Construction Law Update

March-April 2021

Contents

A 'nuts and bolts' management decision: proceedings to be transferred from Western Australia to South Australia in ongoing contractual dispute

Primero Group Ltd v Wärtsilä Australia Pty Ltd [2021] WASC 44

Legislative update

VICTORIA

Electronic signing and remote witnessing in Victoria

Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021

Key points

The *Justice Legislation Amendment (System Enhancement and Other Matters) Act 2021* (**Act**) passed both houses of the Victorian Parliament on 16 March 2021, making permanent certain temporary measures enacted under prior COVID-19-related legislation.

Some of the key changes involve amendments to the *Electronic Transactions (Victoria) Act 2000* (Vic) (**ETA**) which now allow for electronic execution and remote witnessing of certain documents.

These changes are effective on and from 26 April 2021.

Electronic execution of deeds

The Act introduces into the ETA a new section 12A which provides that deeds in Victoria may now be:

- created in electronic form; and
- signed, sealed and delivered by electronic execution.

These amendments are important as they address prior ambiguities regarding the common law position on the form and execution of deeds in Victoria.

Witnessing of documents by audio visual link

One of the other key changes arising from the Act is the insertion of a new section 12 of the ETA covering the requirement under a Victorian law for the presence of a witness, signatory or other person. This can now be met by the witness, signatory or other person being present by audio visual link. Additionally, a witness does not need to be physically within Victoria when witnessing by audio visual link (unless otherwise required by a Victorian law).

The ETA does not define 'audio visual link' but provides these examples:

- observing another person by audio visual link in order to sign a document confirming that person's identity; and
- observing, by audio visual link, another person writing that other person's signature in order to sign a document as a witness to that other person's signature.

As under the prior COVID-19-related legislation, the witness must write or insert a statement indicating that the document was witnessed using an audio-visual link in accordance with section 12 of the ETA.

| back to *Contents*

In the Australian courts

NEW SOUTH WALES

Purpose trumps writing (sometimes) – A contractor's scope of work may not be limited to that expressly written in the contract

***Oikos Constructions Pty Ltd t/as Lars Fischer Construction v Ostin & Anor* [2020] NSWCA 358**

Andrew Hales | Jessica Nesbit | Jonin Ngo

Key points and significance

A contractor's scope of work may be extended to include work not specifically included or expressed in the scope of work if the person for whom work is done expressly made known to the contractor the particular purpose for which the work was required or the result the work is desired to achieve. This outcome arises by virtue of the implied statutory warranties set out in section 18B of the *Home Building Act 1989* (NSW) (**HB Act**).

A contractor should be wary of its obligations in tort to carry out its work with reasonable care, especially in light of the recent duty of care imposed by Part 4 of the *Design and Building Practitioners Act 2020* (NSW).

Facts

This case is an appeal from the decision of the District Court of NSW concerning the interpretation of a contract entered into by a former owner of a residential property (**Property**) (a Mr and Mrs Simons (**the Simons**)) and the appellant, Oikos Constructions Pty Ltd (**Oikos**), under which Oikos contracted to perform water ingress remediation works at the Property (**contract**).

In the District Court, Oikos was found liable to the subsequent owners (**owners**) (the respondents to the appeal) for damages for breach of statutory warranties under the HB Act and was ordered to pay them $168,885. As the owners were the immediate successors in title to the Simons, the owners were entitled to the protection of the statutory warranties pursuant to section 18D(1) of the HB Act.

Central to the District Court's decision was the finding that not only was Oikos required to undertake the works described in Oikos' email of 13 May 2011, but that Oikos was also required to undertake such further works as was reasonably necessary to prevent the entry of water from those areas of the Property then identified. This was based on the court's interpretation of Oikos' email of 13 May 2011 which identified the likely defects allowing water entry in each area and the works believed to be necessary to rectify the defect and where in each case the description of work was imprecise.

Key events

The key events are as follows:

- On 22 October 2009, the Property was sold by Mr Amodeo to the Simons.
- In March 2011, the owners (who were intending to purchase the Property) obtained an inspection report which disclosed various items requiring remediation.
- On 13 May 2011, Oikos sent an email to Mr Simons which outlined a list of rectification works. Oikos emphasised that the scope of works outlined in this email addressed what were then perceived to be the most likely causes of water ingress in the locations specified and was not intended to rectify all possible causes of water ingress.
- In or around 15 May 2011, Oikos prepared the contract, a counterpart of which was signed by Mrs Simons. Under the heading of *'Description of works/materials'*, Oikos inserted *'Works as described in our email dated 13.5.11…'*.
- On 4 July 2011, Oikos commenced its remediation works at the Property.
- On 11 July 2011, Oikos sent an email to the owners' consultant copying Mr Simons stating that:

'At this stage we will only do the works as outlined in the scope of works but we want everyone to be aware that this is just a partial rectification of the overall problem and the outcome might be jeopardised by the remaining defects. Because of this we cannot guarantee the rectification of the problems.

- On 12 July 2011, Mr Simons replied to Oikos stating that:

  'The agreed scope of work needs to be finalised prior to settlement which is next Friday – don't worry about any extra work'

- On 1 August 2011, Oikos completed its remediation works at the Property.
- On 2 August 2011, the Property was sold by the Simons to the owners.
- In November/December 2011, the owners noticed continuing waterproofing issues and a report by the owners' consultant revealed water penetration into various areas of the Property.

Grounds of Appeal

Oikos appealed the decision of the District Court on a number of grounds, including that the primary judge:

- Ground 1 – had misconstrued the contract by finding that Oikos was required to carry out repair works beyond its scope of works;
- Ground 2 – erred in permitting the owners to rely on an amended Scott Schedule (this is a document which allows parties to list out the defective works the subject of the dispute and provide comments in respect of each item of work) and amended expert evidence that expanded the case against Oikos, when Oikos had made forensic decisions, including not calling evidence from an independent expert, based on the case originally pleaded against it;
- Ground 3 – erred in refusing to admit certain evidence and refusing to permit Oikos to amend its defence to rely upon section 18F of the HB Act. Section 18F of the HB Act provides that:

  '…it is a defence for the defendant to prove that the deficiencies of which the plaintiff complains arise from instructions given by the person for whom the work was done contrary to the advice in writing of the defendant or person who did the work.'

- Ground 4 – erred in his findings of breach;
- Ground 5 – erred in his assessment of quantum; and
- Ground 6 – erred in not rejecting the owners' claim against Oikos, because the warranties had been enforced against Mr Amodeo under section 18D of the HB Act and the owners did not establish that they had suffered loss for which they had not been compensated by Mr Amodeo.

Decision

The Court of Appeal allowed the appeal in part. Central to that decision was the finding that the primary judge had erred in his assessment of the scope of works Oikos was contractually obliged to undertake. The Court of Appeal awarded damages to the owners in the sum of $35,548.

Ground 1

In respect of Ground 1 and the question of what Oikos' scope of works was, the Court of Appeal found that:

- the objective purpose of the contract was to address the then identified most likely causes of water penetration, and not to address all potential causes of water penetration;
- the defective installation of the cavity flashings was not one of the *'identified mechanisms'* for the ingress of water. Although Oikos (acting reasonably) ought to have perceived that the cavity flashings had been wrongly installed, this does not mean that the work to rectify the cavity flashings was necessarily incidental to the work Oikos agreed to perform (ie there is a difference between contracting to do work which imports the doing of things necessarily incidental to the proper performance of that work as against doing specified remedial work designed to address a problem whose causes are not known);
- just because the description of work in Oikos' email of 13 May 2011 was imprecise (and which led to the cost of doing the works doubling that of the original estimate), this did not mean that the scope of works was as wide as the owners contended. More work was required to be done than initially anticipated to address what was then perceived to be the likely causes of water penetration; and

- the HB Act statutory warranties may, in certain circumstances, expand a contractor's scope of work. In this case, there was no evidence that the Simons had disclosed a particular purpose to Oikos that the works were to satisfy, therefore, the HB Act warranties did not expand Oikos' scope of works beyond what was agreed. It may have been the owners' purpose, but the owners did not contract with Oikos.

It is worth noting that on a couple of occasions the Court of Appeal referred to the fact that the owners did not sue Oikos in tort (ie on the basis that Oikos owed the owners a duty of care to identify the sources or likely sources of water penetration).

Ground 2

The Court of Appeal held that the primary judge did not err in permitting the owners to rely on the amended Scott Schedule and amended expert evidence. The amended Scott Schedule raised matters which went beyond the works required by the Contract but the primary judge was entitled to take the view that this would not prejudice Oikos because the dispute concerned a question of law (ie whether the contract required the works the subject of the amended Scott Schedule to be performed), rather than a question of fact (ie whether the underlying defect existed). What was relevant to the construction of the contract (and the scope of works) was the terms of the contract and the objective factual matrix surrounding the contract which was not in dispute between the parties.

Ground 3

The Court of Appeal held that the primary judge did not err in refusing Oikos:

- leave to rely on an email of 12 July 2011; and
- leave to amend its defence to rely on section 18F of the HB Act.

This is because:

- the email of 12 July 2011 was irrelevant to the construction of the contract. Further, Oikos had not raised any pleading that the contract had been varied; and
- Oikos' application to amend its defence was made too late which if allowed would have prejudiced the owners and necessitated an adjournment of the proceedings. The fact that the primary judge allowed the owners to expand their claim did not mean that he was obligated to allow Oikos to raise a new defence.

Ground 4 and 5

The Court of Appeal held that the primary judge erred in some respects in his findings of breach and assessment of quantum. This is partly because of his misconstruction of the contract.

Based on the evidence put forth by the parties and after disallowing the amounts allowed by the primary judge, which would have been incurred in any event as a result of those defective works for which Oikos was not responsible, the Court of Appeal found that the appropriate amount of damages should be $35,548.

Ground 6

The Court of Appeal held that the primary judge did not err in refusing Oikos leave to raise a contention that the statutory warranties had already been enforced against Mr Amodeo because the settlement agreement between the owners and Mr Amodeo included a recital which excluded the works performed by Oikos.

| back to *Contents*

When your back is against a (leaky) wall, statutory defences can't always rescue you

RBV Builders Pty Ltd v Chedra [2021] NSWCATAP 56

Andrew Hales | Maciej Getta | Emily Miers

Key point

Contract drawings and plans that form part of a construction contract are not instructions given in writing by a relevant professional independent of the builder which would enable a builder to rely on the defences to a breach of statutory warranties in section18F of the *Home Building Act 1989* (NSW) (**HB Act**). An 'instruction'

for the purpose of section 18F is *'something that occurs after the contract has been signed and something that occurs in the context of performing the work under the contract'*.

Facts

RBV Builders Pty Ltd (**builder**) was engaged by the Chedra (**owners**) under a building contract to excavate and construct a new basement storage area (including a floor, roof and Dincel walls). Following the builder's construction of the basement area, water began penetrating the Dincel walls (**alleged defect**). The owners commenced proceedings in the NSW Civil and Administrative Tribunal seeking recovery of the costs of investigating and rectifying the alleged defect.

The parties' experts prepared a joint report which concluded the alleged defect was occurring at the base of the Dincel walls as a result of the construction of the Dincel walls, placement of a guide or placement of a water stop, all of which had the potential to affect the long-term stability of the basement.

The Tribunal at first instance held that the builder's work in relation to the alleged defect was in breach of various statutory warranties; however, the builder sought to rely on the defences contained in section 18F of the HB Act (**s 18F Defence**).

Section 18F(1)(b) of the HB Act provides that a defendant can plead the defence that a breach of any of the statutory warranties arises from:

> *'reasonable reliance by the defendant on instructions given by a person who is a relevant professional acting for the person for whom the work was contracted to be done and who is independent of the defendant, being instructions given in writing before the work was done or confirmed in writing after the work was done'* (emphasis added).

The builder argued that the alleged defects arose from a design depicted on a drawing enclosed with the building contract (**Drawing**) and that the Drawing constituted an instruction for the purpose of section 18F. The drawing contained a note which required Dincel walls to be built *'to manufacturer's specification'* (**Drawing Specification**).

In interpreting the scope of an instruction for the purpose of a s 18F Defence, the Tribunal:

- found drawings or plans included in a building contract are not instructions for the purpose of s 18F; and
- concluded that an instruction is *'something that has occurred after the contract has been signed and in the context of performing work under the contract'*.

The Tribunal rejected the builder's s 18F Defence and found that:

- the Drawing and Drawing Specification were not instructions;
- the Drawing Specification required the builder to construct the walls in accordance with the Dincel Construction Manual (**Contract Instruction**); and
- the Contract Instruction was unaffected by any oral instructions on site.

The builder appealed the original decision on a number of grounds. One basis of appeal was that the Tribunal erred in finding the Drawing or Drawing Specification was not a written instruction for the purposes of a s 18F Defence.

Appellate Decision

Leave to appeal was refused and the appeal was dismissed.

The Appeal Panel held that the Tribunal was correct in concluding that contract drawings are not an instruction for the purposes of section 18F(1)(b) of the HB Act. In coming to that decision, the Appeal Panel mentioned, in obiter, that the provisions of clause 2 of schedule 2 of the HB Act would have no work to do if a builder could rely upon section 18F(1) in defence of a claim that its work fails to comply with the Building Code or a development consent, simply because the relevant work complies with the contract drawings. In that regard, clause 2 requires that the contract make provision to that effect, which implies that the result is not intended to be automatic.

| back to *Contents*

Vivat freedom of contract!

Growthbuilt Pty Ltd v Modern Touch Marble & Granite Pty Ltd [2021] NSWSC 290

Andrew Hales | Michelle Knight | Will Ryan

Key point

Freedom of contract is alive and well. If the provisions of a contract articulate a clear intention, the parties will be unable to rely on inconsistent implied terms nor exceptions to the general rule. This case upholds freedom of contract in the context of the implied terms of acting honestly, fairly and in good faith, as well as in respect of the law on penalties.

Significance

Parties need to ensure that they understand the implications of their drafting of any 'reserve' or 'unilateral' extension of time clause in a construction contract. In the context of principal-caused delay, if the principal has a unilateral power to extend the date for completion, the court will consider the particular wording of the clause to determine whether there is room to imply any terms, such as to act reasonably or honestly, fairly and in good faith. In this case, the court was not prepared to imply any term of good faith as it was inconsistent with the express terms of the contract which gave the principal an 'absolute discretion' to exercise the unilateral power but 'no obligation' to do so.

Facts

Growthbuilt Pty Limited (**builder**) entered into four subcontracts with subcontractor Modern Touch Marble & Granite Pty Limited (**subcontractor**) relating to four residential building projects.

The relevant extension of time **(EOT**) clauses in the subcontracts made the subcontractor's compliance with the procedures for submitting an EOT claim a condition precedent to any entitlement. Relevantly, clause 11 provided that:

> *'Growthbuilt may in its absolute discretion at any time and for any reason, without prejudice to its rights or the Subcontractor's obligations under this Subcontract, extend the Date for Completion, but Growthbuilt is under no obligation to extend, or to consider whether it should extend, the Date for Completion.'*

Subsequently, the builder terminated each of the subcontracts on the basis that the subcontractor had failed to complete the works on time.

The builder then commenced proceedings in the Supreme Court of New South Wales seeking liquidated damages, post-termination completion costs and the costs of certain materials. The subcontractor cross-claimed against the builder seeking to recover unpaid invoices.

At the hearing, the builder submitted that as the subcontractor had not claimed an EOT or pleaded an EOT entitlement in the proceedings, any evidence by the subcontractor contending that the builder caused delay was of no legal consequence. For this reason, the builder argued that the subcontractor could not rely on the prevention principle. The subcontractor contended that the builder's unilateral power to extend the dates for completion in the subcontracts meant that the prevention principle remained an issue.

At the hearing, Henry J considered the following issues:

- whether the subcontractor could rely on the prevention principle; and
- whether the liquidated damages clause within one of the four subcontracts was unenforceable as a penalty.

Decision

The court rejected the subcontractor's arguments and held that the builder was entitled to the monies claimed (subject to the cross-claim).

Unilateral Power

The court determined that the language of the EOT clause, which provided the builder with an 'absolute discretion' but 'no obligation' to extend the date for completion, reflected a clear intention of the parties to

confer a discretionary power on the builder and that the builder had no obligation to exercise (or consider exercising) that power to extend the date for completion. Accordingly, as the subcontractor had not complied with the contractual mechanism for claiming an EOT, it was not possible for the subcontractor to rely on the prevention principle, time was not 'at large' and liquidated damages applied.

The court, in obiter, also commented that a clause which conferred an 'absolute discretion' excluded an obligation to act reasonably, but those words alone may leave room for the implication of a good faith obligation in the exercise of a unilateral power.

Liquidated damages clause

Although the court considered that the stipulated sum for liquidated damages of $3,500 per day was on the 'high side' given the subcontract price was only $60,500, the subcontractor had not discharged its onus of proving that the sum was *'extravagant, out of all proportion or unconscionable'* to the greatest loss which may be suffered by the builder. The court considered a number of factors, including that:

- the parties agreed that the rate was a genuine pre-estimate of the builder's damages. Whilst this was not conclusive it was not irrelevant;
- it was not unreasonable to expect that the builder would have incurred costs due to a delay in the project, such as holding costs, preliminaries, site establishments costs and costs associated with the loss of opportunity to undertake other work using the resources deployed on the project;
- as a commercial builder, the builder had a commercial interest in the project being completed as soon as possible and on time; and
- there was no evidence that the subcontractor was not capable of protecting its own interests or that it was pressured into agreeing to the clause.

| back to *Contents*

QUEENSLAND

You've got mail! Failing to consider an emailed payment schedule fatal to adjudication decision

***ACP Properties (Townsville) Pty Ltd v Rodrigues Construction Group Pty Ltd & Anor* [2021] QSC 45**

Michael Creedon | Laura Berry | Mikayla Colak

Key points

In order for a payment claim to be valid under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**), it must provide sufficient identification of the work for which payment is claimed. Contractual requirements entered into between parties regarding the level of detail needed for payment claims will not be picked up when considering whether or not a payment claim is valid.

An adjudicator's failure to consider a payment schedule, in deciding an adjudication application, is a jurisdictional error, making the adjudication decision void and of no effect.

Facts

ACP Properties (Townsville) Pty Ltd (**ACP**) entered into a building contract with Rodrigues Construction Group Pty Ltd (**RDG**) by engaging it to undertake construction work in the form of refurbishing the Townsville Transit Centre.

Payment Claim

On 4 September 2020, RDG sent ACP an invoice via email, which it contended was a payment claim under the BIF Act. The invoice was accompanied by a series of annexures, including timesheets for a number of employees and supplier invoices. The employee timesheets stated the times the employees had worked but did not identify the nature or type of work. Similarly, the supplier invoices identified the supplier and the amount of the invoice but did not always identify the work or materials supplied.

Payment Schedule

On that same day, Mr Campbell of ACP sent an email in response to RDG's email, which ACP contended was a payment schedule under the BIF Act. In his email, Mr Campbell stated amongst other things that he had paid RDG in full and was not responsible for the additional charges as they were overruns for which RDG was responsible.

On 7 September 2020, Mr Campbell sent another email to RDG that ACP also contended was a payment schedule under the BIF Act. Again, the email iterated that Mr Campbell was of the belief that he had already paid in full and would not be acting upon anything sent to him. ACP did not pay any amount to RDG in respect of the invoice.

Adjudication

On 15 October 2020, RDG applied for an adjudication under the BIF Act. On 6 November 2020, the adjudicator delivered his decision that the invoice sent by RDG was a valid payment claim for the purposes of the BIF Act and that neither of the ACP emails were a payment schedule for the purposes of the BIF Act.

ACP challenged the validity of the adjudication decision on two grounds:

- first, the email containing the invoice and its annexures lacked sufficient detail to make it a payment claim within the meaning of the BIF Act; and
- secondly, the adjudicator failed to recognise either of the emails from ACP to RDG as a payment schedule within the meaning of the BIF Act.

ACP submitted that the adjudicator's failure to recognise either of the emails from ACP to RDG as a payment schedule amounted to a jurisdictional error that invalidated the adjudication decision. RDG contended that, if such an error occurred, it was within jurisdiction and would not invalidate the adjudication decision.

Decision

The court found that:

- the invoice issued by RDG was sufficiently detailed to be a payment claim within the meaning of the BIF Act; and
- each of the emails from ACP constituted a payment schedule under the BIF Act, meaning the adjudicator's conclusion to the contrary was in error.

The adjudicator's failure to consider either of the payment schedules in deciding the adjudication application, and consequential refusal to consider the related adjudication response, resulted in the adjudicator's decision being infected by jurisdictional error.

In reaching this decision, Bradley J considered the level of information contained in the invoice and the emails to determine whether they provided sufficient detail to be classified under the BIF Act as a payment claim and a payment schedule respectively.

His Honour found that a payment claim under the BIF Act must provide sufficient identification of the work for which payment is being claimed. Although the contract between the parties may have required a level of detail beyond this threshold, the requirements under the BIF Act do not require this level of detail. As a result, his Honour rejected ACP's submission that RDG was required to provide the level of detail necessary to allow the claim to be reconciled to a specific contractual obligation.

For the payment schedule, his Honour found that each of the emails sent by ACP were very clear; that is, ACP considered no amount was payable under the contract for the reasons given, and that ACP proposed to pay no amount.

As the adjudicator did not classify either of the emails as a payment schedule, he failed to properly consider the payment schedule and adjudication response provided by ACP in deciding the adjudication application. Because of this jurisdictional error, the adjudicator's decision was void and of no effect.

| back to *Contents*

Only one contract per payment claim allowed!

Ausipile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd [2021] QSC 39

Sarah Ferrett | Matt Hammond | Tia Shadford

Key point and significance

This decision confirms that a payment of claim must only deal with claims under one construction contract; otherwise it will be deemed invalid under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**).

Facts

Bothar Boring and Tunnelling (Australia) Pty Ltd (**Bothar**) entered into:

- a design and construct subcontract with Ausipile Pty Ltd (**Ausipile**) for the design and construction of a secant pile launch shaft at Quota Park, Biggera Waters; and
- an agreement for the wet hire of the Ausipile's crawler crane in order for Bothar to complete additional works under the head contract.

As a result of issues, which arose with the secant piles throughout the life of the project, Bothar held back either partial or complete payments to Ausipile under the subcontract in anticipation of significant defects which would require rectification in the future. This left three of the six payment claims that Ausipile had issued to Bothar largely unpaid (specifically, Payment Claims 4, 5 and 6).

Relevantly, Bothar did not provide a valid payment schedule in response to Payment Claim 6 (which, in addition to the claim specific to that reference date, sought payment of the unpaid amounts claimed in Payment Claims 4 and 5).

In response, Ausipile filed an originating application against Bothar seeking judgment for the outstanding amounts under Payment Claims 4, 5 and 6, pursuant to section 78(2)(a) of the BIF Act. Bothar advanced three defences in response to the application:

- Ausipile engaged in misleading and deceptive conduct by remaining silent after a conversation with a representative of Bothar indicating that, as a result of defective works, Bothar would not be assessing or paying future payment claims (and therefore not delivering payment schedules) which was followed up with a letter from Bothar confirming that, *'as discussed',* further payment under the subcontract would be withheld;
- no valid warning was given by Ausipile when initiating proceedings under section 99 of the BIF Act; and
- Payment Claim 6 was not a valid payment claim within the meaning of the BIF Act as it contained claims in relation to two separate contracts.

Decision

Wilson J dismissed the application for judgment on the basis that, while Bothar's first and second defence failed, the third defence was successfully made out. Her Honour stated that where a payment claim concerns more than one contract, that will be fatal to its validity under the BIF Act.

Her Honour rejected Ausipile's submissions that:

- the crane hire agreement was a variation of the subcontract, instead determining that it constituted a second contract between the parties. Her Honour relied upon the reasoning in *Matrix Projects (Qld) Pty Ltd v Luscombe Builders* [2013] QSC 164 to support the finding that the crane hire was a separate contract to the subcontract. Her Honour also made her determination after taking into account *'all of the circumstances'*, including the fact that the crane was hired for separate and independent work under the head contract, the scope of works did not cover the underlying purpose of the hire, and the crane remained on site some five weeks after the subcontracted works were complete and Ausipile demobilised from the site; and
- the issue of whether the payment claim related to one contract should have been deferred to an adjudication (which was ultimately not determined on the basis of the finding above).

| back to *Contents*

Will the real payment schedule please stand up?

Kangaroo Point Developments MP Property Pty Ltd v RHG Construction Fitout and Maintenance Pty Ltd [2021] QSC 30

Andrew Orford | Alex Hammerton | Daniel Szabo

Key points

Parties cannot agree to alter the statutory definition of payment schedule. Any purported payment schedule must meet the requirements in section 69 of *the Building Industry Fairness (Security of Payment) Act 2017* (**BIF Act**).

Adjudication applications must include a valid payment claim and a valid payment schedule. In this case, the Supreme Court declared void an adjudication decision because the adjudication application had attached the wrong payment schedule and was therefore invalid.

Facts

Exchange of payment claim and schedule(s)

On 27 July 2020, contractor RHG Construction Fitout and Maintenance Pty Ltd (**RHG**) served a payment claim on Kangaroo Point Developments MP Property Pty Ltd (**KPD**), the applicant in this matter. KPD's solicitors responded to RHG on 6 August 2020 advising that they held instructions to respond to the payment claim and would do so within the timeframe. The letter also expressly stated anything issued by the superintendent to RHG was not to be construed as a payment schedule for the purposes of the BIF Act.

The superintendent issued an assessment of what was due under the contract on 10 August 2020. Under the terms of the contract, this assessment was a payment schedule. KPD's lawyers wrote to RHG on 17 August 2020, within the time for a response to the payment claim, and said that their correspondence was KPD's payment schedule under section 76(1) of the BIF Act.

Adjudication

RHG lodged an adjudication application with an adjudicator. In its application, RHG nominated the superintendent's assessment as the relevant payment schedule by:

- providing the payment schedule date of 10 August 2020;
- attaching the superintendent's assessment to the application; and
- not attaching, nor referring to, the payment schedule provided by KPD's lawyers.

The adjudicator determined that the superintendent's assessment was the payment schedule and the legal correspondence was not. He decided the application on the basis that the parameters of the dispute were the payment claim and the payment schedule provided by the superintendent.

Decision

The court held that the adjudication decision was void.

The Superintendent's assessment was not a payment schedule because:

- it did not meet the mandatory requirements in section 69; and
- the lawyer's letter of 6 August 2020 revoked the superintendent's agency to issue payment schedules.

Mandatory requirements

The assessment did not meet the mandatory requirements in section 69. It did not state *'the amount of payment, if any, that the respondent proposes to make'* because it made a recommendation to KPD rather than a determination directed to RHG.

While the contract designated such assessments as payment schedules for the purposes of the BIF Act, the court held this term could not override the mandatory nature of the requirements in section 69.

Agency revoked

The superintendent's delegated authority to act as KPD's agent in issuing payment schedules had been revoked prior to the payment schedule being issued. Therefore, the assessment could not be considered KPD's payment schedule, and RHG had nominated the wrong document as the parameters of the dispute.

Effect on adjudication decision

The court found that the adjudication application was not valid because it did not meet the criteria set out in section 79(2), specifically because it did not identify the (correct) payment schedule to which the dispute related. Because of this, the adjudicator did not have the proper statutory authority to determine the dispute.

Appeal

RHG has filed an appeal in relation to this decision, in addition to applying for a stay of the orders made on 26 February 2021. We report on the outcome of the stay application *below* and we will report on the appeal in future CLU updates.

| back to *Contents*

Which prejudice is greater: Security versus loss of funds?

RHG Construction Fitout and Maintenance Pty Ltd v Kangaroo Point Developments MP Property Pty Ltd [2021] QCA 57

Andrew Orford | Alex Hammerton | Daniel Szabo

Key point

Where money has been paid into court by a defendant principal who has successfully applied to have an adjudication determination declared void, a court is unlikely to order the release of those funds in circumstances where the plaintiff contractor appeals the decision and has an arguable case. The prejudice that would be suffered by a plaintiff contractor by the loss of security of monies held in court outweighs a defendant principal's temporary loss of access to the funds.

Facts

As outlined *on the previous page*, Kangaroo Point Developments MP Property Pty Ltd (KPD) successfully challenged an adjudication decision on the basis that the applicant, RHG Construction Fitout and Maintenance Pty Ltd (RHG), had attached the 'wrong' payment schedule to its adjudication application.

Prior to the hearing of KPD's application, KPD paid the adjudicated amount, interest, and 50 per cent of the adjudicator's fee, into court.

The court, at first instance, determined that the adjudicator's decision was void because the superintendent's determination did not meet the requirements of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) **(BIF Act)**, nor was it the correct payment schedule to be used in the adjudication because KPD had revoked the superintendent's ability to act as KPD's agent in responding to the payment claim. Dalton J, who determined KPD's application, also made orders for the release of the monies held in court.

RHG filed an appeal and applied for a stay of the judge's decision pending the outcome of the appeal. In doing so RHG contended that if the funds paid into court by KPD were released, prior to the determination of the appeal, it would suffer a disadvantage.

Decision

The court granted the stay application. The court held RHG had an arguable case and that the competing prejudice to the parties in granting or not granting the stay application favoured RHG. This means that the money KPD paid into court is not to be released until the appeal is decided, despite KPD's success in having the adjudication decision declared void and otherwise being entitled to the return of the money.

Arguable case

The court found RHG had an arguable case on two points.

First, RHG contends the superintendent's payment schedule did meet the requirements under section 69 of the BIF Act. The court at first instance held that because the determination referred to a payment 'recommendation', it did not specify the amount of payment, if any, KPD proposed to make. RHG argues that the contract deemed the superintendent's determination to be a payment schedule and required KPD to pay the recommended amount. Therefore, under the contract, the recommendation is the amount KPD proposes to pay. The court found it was arguable that the contract operated so that the determination was a payment schedule.

Second, RHG argues that because it included the lawyer's letter in its submissions and referred to it as a 'second payment schedule', it did identify the payment schedule as required by section 79 of the BIF Act. The court found this too was a good arguable point.

Competing prejudice

RHG argued it would suffer prejudice if the stay was not granted because KPD would be entitled to disburse the funds as it saw fit, and therefore, if RHG succeeded on appeal, it would not have the security of funds in court to draw upon. It would then, in effect, become an unsecured creditor of KPD in the event of liquidation.

KPD argued that the money was paid into court to secure a stay of the adjudicator's decision, and as it had been overturned, the money no longer secured any obligation from RHG and should no longer remain in court. In addition, if RHG did succeed on appeal, then it would be in the same position as before in that it would have a binding decision which it could enforce as an order of a court. KPD argued it would suffer prejudice by not having access to funds to which, at law, it was entitled.

The court decided the competing prejudice weighed in favour of RHG, particularly where the appeal was to be heard within a matter of weeks. Any prejudice to KPD would therefore be short-lived, particularly as compared to the prejudice to RHG in becoming an unsecured creditor. That prospect outweighed KPD's temporary loss of access to that sum of money.

We will report on the outcome of the appeal in future editions of the CLU.

| back to *Contents*

Beware when signing off on Minimum Financial Requirements Reports!

JM Kelly Builders Pty Ltd (in liq) v Milton [2021] QSC 59

Clare Turner | Allie Flack | Tia Shadford

Key point and significance

The unpaid debts of a construction company in liquidation, particularly in circumstances where those unpaid debts contributed to a company's insolvency, may be recoverable as damages against an independent accountant who negligently signs off on a Minimum Financial Requirements Report delivered to the Queensland Building and Construction Commission (**QBCC**).

Facts

JM Kelly Builders Pty Ltd (in liq), Kawana Joinery Co Pty Ltd (in liq), Burns & Twigg Pty Ltd (in liq) and BPM Cowlrick Pty Ltd (in liq) (**plaintiffs**) were all involved in the building and construction industry. Each of the plaintiffs held a licence issued by the QBCC. As a condition of holding each licence, the plaintiffs were required to submit Minimum Financial Requirements Reports (**MFR Reports**) to the QBCC to evidence that their financial status met the QBCC's stipulated minimum financial requirements under the QBCC's MFR Policy.

The plaintiffs engaged Arnold Milton, a chartered accountant and registered auditor and the sole director of Arnold Milton Pty Ltd (**Milton**), to act as the Accepted Independent Accountant, required under the MFR Policy, to prepare and provide these MFR Reports to the QBCC. The reports, prepared by Milton, confirmed that the plaintiffs met the minimum financial requirements and the plaintiffs' licences were renewed. After the licence renewal, the plaintiffs fell into financial distress, accrued a number of debts and were ultimately placed in voluntary liquidation.

Initial application by the plaintiffs

The liquidators, on behalf of the plaintiffs, commenced proceedings against Milton and his company, seeking damages for negligence, breach of contract and misleading or deceptive conduct under the Australian Consumer Law. The liquidators alleged that Milton's actions caused inaccurate or false MFR Reports to be provided to the QBCC. The liquidators claimed that, had those reports not been sent, each of the plaintiffs' licences would have been cancelled or suspended and trading would have ceased, meaning that no further debts would have accrued.

This application

Milton applied for two orders:

- the plaintiffs' statement of claim to be struck out under rule 171(1)(a) of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**); and
- the plaintiffs' entire application to be dismissed under rule 658(1) of the UCPR, which provides that a court may, at any stage of the proceeding, on the application of a party, make any order, including a judgment, that the nature of the case requires.

Milton alleged that there were nine defects in the statement of claim which warranted it being struck out (**grounds**). Adopting the categorisation used by Flanagan J, grounds 1-5 and 9 related to allegations that the losses pleaded by the plaintiffs were not recoverable, ground 6 alleged that causation for the negligence claim had been insufficiently pleaded and grounds 7 and 8 alleged that the essential elements of breach of contract and negligence were not properly pleaded.

Decision

Flanagan J dismissed Milton's application.

Grounds 1-5 and 9

Milton argued that the plaintiffs' losses were not recoverable. Milton's main argument was that there was no loss suffered by the plaintiffs because, in incurring liabilities to trade creditors, the plaintiffs also obtained goods of equal value or purchased services from those trade creditors. Milton also contended that the alleged losses were properly categorised as the plaintiffs' unpaid debts (and as such were the trade creditors' losses) and were not a form of loss recoverable by the plaintiffs.

Flanagan J rejected these arguments. In doing so, his Honour stated that this was a case where it was alleged that each of the plaintiffs continued to trade as a company with a licence and continued to incur debts to creditors, which were not paid or discharged, and existing English and Australian case law tends to suggest that accrual of liabilities that cause insolvency are likely to be recoverable.

Milton also argued that elements of the plaintiffs' claim were not properly pleaded and that the plaintiffs failed to comply with rule 155 UCPR in that they failed to properly claim and plead damages. Flanagan J did not accept these submissions, concluding that the plaintiffs pleaded the nature of the losses suffered, the circumstances in which the plaintiff suffered those losses and how those losses were calculated.

Ground 6

Milton argued that the statement of claim did not plead how the unpaid debts incurred by the plaintiffs were caused by Milton's negligence and how any breach of duty was a necessary element of the occurrence of the harm; further, any causal link would have been severed by the conduct of the plaintiffs' corporate officers. The plaintiffs should not be permitted to rely on their own wrong doing, in incurring the debts, to recover damages against Milton and his company.

Flanagan J rejected this argument, stating that the issues in relation to causation were a matter for trial and was not something that ought to be resolved in strike out application.

Grounds 7 and 8

In grounds 7 and 8, Milton argued that that the essential elements of breach of contract and negligence were not properly pleaded. His Honour did not accept these arguments and stated that the complaints raised in grounds 7 and 8 did not constitute a basis for striking out the statement of claim or summarily dismissing the proceeding.

| back to *Contents*

Karam Group Pty Ltd v Earthmoving Contractors Pty Ltd & Ors [2021] QSC 10

Andrew Orford | Amy Dunphy | Craig Halangoda

Significance

This case has two key points for a party that is seeking an interlocutory injunction to prevent another party from enforcing an adjudication decision, namely that:

- the 'policy' of the *Building Industry Fairness (Security of Payments) Act 2017* (Qld) (**BIF Act**) could be a factor against granting an interlocutory injunction; however, its weight will diminish depending on the strength of the prima facie case established and the existence of a jurisdictional error; and
- in order for a payment into court of an adjudicated amount to provide adequate security and support the granting of an injunction, the full adjudicated amount must be paid into court.

Facts

The applicant, Karam Group Pty Ltd (**developer**), filed an originating application seeking to set aside an adjudication decision made in favour of the respondent, Earth Moving Contractors Pty Ltd (**contractor**). This particular proceeding was to determine an application for an interlocutory injunction to restrain enforcement of the adjudication decision.

The developer engaged the contractor to perform certain works in relation to the construction of a building in Coorparoo. On 31 August 2020, the contractor issued a purported payment claim in the amount of $2,838,952, with the date on the payment claim being *'30 August 2020'*. In response, a payment schedule was issued by the Superintendent on 9 September 2020 for an amount of $47,529. An adjudication application was then lodged by the contractor on 22 October 2020, and it was found that the developer had to pay $2,218,619 plus interest and the adjudicator's fees. Importantly, in September, a subcontractor's charge was issued by Queensland Pre-Stressing. Subsequently, a notice of claim of subcontractors charge over money payable to the contractor was issued to the developer. The developer complied with the notice and paid $749,844 into the District Court pursuant to section 126 of the BIF Act.

In order to establish a right to an injunction, it must be shown that there is a *'prima facie case',* that the applicant is entitled to the final relief sought, and that the balance of convenience favours the making of the interim orders.

In arguing that there was a prima facie case, the developer claimed that there were two jurisdictional errors which affected the adjudication application. It argued that the August payment claim included construction work undertaken on 31 August 2020, which was after the reference date nominated on the payment claim (30 August 2020). It also argued that the contractor's adjudication application differed from the payment claim as it contained an additional section relating to a *'delay claim'*.

In establishing the balance of convenience, the developer argued that it paid an amount into court which would provide security for the claim and, if orders were not made, the developer would lose protection to the adjudicated amount and be forced to seek a refund from the contractor. Conversely, the contractor argued that the strength of the case was not sufficient to overcome the policy of the BIF Act (described as pay now argue later) and that the amount to be paid into court by the developer was not sufficient to meet the adjudicated amount.

Decision

The court ordered that the application be dismissed. The court found that the developer had a prima facie case in relation to the reference date and delay claim issue, however, it was not a strong prima facie case. The court then considered at length the balance of convenience, ultimately determining that the balance of convenience favoured the refusal of an injunction.

Policy of the BIF Act

The contractor argued that the policy of the BIF Act relocated risk to the principal such that, when monies are paid pursuant to an adjudication decision, the risk that it may ultimately not be repaid if the adjudicator's decision is overturned is a risk assigned to the principal.

The court found that the proper approach to the policy of the BIF Act is that referred to in *BRB Modular Pty Ltd v AWX Constructions* [2015] QSC 222, which stated that the policy of the BIF Act to attribute risk to the principal only applies in its full force to valid adjudication decisions and not decisions that are void and liable to be quashed by the courts. In determining the weight of the policy of the BIF Act for the balance of convenience, the strength of the prima facie case must be considered. In cases where there is a strong prima facie case, the policy will hold less weight and vice versa. Here, the court found that the strength of the prima facie case was low, and therefore the policy of the BIF Act favoured the refusal of the injunction.

Payment into court

Whilst an offer to pay an amount of an adjudication into court generally favours the granting of an injunction, there was controversy surrounding the amount to be paid into court. The developer proposed to pay into court $1,421,245, however, the contractor was claiming it was entitled to $2,304,105. The developer deducted $47,529 for monies already paid to the contractor and $749,844 which the developer paid into the District Court pursuant to section 126 of the BIF Act in order to satisfy the notice of claim of subcontractor's charge. Whilst the deduction of $47,529 was not in issue between the parties, the contractor argued that the amount of $749,844 was not properly deductible.

The court found that the monies paid into the District Court pursuant to section 126 of the BIF Act should not be treated as if they were part of the payment into court in respect of the current proceedings relating to the adjudication decision. There was no obligation for the developer to pay the monies into the District Court pending outcome of the present application, and it could have retained the amount pending outcome of the present proceeding in accordance with section 126(2) of the BIF Act. Additionally, the payment of those monies would not depend on the outcome of the present proceeding but instead depend on the District Court making a final determination in respect of the proceedings arising out of the subcontractor's charge. Accordingly, the weight of the payment into court was lowered because it did not cover the entire adjudication amount.

| back to *Contents*

Heads up! Principals still owe a limited duty of care to subbies on-site

Meechan v Savco Earth Moving Pty Ltd [2021] QDC 14

Michael Creedon | Allie Flack | Isabella Impiazzi

Key point

This case is a reminder that, while a principal contractor will not be vicariously liable for all injuries and loss suffered by subcontractors or independent contractors on-site, failure to enforce safety procedures may still constitute a breach of the duty to take reasonable care to avoid unnecessary risk or injury, and to minimise other risks of injury. This is a less stringent duty than what a principal contractor owes to its own employees but must still be observed when arranging for works to be carried out by subcontractors or independent contractors.

Facts

The defendant, Savco Earth Moving Pty Ltd (**Savco**), carried on the business of excavation and was the principal contractor of a particular job site in Queensland (**Site**). Savco entered into a subcontract with CD Kerb and Channelling Pty Ltd (**CDK**) to carry out work around the car park on the site. The plaintiff, Mr Meechan, was employed as a labourer by a related entity of CDK.

CDK used a heavy kerb and channelling machine which could only be moved around the Site by a crane attached to one of CDK's truck. The site foreman, Mr Harris, explained to a Savco employee that the kerb machine needed to be moved to another location but that, due to its tight positioning, CDK's truck and crane could not reach it. The Savco employee informed Mr Harris that Savco would organise for someone to move the kerb machine using the excavator, rather than the crane, which could only be operated by qualified personnel. Mr Harris then said he could operate the excavator, despite lacking the requisite qualifications, which the Savco employee allowed.

Mr Meechan rigged the excavator's chains to the kerb machine, which were secured by heavy shackles, and stood on the back of CDK's truck to guide Mr Harris as he lifted the kerb machine onto the truck. Without sufficient warning, Mr Meechan threw a shackle to Mr Harris and, when attempting to grab it, Mr Harris bumped the joy stick causing the excavator to swing to the left, knocking Mr Meechan to the ground. Mr Meechan suffered personal injury.

In the negligence claim brought by Mr Meechan, he said that his loss was caused by Savco because it failed to ensure the excavator was operated by an appropriately qualified operator. Savco denied liability on the basis that it did not give permission for Mr Harris to use the excavator and only allowed it to be used by appropriately skilled operators.

Decision

The court found that Savco was in breach of its duty of care but was ultimately not liable for Mr Meechan's injury because the accident was caused by Mr Meechan throwing the shackle to Mr Harris without sufficient warning, rather than Savco's failure to ensure an appropriately qualified person was operating the excavator.

Did Savco, as a principal contractor, owe Mr Meechan a duty of care?

Sheridan DCJ applied the common law rule that a principal contractor does not owe the same duty of care to independent contractors engaged by them as it does to its own employees. In this case, Savco had a duty to use reasonable care when coordinating work that carries a risk of injury, but this duty did not extend to avoiding any and all risks. Rather, it was a duty to avoid unnecessary risks and to minimise other risks of injury. Additionally, as a principal contractor, Savco did not have a duty to retain control of all working systems if it was reasonable for CDK, being a competent subcontractor, to control and manage the system of work without Savco's direct supervision. Savco would not be vicariously liable for damage caused by CDK's negligent failure to employ safe systems of work.

In this instance, her Honour found that Savco was in breach of its duty of care because the Savco employee thought it was reasonable to allow Mr Harris to operate the excavator despite being aware of the safety risks and failing to confirm Mr Harris' qualifications. Therefore, Savco's failure to ensure the excavator was exclusively operated by appropriately qualified personnel constituted a failure to exercise reasonable care to avoid unnecessary risks of injury on-site.

Did Savco cause Mr Meechan's injury?

Sheridan DCJ applied the 'common sense' test of causation which required that Savco's act, in allowing Mr Harris to use the excavator, must have been sufficiently closely connected with Mr Meechan's accident so it could reasonably be regarded as being responsible for it. At trial, Mr Meechan acknowledged the danger of standing near the unqualified Mr Harris while he was operating the excavator, which was elevated when he threw the heavy shackle to Mr Harris without sufficient notice. In her Honour's view, if Mr Meechan threw the shackle to even an experienced and qualified person in the manner that he did, he still would have suffered the same harm.

Therefore, Sheridan DCJ held that, while Savco was in breach of its basic duty of care by allowing Mr Harris to operate the excavator, it was Mr Meechan's own actions that caused Mr Harris to lose control of the excavator which led to Mr Meechan's injury.

| back to *Contents*

Please explain: the disclosure of expert reports in pre-trial mediation

Murphy Operator & Ors v Gladstone Port Corporation (No 7) [2021] QSC 18

Julie Whitehead | Sarah Cahill | Isabella Impiazzi

Key point

The policy and philosophy of the UCPR will not be freely set aside to ease concerns about prejudice and the disclosure of draft expert reports. If an expert prepares a report for use in a pre-trial mediation based on imperfect information, that expert will not be disadvantaged when presenting a different view or a more fulsome report at trial because they will be able to identify and explain any changes in opinion during cross-examination.

Facts

This case is part of a class action lead by Murphy Operator Pty Ltd & Ors (**Murphy**), which is comprised of three lead plaintiffs and over 150 group members against Gladstone Port Corporation in relation to alleged losses from a contamination event in the Gladstone harbour in 2011-2012. The question for the court in this specific instance concerned the statutory disclosure requirements for expert reports during mediation.

Directions Order to Disclose and Mediate

A directions order issued on 9 December 2020 outlined a disclosure schedule for each party in the lead up to a mediation which was to be scheduled before 29 October 2021.

By application, the plaintiffs sought an order that the parties obtain leave to engage mediation loss experts to estimate the likely value of the compensable losses claimed by the group members as a whole, and to subsequently excuse the parties from compliance with rule 212(1) of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) in relation to those reports. Rule 212 provides that the duty of disclosure does not apply to privileged documents.

Murphy's argument

Murphy argued that class actions differ from ordinary litigation because of the initial trial which focuses on identifying common questions of fact, with the lead plaintiffs presenting their case on liability and quantum issues. The initial determination may guide the parties toward settlement rather than litigate the rest of the plaintiff group members. Therefore, when a class action is mediated before the initial trial, the quantum report is prepared by the expert to assess group-wide losses. Given the size of the class, the expert must use less precise information than what would be used to prepare individual reports for each plaintiff for the initial trial.

In this case, the plaintiff was concerned that the group loss report prepared by the mediation loss expert would use different modelling and analyses to those employed when assessing the plaintiffs' individual losses that would be prepared for trial. Therefore, Murphy argued that these potential differences in reasoning may provide cross-examination 'fodder' against the specific loss expert at trial if mediation privilege did not cover the mediation loss expert's report. As it stood, rule 212(1) of the UCPR operated to prevent mediation privilege over the mediation expert report.

Decision

The court considered Murphy's concern that it could have a 'chilling effect' upon an expert to learn that any draft report, document or information must be disclosed, but the court ultimately dismissed the application because dispensing with the disclosure requirements would be inconsistent with the broader disclosure policy within the UCPR. Additionally, the court weighed up the option of preparing over 150 individual reports which would be costly and time consuming (and therefore also contrary to the UCPR's policy to resolve disputes expeditiously and at minimum expense) against the preparation of a group-wide report based on imperfect information that would be inappropriate for use in litigation. On this point, the court concluded that, since an expert is ultimately entitled to change their mind and present a different opinion, a non-partisan expert should not have an issue with the disclosure of draft and imperfect reports at mediation because, at trial, the expert will be able to identify and explain any changes in their opinion.

| back to *Contents*

Want your expert report to be admissible? The conclusion must flow from the facts!

Springfield City Group Pty Ltd v Pipe Networks Pty Ltd [2020] QSC 395

David Pearce | Megan Sharkey | Charlotte Lane

Significance and key point

This decision is a reminder of the need to ensure that expert reports comply with the requirements established in the decision of *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

A trial judge may rule that an expert report is inadmissible if it does not establish the material assumptions relied upon by the expert, or fails to comply with the 'statement of reasoning rule'.

Facts

In 2005, Springfield City Group Pty Limited (**Springfield**) entered into a contract (**IRU Agreement**) with Pipe Networks Pty Ltd (**Pipe Networks**) for the construction, operation and maintenance of two phases of fibre-optic network between Springfield Central and the Brisbane CBD. At the same time as entering into the IRU Agreement, Springfield and Pipe Networks entered into a Wholesale Fibre Services Agreement (**Wholesale Agreement**), by which Pipe Networks agreed to acquire certain fibre-optic capacity over the network the subject of the IRU Agreement, on the terms set out in the Wholesale Agreement.

Springfield contended that in late 2009, without its knowledge or consent, Pipe Networks installed its own fibre-optic network (**Duplicate Network**) running in the pits and conduits in which Springfield's network had been laid. Springfield claimed that, since installation, Pipe Networks had been utilising the Duplicate Network to sell fibre capacity to the area in competition with Springfield. Springfield contended that as part of the IRU Agreement and/or part of a fiduciary duty that Pipe Networks owed to it, Pipe Networks was not entitled to use the network infrastructure (including the conduits) to build and accommodate a competing network. Springfield commenced proceedings against Pipe Networks claiming damages under various causes of action and also an account of profits of approximately $6 million and $40 million respectively. The matter was set down for a ten-day trial commencing on 9 November 2020.

On day seven of the trial, Springfield tendered an expert report of Mr O'Shea, an accountant, dated 20 December 2019 (**2019 Report**) and a joint expert report of Mr O'Shea and Pipe Networks' expert accountant. Springfield also sought to rely on a further report of Mr O'Shea (**2020 Report**). During the interlocutory stages of the proceeding, Bond J had made orders that the 2020 Report could not be tendered without leave. Consequently, Springfield applied for such leave.

Issue

In the 2019 Report, Mr O'Shea made assumptions concerning the operational and financial performance of the Springfield network, including the capacity of the network and the revenue derived and expenses incurred from the operation of the network. Mr O'Shea also made assumptions concerning the operational and financial performance of Pipe Networks' Duplicate Network.

Springfield made the forensic judgment that at trial it would not seek to prove critical assumptions of fact on which Mr O'Shea would base his evidence and asked Mr O'Shea to assume the truth of the information which he had identified and set out in the Revenue Data Schedule (**Schedule**) to the 2019 Report. Notably, the Schedule was only finalised on 6 November 2020, resulting in the 2020 Report only being produced on 15 November 2020, after the completion of the first week of the trial. One of the reasons for the delay of the 2020 Report was because the Schedule entirely superseded assumptions which Mr O'Shea had previously been asked to base his evidence on. Springfield also asserted that the Schedule was late due to significantly inadequate and late disclosure by Pipe Networks.

Decision

The court dismissed Springfield's application for leave to tender the 2020 Report of Mr O'Shea, however, it granted Springfield leave to prepare a further expert report of Mr O'Shea which consolidated the 2019 Report and the 2020 Report.

In coming to this conclusion, Bond J commented that Springfield had failed, prior to the commencement of the trial, to raise with the court what must have been a foreseeable problem (namely, the late delivery of the

2020 Report). The prospect that a new expert report would disrupt the conduct of the trial should have been apparent to a party whose proceedings are managed on the Commercial List. Bond J noted that Pipe Networks was also late with its own expert evidence.

Bond J also accepted Pipe Networks' argument that the 2020 Report failed to comply with the 'statement of reasoning rule' as expressed in other case law. Under this rule, the expert must state in chief the reasoning by which the conclusion arrived at flows from the facts proved or assumed by the expert. Bond J opined that no such reasoning was identified in the 2020 Report, nor was he provided with criteria by which he could evaluate the validity of the conclusions reached. As such, the 2020 Report was in a form that rendered it inappropriate to grant leave for Springfield to rely on it.

However, his Honour concluded that given Pipe Networks carried part of the blame for Springfield's difficulties with its expert opinion evidence, it would be unfair to Springfield to deny it the opportunity to adduce further evidence from Mr O'Shea. Any prejudice to Pipe Networks could be ameliorated by providing it with time to prepare a responsive report and possibly the delivery of a further joint report.

The partly-heard trial was adjourned to a date to be fixed. The ruling on Pipe Networks' objections to the 2019 Report and the joint expert report of Mr O'Shea and Pipe Networks' expert accountant was reserved.

| back to *Contents*

SOUTH AUSTRALIA

Even poorly drafted agreements can produce a commercially sensible result

Tesseract International Pty Ltd v Pascale Construction Pty Ltd [2021] SASCA 8

James Kearney | Daina Marshall | Jack Eccleston

Key point and significance

Courts will continue to apply a liberal approach to the construction of dispute resolution clauses in order to effect a business-like and commercially tenable interpretation of the parties' agreement. In doing so, the court highlighted that courts would endeavour to give meaning and effect to the terms of an agreement even in the case of poorly drafted agreements. Further, the decision underscored the appropriateness of sensible multi-tiered dispute resolution processes within commercial contracts.

Facts

The appellant, Tesseract International Pty Ltd (**Tesseract**), entered into a contract with the respondent, Pascale Construction Pty Ltd (**Pascale**), to review tender documentation and provide an engineering design for the construction of a Bunnings Warehouse.

The contract was a standard form provided by the Master Builders Association in South Australia and contained provisions for dispute resolution, being conciliation (clause 20) and arbitration (clause 21). Clause 22 of the contract provided that the decision of the conciliator or arbitrator would be binding.

There was a dispute between the parties as to the design supplied, which Pascale alleged to be defective and claimed loss and damage in the order of $8,410,000. In its draft points of claim, Pascale alleged liability, among other things, for breach of contract and liquidated damages. A subsequent attempt to mediate was unsuccessful.

On 7 November 2019, Pascale sent a letter to Tesseract together with a notice of dispute proposing to dispense with the conciliation process and proceed to arbitration if the dispute could not be resolved. On 25 November 2019, Tesseract responded and contended that the parties could not participate in either process because the relevant provisions were void for uncertainty and impermissibly attempted to oust the jurisdiction of the court.

Tesseract contended that there was an inherent contradiction between a conciliation process and a process that is intended to be determinative and binding, and that a binding conciliation cannot be reconciled with the existence of the arbitration process contemplated by clause 21.

Tesseract issued proceedings in the Supreme Court of South Australia seeking a declaration by the court to that effect and relief in the form of an order to restrain Pascale from proceeding with the dispute resolution procedure under the contract. In August 2020, Dart J rejected Tesseract's arguments and dismissed the proceedings. Tesseract appealed to the Court of Appeal.

Decision

The Court of Appeal dismissed the appeal.

In the course of his Honour's reasons, Doyle JA reflected on the general principles governing construction of dispute resolution clauses, including that they will only be void for uncertainty if the words used are so incapable of definite or precise meaning that the court is unable to attribute to the parties any particular construction intention. His Honour accepted that whilst a conciliation process being determinative and binding was not in conformity with the meaning usually ascribed to conciliation, the name the parties had given to the process was not determinative with the ultimate issue being what was the process that the parties had agreed to as a matter of substance.

His Honour considered that there was no tension between the conciliation and arbitration processes because they were intended to be consecutive rather than alternative processes, even though that was not expressly stated to be the case. In essence, although the conciliation was to be binding, it remained subject to the right of arbitration. While his Honour acknowledged that the drafting of the contract was less than ideal, he considered that there was *'nothing incongruous or uncommercial'* about construing in this way. His Honour noted that not only are contracts that contained multi-tiered processes of dispute resolution commercially workable, they also *'reflect a commercially sensible approach to dispute resolution'*.

In a separate opinion, Livesey JA reasoned that the case was *'a good example of a poorly drafted agreement which, nevertheless, is capable of being given a business-like interpretation as to produce a commercially sensible result'*. His Honour went on to reaffirm the reluctance of the court to find any agreement void for uncertainty and stated that the favourable approach remains to hold parties to their bargain.

| back to *Contents*

WESTERN AUSTRALIA

Summary judgment and no stay of proceedings for certified progress claims later disputed and referred to arbitration

MSP Engineering Pty Ltd v Tianqi Lithium Kwinana Pty Ltd [No 2] [2021] WASC 39

Tom French | Candice Lamb | Esther Ting

Key point and significance

The Supreme Court of Western Australia has granted summary judgment in respect of two certified progress claims that were the subject of an arbitration, but no stay of proceedings was allowed by the Court of Appeal. This was able to occur due to a limited preservation of rights in the dispute resolution clauses of the relevant contracts between the parties as, even though arbitration was prescribed for disputes, there was a right to seek urgent relief from a court to enforce payments due under the relevant contracts.

Facts

MSP Engineering Pty Ltd (**MSP**) and Tianqi Lithium Kwinana Pty Ltd (**Tianqi**) entered into two separate but essentially identical contracts for MSP to design and construct lithium hydroxide processing plants in Western Australia. Under the contracts, MSP claimed two payments from Tianqi totalling approximately $35.2million. The superintendent certified amounts due and payable by Tianqi. Tianqi attended to payment of some of the certified amounts but failed to pay the remaining balance of approximately $2.7million under the first contract and $5.6million under the second contract.

On 4 March 2020, MSP commenced two proceedings in the Supreme Court seeking summary judgment in respect of the balance owed by Tianqi under each contract.

On 6 March 2020, Tianqi contemporaneously issued notices of dispute under the contracts in respect of the same claims, and the parties proceeded through the dispute resolution provisions in the contracts, up to and including the appointment of an arbitrator for the purposes of arbitration. On 7 August 2020, Tianqi purported to terminate the contracts by issuing a show cause notice on the basis that it believed MSP failed to perform its design obligations under the contracts.

In the earlier matter of *Tianqi Lithium Kwinana Pty Ltd v MSP Engineering Pty Ltd [No 2]* [2020] WASCA 201, Tianqi had sought a stay of the proceedings and the referral of the matter to arbitration pursuant to section 8(1) of the *Commercial Arbitration Act 2012* (WA). MSP argued that those proceedings were not the subject of the arbitration agreement under the respective contracts, as there was a carve out for the institution of proceedings *'to enforce payment due under the Contract'*.

Master Sanderson at first instance dismissed the stay application and made programming orders for a summary judgment application by MSP. Tianqi appealed. The Court of Appeal agreed with Master Sanderson and found those proceedings did not relate to a matter which was *'the subject of an arbitration agreement'* for the purposes of the Commercial Arbitration Act. As a result, MSP proceeded with its summary judgment application.

Tianqi argued that MSP was not entitled to summary judgment because:

- it had the rights of set-off against the unpaid amounts claimed by MSP under the terms of the respective contracts. Tianqi relied on its purported termination and the relevant termination clauses which gave Tianqi the power to deduct moneys due to it by MSP if it had rightfully terminated the contracts;
- it had rights of set-off in law or equity given the contracts had allegedly been terminated; and/or
- the contracts were liable to be set aside, avoided, or declared unenforceable and therefore any contractual rights MSP may have under the contracts could not be enforced but must await determination in the arbitration.

The substance of the set-off which Tianqi sought to apply was for substantial damages for breach of contract by MSP.

Decision

Master Sanderson granted summary judgment in favour of MSP, despite the complexity of the matters in issue between the parties, given that the parties had expressly agreed that, when progress claims were made and certified, the amounts due and payable by the Tianqi and MSP would be paid and, if not paid, could be recovered summarily. In other words, set-off was not available following certification.

Master Sanderson's findings are set out further below.

Right of set-off under the terms of the contracts

Master Sanderson disagreed with Tianqi's argument that, once valid termination of the contract was assumed and an amount of damages may become due, the parties' rights were effectively put on hold pending the arbitration. Rather, Master Sanderson held that the right of set-off under the termination clause for amounts which *'may become due'* did not contemplate a set-off of an unspecified amount which may become payable after an arbitration, such as a claim for damages. He held it contemplated crystallised claims which the parties may have agreed would be deducted from payment in the future following termination. For example, this could include a credit for descoped works or similar. He contrasted this to a 'drop dead' termination provision, in which parties are not entitled to claim or set-off following termination.

Right of set-off in law or equity

Master Sanderson held that Tianqi did not have any right to rely upon a legal or equitable set-off. He affirmed that equitable set-off may be available where the claims are so closely related, particularly as to time and subject matter and to the conduct of the parties, that the equity of a case requires it. However, the progress claims and the subsequent certifications were issued while the contracts were ongoing and Tianqi had expressly undertaken to make payment upon issue of the payment certificates. Therefore, equity required the undertaking to be honoured and Tianqi had no right to equitable set-off.

Unenforceability of the contract

Master Sanderson held that the contract could not be set aside. There was no allegation of fraud against MSP and, even if there was, there would have to be a balancing exercise between the amounts claimed by MSP and amounts owing to Tianqi. Ultimately, Tianqi should still be required to meet its obligations under the contracts, that is, to pay any amounts under the progress certificates.

| back to *Contents*

A 'nuts and bolts' management decision: proceedings to be transferred from Western Australia to South Australia in ongoing contractual dispute

Primero Group Ltd v Wärtsilä Australia Pty Ltd [2021] WASC 44

James Kearney | Daina Marshall

Key point and significance

An application by Wärtsilä pursuant to section 5(2) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (WA) to have proceedings transferred to the Supreme Court of South Australia was held to be in the interests of justice, despite an earlier decision in October 2020 by the Supreme Court of South Australia in *Wärtsilä Australia Pty Ltd v Primero Group Ltd* [2020] SASC 185 not to transfer proceedings to Western Australia.

The *'management style'* decision to transfer the proceedings to SA was based on the nexus of the dispute in both geographical location and the terms of the subcontract which expressly referenced the law and jurisdiction of SA. Also of importance was the similarity in subject matter between the SA and WA proceedings.

Facts

Wärtsilä was the head contractor in an agreement with AGL to construct the Barker Inlet power station on Torrens Island. Primero was subcontracted by Wärtsilä to perform some of the required works. Subsequently there has been a series of contractual disputes between Primero and Wärtsilä in relation to delays and payment.

The WA proceedings first arose in circumstances of urgent interlocutory relief sought in April 2020. At the same time, Primero had been seeking summary relief against Wärtsilä under the *Building and Construction Industry Security of Payment Act 2009* (SA) in SA by adjudication. Later, in June 2020, the SA proceedings were commenced. As a result, the parties had on foot litigation in both WA and SA which had, in substance, the same issues for resolution.

In July 2020, Primero filed an interlocutory application in the SA proceedings seeking orders to transfer Wärtsilä's action to WA. In October 2020, that transfer was rejected by Bampton J of the South Australian Supreme Court as no pleadings had yet been filed in the WA proceedings, meaning there was no basis of comparison of the relevant issues raised by the parties in the two separate actions.

Both proceedings had progressed further at the time of Wärtsilä's application to transfer the proceedings to SA. The parties had exchanged pleadings in the SA proceeding and had substantially advanced pleadings in the WA proceedings.

Decision

In deciding whether to transfer the proceedings to SA, Kenneth Martin J considered the fact that the subcontract was governed by the laws of SA and that by the dispute resolution provisions the parties had submitted to the courts of SA exercising jurisdiction. His Honour also noted that Primero and Wärtsilä are not companies exclusively domiciled within any particular Australian state.

His Honour referred to the High Court's decision in *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 and opined that what is required under the relevant cross-vesting legislation is a *'nuts and bolts'* management decision to be made by reference to the overall *'interests of justice'*.

The decision also considered that the contractual dispute had geographical proximity to South Australia and that the dispute was perfectly capable of being determined *'swiftly, justly, fairly and appropriately, in the Supreme Court of South Australia'*.

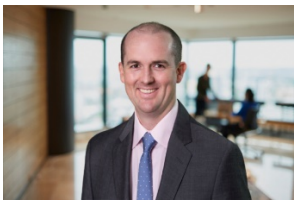
In reaching his conclusion, Kenneth Martin J gave minimal weight to the location of expert and non-expert witnesses, citing the rapid advances by Australian courts concerning the use of video-link technology which he considered to be *'highly efficient'*.

| back to *Contents*

Contributing partners and special counsel

Email *firstname.lastname@minterellison.com*

Andrew Hales
Partner
T +61 2 9921 8708
M +61 470 315 319

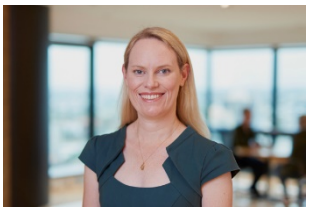


David Pearce
Partner
T +61 7 3119 6386
M +61 422 659 642

James Kearney
Partner
T +61 8 8233 5685
M +61 401 132 148

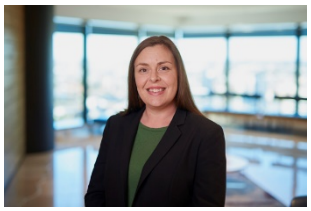
Andrew Orford
Partner
T +61 7 3119 6404
M +61 400 784 981

Michael Creedon
Partner
T +61 7 3119 6146
M +61 402 453 199



Julie Whitehead
Partner
T +61 7 3119 6335
M +61 422 000 320

Tom French
Partner
T +61 8 6189 7860
M +61 423 440 888



Sarah Ferrett
Special Counsel
T +61 7 3119 6528
M +61 411 330 984

Clare Turner
Special Counsel
T +61 7 3119 6567
M +61 413 232 682

Construction Law Update editor
Sophie Wallwork (Sydney)
T +61 2 9921 4039

ME_182179728