales | Ashleigh Blumor

Key points and significance

Although no new reference date arose and the right to payment was suspended after work was taken out of the builder's hands, a right to a progress payment that existed before suspension could be pursued under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**).

If a claimant's position is that an adjudicator has failed to determine an adjudication application within the time allowed by section 21(3) of the Act, it is unnecessary for the claimant to commence proceedings for a declaration to that effect before exercising its rights under section 26(2) of the Act to withdraw the application and make a new adjudication application.

Facts

Parrwood Pty Ltd (**developer**) engaged Trinity Constructions (Aust) Pty Ltd (**builder**) under an amended AS4902-2000 contract to design and construct 59 apartments in a development known as the Affinity Project. In September 2019, the developer exercised its right to take work out of the builder's hands for substantial breach under clause 39.4 of the contract. The builder served a payment claim to which the developer issued a payment schedule for a scheduled amount of $nil.

On 15 November 2019, an adjudicator made a determination that no amount was owing to the builder because when the payment claim was made, the developer had validly exercised its right to take work out of the builder's hands, so that payment under the contract was suspended until it became due under clause 39.6 (**first determination**).

On 22 November 2019, the builder purported to withdraw the adjudication application by notice served on the first adjudicator under section 26 of the Act and made a new adjudication application. The second adjudicator decided that the first adjudicator had failed to perform his statutory function because he declined to determine the payment claim, meaning that the first determination was void. There was nothing preventing the second adjudicator from determining the claim herself, which she did in favour of the builder (**second determination**).

The developer sought a declaration in the Supreme Court of New South Wales that the second determination was void. By cross-summons filed without leave of the court, the builder sought a declaration that the first determination was void.

Ball J had to determine:

- whether it was open to the builder to contend that the first determination was void where the builder hadn't applied to set it aside before the second adjudication and if so, whether it was void; and
- whether the payment claim was invalid due to it being accompanied by a supporting statement which the builder allegedly knew to be false or misleading in a material particular.

Decision

Ball J granted the builder leave to file the cross-summons and held that the first determination was void. His Honour decided that it had been clear since the builder purported to withdraw the adjudication application that it thought the first determination was void and that the cross-summons simply formalised the position that existed before it was filed. His Honour noted that the builder could have commenced proceedings after the first determination was handed down, but that it was *'neither necessary nor sufficient to protect its position for it to do so … because it was open to [the builder] to take the view that the determination was void and proceed on that basis'*.

It was not disputed that on and from 25 August 2019, the builder became entitled to a progress payment under section 8 of the Act and as a result became entitled to serve a payment claim regarding that progress payment. Under section 22 of the Act, the adjudicator appointed to adjudicate that claim had to determine

the progress payment to be paid to the builder. The first adjudicator did not do this and instead concluded that because of decision to take the work out of the builder's hands, the right to a progress payment was suspended until the final reckoning mechanism in clause 39.6 had operated. The first adjudicator was wrong, as a right to a progress payment under the Act had arisen regarding a reference date that arose before suspension occurred.

In relation to the developer's claim that the supporting statement contained a false statement, his Honour was not satisfied that the developer had discharged its onus of proof, particularly as it was a serious allegation and had to be established by clear evidence. His Honour held that the three subcontractors not disclosed in the supporting statement were not engaged by the builder, but by a related company, and there was no evidence from which it could be inferred that the builder knew that the supporting statement was false.

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Builders beware – the EP&A Act statutory limitation period may not always be available

Sydney Capitol Hotels Pty Ltd v Bandelle Pty Ltd [2019] NSWSC 1825

Andrew Hales | Nicholas Grewal | David Bell | Jack McFadden

Key point and significance

Section 6.20 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) will not apply to statute-bar a civil action arising out of or in connection with defective building work if a claim is brought by a plaintiff only accidentally, incidentally or indirectly affected by the defective building work. Rather, the statutory limitation period effected by section 6.20 should apply narrowly rather than in accordance with its plain and grammatical meaning.

Facts

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

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

The builder pleaded that the tenant's claim was statute barred because of section 6.20 of the EP&A Act, which provides that *'a civil action for loss of damage arising out of or in connection with defective building work … cannot be brought more than 10 years after the date of completion of the work'*.

Hammerschlag J determined that the key issue was whether, on the proper construction of the section, the loss or damage suffered by the tenant arose *'out of or in connection with defective building work'*.

The tenant argued that the section should be construed narrowly to only apply to protect a party who does defective building work from a claim by a person with whom that party contracted to do work.

Decision

Hammerschlag J determined that section 6.20 of the EP&A Act did not apply and that the tenant's claim was therefore not statute barred by that section. His Honour followed the decision in *Dinov v Alliance Australia Insurance Limited* (2017) 96 NSWLR 98, which itself approved of the reasoning in *Australian Rail Track Corporation Ltd v Leighton Contractors Pty Ltd* [2003] VSC 189.

In *Australian Rail*, Bongiorno J considered a provision in a statute to the same general effect as section 6.20 of the EP&A Act and concluded that, despite the ordinary and grammatical meaning of the provision, it should not be construed to include claims brought by plaintiffs but accidentally, incidentally or indirectly affected by what might be described as defective building work. His Honour considered that the purpose of

the provision was not to change the general law of tortious liability but to regulate liability of building owners and building practitioners. Therefore, giving the provision its ordinary and grammatical meaning would give it an operation obviously not intended having regard to relevant parliamentary materials.

This reasoning was referred to with approval in *Dinov* by the New South Wales Court of Appeal, which considered that the section imposes an absolute time bar for protecting those who otherwise would have some legal liability in damages for defective building work.

Despite acknowledging that he would have reached a different conclusion if deciding the matter afresh, Hammerschlag J felt bound to follow the Court of Appeal and concluded that section 6.20 of the EP&A Act should be given a restricted meaning to give effect to the purpose of the legislation. His Honour concluded that the loss and damage was caused by the defective building work in only an accidental, incidental or indirect sense and therefore the defence must be struck out.

It remains to be seen whether this decision will be appealed.

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How do you construe an irrevocable waiver in a deed? Does privity entitle *any* party to a deed to enforce a covenant in it?

Wollongong Coal Ltd v Gujarat NRE India Pty Ltd [2019] NSWCA 135

Andrew Hales | Zoe Zhang

Key points and significance

A clause in a deed by which a party agreed to immediately irrevocably waive existing rights of indemnity or subrogation and promised not to exercise any specified rights at any stage, was immediately effective and not wholly promissory.

In concluding that privity does not entitle *any* party to a deed to enforce a covenant in it, the Court of Appeal discussed the doctrine of privity and how it may apply to multi-party deeds.

Facts

Wollongong Coal Ltd (**WCL**) and Gujarat NRE India Pty Ltd (**GNI**) were both members of Gujarat Group. WCL entered into an agreement with UIL (Singapore) Pte Ltd (**UIL**) under which UIL paid WCL $20 million in exchange for the supply of coal (**agreement**). GNI was the guarantor under this agreement and offered security by way of 150 million fully paid ordinary shares in WCL. The agreement was breached by WCL in failing to supply the coal. GNI, WCL and UIL entered into an override deed for repayment by instalments, but WCL again defaulted on its obligations. UIL called on the security and sold the WCL shares.

A dispute arose over whether GNI had unilaterally renounced its right of indemnity as guarantor for WCL through clause 5.3 'Waiver of rights' of the override deed, which provided that: *'[GNI] irrevocably waives and must not exercise any right of indemnity or subrogation which it otherwise might be entitled to claim and enforce against or in respect of [WLC].'*

Typically as a guarantor, GNI would have a right of indemnity, however, WCL argued that clause 5.3 of the override deed was a unilateral renunciation of that right. GNI argued that clause 5.3 did not prevent GNI from enforcing its right of indemnity against WCL because, as a matter of construction, the waiver under clause 5.3 was solely to benefit UIL, therefore only UIL could enforce the waiver. WCL also contented that privity entitled it to enforce clause 5.3 and that clause 5.3 was *'clear and unambiguous'* such that there was no occasion to consider the surrounding circumstances or the commercial purpose of the override deed in construing the clause.

GNI also made a claim for a separate debt of $6,565,398 in the proceedings. WCL claimed that, although there was no mutuality of debts, it had a defence of equitable set-off as between its debt to GNI and a judgment debt of $59 million it had obtained against Gujarat India for the supply of coal over many years.

GNI obtained judgment on both claims as the primary judge held that WCL could not enforce clause 5.3 and WLC's defence of equitable set-off was not made out. WLC appealed.

Decision

The Court of Appeal allowed WLC's appeal on the construction of clause 5.3 and denied WLC's appeal on the equitable set-off point.

The Court held that WCL could rely on GNI's irrevocable waiver of its right of indemnity because properly construed, clause 5.3 amounted to an immediately effective and unilateral renunciation of GNI's right of indemnity and a promise not to exercise any specified rights at any stage. In construing clause 5.3 in its context, the Court dismissed WLC's submission that clause 5.3 was *'clear and unambiguous'*.

WLC's submission that privity entitled any party to a deed to enforce a covenant in it was also held to be misconceived. Leeming JA made key observations about privity in deeds as distinct from privity in agreements. Leeming JA also commented that the doctrine of privity is not a *'positive right'* in that, at common law, privity is used to prevent third parties from suing on terms of an agreement to which they are not a party. However, it cannot be used in the reverse, as argued by WLC in its submissions.

Regarding WLC's defence of equitable set-off, the Court held that WLC failed to establish that Gujarat India's debt to it impeached its indebtedness to GNI. There was insufficient connection between the two claims so GNI could rely on one claim without considering the other.

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QUEENSLAND

Directors on notice! The QBCC does not always need to notify of its decisions

Crocker v Queensland Building and Construction Commission [2020] QSC 24

David Pearce | Allie Flack | Cameron Gee

Key point and significance

The Queensland Building and Construction Commission (**QBCC**) need not provide notice to directors caught under section 111C of the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**) when it makes a decision regarding a building company.

Facts

This was an application for judicial review before the Supreme Court of Queensland of several decisions made by the QBCC regarding three claims by homeowners on the insurance fund under the QBCC Act. The claims concerned three building contracts made between homeowners and Statewide Residential Building Inspection and Maintenance Services Pty Ltd (**Statewide**) for properties at Norman Park, Ashgrove and Toowong. Section 111C of the QBCC Act provides that when a company owes the QBCC an amount because of payment made by the QBCC on a claim under the insurance scheme, the company's liability attaches to the company's director. The QBCC issued notices to Mr Crocker, in his capacity as a director of Statewide, under section 111C demanding payment for the amounts claimed by the homeowners.

Mr Crocker sought relief for the following QBCC decisions:

1. to issue notice under section 111C of the QBCC Act;
2. that Mr Crocker was a director of Statewide;
3. to accept the claims (of homeowners) in relation to the three relevant properties;
4. to issue a notice to rectify any defects for the properties;
5. to issue a scope of works; and
6. to make payments on the claims.

Decision

Decision 1 and 2

Mr Crocker sought declaratory relief from liability for the potential debt claimed by QBCC. Jackson J considered that whether or not Mr Crocker was liable for the debt depended on application of the statute, but it did not depend on any administrative decision which was reviewable by the court. The application for relief of decisions 1 and 2 was refused.

Decision 3

Jackson J again refused review of decision 3 because the QBCC Act does not require or authorise a separate decision to receive and accept an insurance claim from a homeowner by the QBCC.

Decision 4

Jackson J held that judicial review was not available for decision 4 as no decision was made by the QBCC to issue a notice to rectify any defects for the properties under section 73(1) of the QBCC Act.

Decision 5 - 6

Jackson J did, however, consider the decisions to issue a scope of works and to make payments on the claims were reviewable by way of sections 86(1) (g) to (h) of the QBCC Act and were characterised as administrative decisions made under an enactment. Mr Crocker claimed he wasn't afforded procedural fairness and that the QBCC had acted unreasonably. His Honour refused these grounds except for the QBCC's decision to make a payment on the claim for the Toowong property. There, a deed of settlement existed between the homeowner and Statewide under which Statewide was released of any further liability. Clause 6.15 of the statutory insurance policy provides that where a contractor is released from liability, so too is the QBCC under the policy. The court concluded that it was unreasonable for the QBCC to pay the claim for the Toowong property and ordered the decision to approve the insurance claim be set aside.

Notice to directors

Mr Crocker further submitted that, by operation of section 111C of the QBCC Act, notice of decisions must be given to the directors captured by that section and to the building company itself. Jackson J found that, absent any statutory requirement to do so, the operation of section 111C was not a sufficient reason to imply it into the statute. None of the decisions were reviewable on this basis.

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Natural justice claims are not always found at the end of the rainbow!

Rainbow Builders Pty Ltd v State of Queensland [2020] QSC 25

Andrew Orford | Sarah Ferrett | Danielle le Poidevin

Key point

A party, aggrieved by an arbitral award, must consider its own conduct when considering whether to challenge an arbitral award based on a denial of natural justice. A party that has not objected to an arbitration being expanded or availed itself of the opportunity to cross examine witnesses or make further submissions cannot then complain of a denial of natural justice. A failure of an arbitrator to require additional evidence or assistance from the parties will not amount to a denial of natural justice.

Facts

Rainbow Builders Proprietary Limited (**builder**) applied to set aside an arbitral award under section 34(2) of the *Commercial Arbitration Act 2013* (Qld) (**Act**). The State of Queensland (**State**) cross-applied to enforce the same arbitral award under section 35 of the Act.

The underlying dispute referred to arbitration arose out of a construction contract between the builder and the State. The builder claimed retention moneys (amounting to $57,750 excluding GST). This claim was rejected by the State, which issued a counterclaim for $410,000 for defective workmanship.

In the arbitration, the State delivered an expert report by a quantity surveyor (**relevant expert**) regarding the costs of repairing the defective works (**first report**). The expert later produced a supplementary report, which estimated the costs of rectification to be $455,375 (**supplementary report**).

The arbitrator issued three partial awards in:

- February 2019 (**February award**), which found that waterproofing was not carried out according to the contract and sought submissions from the parties regarding rectification costs (**quantum issue**);
- August 2019 (**August award**), awarding rectification costs of $218,995 to the State and seeking clarification from the parties regarding whether Corian sheeting referred in the expert report was a rectification cost that ought to be included in the final award (**Corian sheeting issue**); and
- September 2019 (**September award**), which determined that the Corian sheeting issue was a rectification cost and awarded a further $50,152 in costs to the State.

The builder alleged that it had been denied natural justice during the arbitration as:

1. the State's counterclaim was outside the scope of the arbitral dispute and ought not to have been considered by the arbitrator; and
2. the builder had not been given a reasonable opportunity to present its case and had not been treated with equality.

Decision

The builder's application was dismissed and the State's cross-application to enforce the September award succeeded.

Was the State's claim outside the scope of the arbitral dispute?

Jackson J rejected the contention that the State's counterclaim was outside of the arbitral dispute. Parties to a dispute may, by agreement, expand the scope of their dispute. The builder had agreed to the dispute's expanded scope by:

- allowing the State to submit its counterclaim as part of the arbitral proceeding; and
- raising no objection to the State's counterclaim during the arbitration.

Had the builder been given a reasonable opportunity to present its case?

Jackson J rejected the builder's complaint it had not cross-examined the expert witness regarding his supplementary report, nor made submissions or provided evidence regarding the Corian sheeting issue, because:

- the builder did not seek an opportunity to cross-examine the expert witness; instead, the builder made written submissions relying on an alternative expert witness statement. This was an implied invitation for the arbitrator to determine the quantum issue and the August award; and
- the builder failed to respond to the arbitrator's request for further advice regarding the Corian sheeting issue. The arbitrator noted the builder's failure to respond when he advised the parties he intended to accept and incorporate Corian sheeting costs into the State's award.

Had the State and Rainbow been treated equally?

The builder argued it had not been treated equally in the arbitral process because:

- the arbitrator had not decided all issues in issuing the February award;
- the disagreement between the two expert witnesses regarding the quantum issue had not been resolved by way of a joint meeting of experts, joint report or cross-examination before the arbitrator; and
- the arbitrator delayed his decision in relation to the Corian sheeting issue as the State had failed to provide sufficient and clear evidence.

Jackson J again rejected the builder's claim and determined that the arbitrator did not fail to treat the builder equally:

- in choosing not to determine all issues in the February award; or
- by not engaging in further processes to resolve differences between the supplementary expert reports.

The arbitrator did not have adequate evidence (from the relevant expert's first report) to determine quantum, and it was within the power of the arbitrator to make a partial award. Further, neither party had requested an additional process to resolve the differences between the supplementary reports and these are not a procedural pre-condition to deciding disputed questions of expert opinion. Jackson J commented that, while it was understandable that the builder would feel aggrieved that the arbitrator had deferred final resolution of the quantum issue twice, this did not amount to a failure to treat the builder equally.

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VICTORIA

Pitfalls of trusting third parties – payment claims under the Security of Payment Act

Rudyard Pty Ltd v ASEA 1 Pty Ltd [2019] VCC 1995

Nikki Miller | Tom Johnstone | James Mullins

Significance

The court will take a broad approach to identify a valid payment claim served under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**). Perfect precision is not required for a payment claim to reasonably identify the construction work for which the claim is served. To fill in any gaps, the court may consider the knowledge of a third party with apparent or ostensible authority to act on the principal's behalf.

Facts

ASEA 1 Pty Ltd (**respondent**) contracted Rudyard Pty Ltd (**claimant**) to coordinate design work for a residential apartment development. In meetings, the sole director and secretary of the respondent made statements about the respondent's association with a third party, Mr Knight. The claimant purported to serve, by email and by post to Mr Knight, three payment claims on the respondent totalling $343,750 (**payment claims**) dated 24 April 2019, 25 May 2019 and 29 June 2019. Mr Knight did not notify the respondent of the payment claims. When the respondent issued no payment schedule in response, the claimant sought judgment against the respondent under section 16(2) of the Act.

The respondent submitted that judgment should not be given because, among other things, the payment claims:

- were not properly served on the respondent; and
- failed to identify the construction work to which the payments claims related.

Decision

The court held that the third payment claim was validly served and entered judgment for the claimant for $343,750, with interest compounding monthly.

Service

Neither the contract nor the Act permitted service by email, but in any event, Woodward J held that service by post was effective under both the contract and the Act. This was despite the misspelling of the respondent's name as 'ASEA Pty Ltd' on the payment claims. The court confirmed that it will not permit minor errors to thwart the Act's objective.

Identification of construction work

His Honour rejected the respondent's submissions that it was not apparent from the payment claims what works were performed by the claimant. Citing the test outlined by *Lyons J in John Beever (Aust) Pty Ltd v Paper Australia Pty Ltd* [2019] VSC 126, his Honour held that the court could consider the parties' background knowledge when evaluating whether construction work was sufficiently identified, demonstrated by their past dealings and prior exchanges.

His Honour further held that identification is sufficient if made to a third party with apparent or ostensible authority to act on the respondent's behalf. A history of email and documentation exchanges between

Mr Knight and the claimant, with an 'authorisation of engagement' executed by Mr Knight on the respondent's behalf purporting to appoint a superintendent under the contract, evidenced this authority.

While emails to Mr Knight were not valid means of service, they evidenced the respondent's knowledge of the content of the payment claims. Notwithstanding that the first two payment claims were vague, his Honour held that a reasonable observer in the respondent's position (with the knowledge of Mr Knight attributed to it) would have readily comprehended the construction work claimed under the third payment claim. This was sufficient for the respondent to issue a payment schedule as required by the Act.

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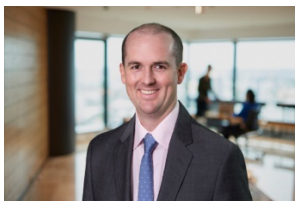

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