Construction Law Update

May 2019

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In the Australian courts

NEW SOUTH WALES

How low can you go: The threshold to defeat a statutory demand may be low but a 'manufactured' claim is not enough

Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd [2019] NSWCA 60

Richard Crawford | Kate Morrison | Lauren Topper

Key point and significance

In this case, the New South Wales Court of Appeal (**Appeal Court**) considered an appeal from the New South Wales Supreme Court (**Supreme Court**) to dismiss an application from Grandview Ausbuilder Pty Ltd (**Grandview**) to set aside Budget Demolitions Pty Ltd's (**Budget**) statutory demand under section 459 of the *Corporations Act 2001* (Cth) (**Corporations Act**).

This case reiterates the importance of acting quickly to establish whether you have an offsetting claim when facing a statutory demand and also serves as a reminder that an offsetting claim must be 'genuine' within the meaning of the Corporations Act for the court to consider it. It cannot be *'manufactured or got up simply for the purpose of defeating the demand made against the company'*.

Facts

MinterEllison covered the case before the Supreme Court in our December 2018 – February 2019 Construction Law Update, but for ease of reference we summarise the facts again here.

Budget served a statutory demand in respect of two unpaid progress claims made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) **(Act**) on Grandview. Grandview sought to set aside the statutory demand under section 459G of the Corporations Act. Grandview issued a payment schedule for the first payment claim, providing for payment of the full amount claimed, but never paid the sum. Grandview did not respond to the second payment claim within the ten-day period allowed under section 14(4) of the Act.

Despite Grandview's admission that Budget was owed the sums contained within the payment claims, no judgement was obtained by Budget against Grandview (although it was open to Budget to do so under section15(2)(a)(i) of the Act).

At first instance, Grandview maintained that it had three separate offsetting claims cumulatively exceeding the amount of the statutory demand, being:

- the Liquidated Damages Claim for delay in completion (said by Grandview to be valued at $330,000);
- the Milestone Damages Claim for failure to perform certain works at certain times (said by Grandview to be valued at $3.816 million); and
- the Loss of Bargain Damages Claim for the cost to complete the works to put Grandview in the position it would have been in if the subcontract had completed (said by Grandview to be valued at $1.1 million).

In the Supreme Court, Parker J accepted that Grandview had established an offsetting claim of $220,000 in respect of the Liquidated Damages Claim; that finding was not challenged in these proceedings. However, Parker J also held that neither the Milestone Damages Claim nor the Loss of Bargain Claim had been established to the requisite level. In the current case, Grandview sought to challenge Parker J's conclusions that these two heads were not available to it as an offsetting claim within the meaning of section 459H(1)(b) of the Corporations Act.

Milestone Damages Claim

In reaching his decision that the Milestone Damages Claim failed, Parker J relied on the 'Graywinter Principle', taken from *Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund* (1996) that provides that a plaintiff cannot rely on a new ground at hearing to set aside a statutory demand, that had not been set out in the affidavit provided with the application under section 459G of the Corporations Act. The new ground referred to being that rectification of the subcontract between the parties was required to correct

the fact that no rate of liquidated damages for failing to meet the milestone completion dates had been included in the subcontract. When this was pointed out at the initial hearing, counsel for Grandview said that the intention was to rely on the rectification principle. The affidavit submitted with the application to set aside the statutory demand did not set out any material facts that could sustain a claim to rectify the subcontract between the parties.

In the Appeal Court, counsel for Grandview attempted to shift the focus away from the argument that rectification was required but instead towards an argument that the subcontract could in fact be construed so as to allow the Milestone Damages to be quantified. The Appeal Court rejected this argument and held that Parker's J application of the Graywinter Principle had been correctly applied and that there was no viable Milestone Damages Claim that could be offset.

Loss of Bargain Damages Claim

Section 459H(5) of the Corporations Act provides that a company may apply to the court for an order setting aside a statutory demand provided that there is a ***genuine dispute*** (emphasis added) between the company and the respondent about the existence or amount of a debt to which the demand relates.

At first instance, Parker J did not consider the application of section 459H(5) in detail because he found that the Loss of Bargain Damages amounted to a negative figure and therefore that Grandview had failed to establish any claim under this head. The Appeal Court disagreed with this and found on the facts that, prima facie, Grandview had raised an offsetting claim for the Loss of Bargain Damages which exceeded the arguable value of the statutory demand, meaning a basis for setting it aside had been made out.

However, the Appeal Court went on to look at the case law surrounding the definition of the word 'genuine' in the context of an 'offsetting claim' in section 459H(5) of the Corporations Act. The Appeal Court relied on *Ozone Manufacturing Pty Ltd v Deputy Commissioner of Taxation* (2006) where it was said that the test of whether an offsetting claim exists are the *'same as for a genuine dispute, that is to say, the claim must be bona fide and truly existing in fact and that the ground for alleging the existence of the dispute are real and not spurious, hypothetical, illusory or misconceived'*. The Appeal Court also referred to *JJMMR Pty Ltd v LG International Corporation* [2003] in which it was said *'the claim to set off against the debt demanded must not have been manufactured or got up simply for the purpose of defeating the demand made against the company. It must have an existence that is objectively demonstrable independently of the exigencies of the demand that evoked it'*.

The Appeal Court found on this basis that the relatively low threshold to be satisfied to establish an offsetting claim had not been met by Grandview. On the facts of the case, Grandview relied on an argument that non-completion of the works by 12 December 2017 amounted to a breach of contract and that the subcontract had terminated at that point. The Appeal Court however found Grandview's actions and statements were *'wholly inconsistent with any intention to terminate the Sub-Contract'*. When Budget did not meet the practical completion date, there had been no complaint from Grandview, and Grandview instead confirmed that it looked forward to Budget resuming its work after the shutdown period imposed by Grandview. As such, Grandview's contention that it had a 'plausible' claim for Loss of Bargain Damages could not be accepted as Grandview had affirmed the subcontract (and so it was still open for Grandview to seek specific performance of the subcontract and secure the bargain).

Decision

Leave to appeal was granted but the appeal should be dismissed with costs.

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Errors of law in expert determination procedures

Lainson Holdings Pty Ltd v Duffy Kennedy Pty Ltd [2019] NSWSC 576

Richard Crawford | Adriaan van der Merwe | Maciej Getta

Key point

If an expert appointed under an expert determination procedure makes an error of law, the terms of the contract and any expert rules will determine whether the determination will still be binding on the parties, notwithstanding the error.

Significance

Expert determination has become an increasingly popular alternative dispute resolution alternative to litigation and arbitration by parties seeking expeditious, informal and inexpensive resolution of disputes. The expert determination rules often require the expert to make a determination 'according to law'. In this case, the court found that to construe a clause requiring the experts determination to be 'according to law' did not mean free from all legal errors. To do so would cause commercial inconvenience and subject to appeal every question of law relied upon by an expert.

Facts

A principal landowner and builder entered into a AS4902-2000 contract where the builder was to carry out building work in constructing a residential development for $21.9 million (**Contract**).

The Contract required the builder to deliver two unconditional bank guarantees as security. The builder failed to do this. On 28 September 2015, the principal served a show cause notice on the builder under the Contract for this breach. In response the builder served its own show cause notice on the principal alleging breaches by the principal.

The principal, claiming it was entitled to, terminated the contract. The builder disputed this and claimed that the principal repudiated the contract by incorrectly purporting to terminate allowing the builder to itself bring the Contract to an end. Both the builder and the principal claimed they were entitled to loss and damage from each other.

The dispute was referred to a binding expert determination under the Contract in accordance with the Resolution Institute Expert Determination Rules.

On 26 May 2016, an expert was appointed, the dispute was heard between 16 December 2016 and 13 April 2017, and on 14 March 2018 the expert delivered a 137-page determination in favour of the builder.

The expert determined that the principal issuing the show cause notice and terminating the Contract was ineffective because it was in breach of an implied term that the principal would exercise its powers in relation to the issue of a show cause notice and termination 'reasonably, in good faith and not for an extraneous purpose' (**Implied Term**). In doing so, the expert held the principal repudiated the contract and the builder validly terminated, and the builder was awarded $1,837,212.

The principal argued that it is not bound by the determination because:

- the expert did not discharge the task entrusted to him by the Contract as the expert made an error of law in finding the existence of the Implied Term; and
- where a question of law becomes material before an expert, the courts can interfere where an expert has made a mistake of law.

Decision

Can the expert make an error of law?

The court did not grapple with whether the expert was right in finding that the Implied Term existed. Instead the court, on the assumption that the expert was right, found that:

- the parties will be bound if the expert did what the Contract, on its proper construction, required him to do irrespective of the result;
- the parties had agreed that the determination of the dispute will stand as a final and binding consensus between them;
- where an expert goes outside the ambit of what a contract requires, the determination is not binding because the consensus it is intended to reflect will be absent. The Contract required the expert to determine the dispute 'according to law'; this was a matter of contractual construction;
- the court disagreed with the principal's argument that the words 'according to law' (used in the expert rules) meant "by the correct application of only legally correct principles only", or, put another way, in a manner 'free from legal error affecting the result'. Instead, the court found that the construction contended for by the principal would make all determinations subject to appeal on an error of law, which could include a misapplication of the law of evidence; would permit the party seeking to sustain the determination to raise alternative bases in law upon which the expert could have reached the result; and would give a far wider right of review of the determination than there would be if it was an arbitral award; and

- in the context of this Contract, the words mean 'in the manner which the law requires a person in the position of the expert to go about the mandated task, so as to give it contractual efficacy' for example, honestly, without bias or collusion, and while not intoxicated.

Can the court intervene to redress a mistake of law which appears on the face of an expert determination?

No, an expert determination is not a record in the legal sense used in the authorities in cases where the court can intervene when there is an error on its face.

The record of an arbitral tribunal will qualify for intervention as it has the same effect as a judgement of court. An expert determination, on the other hand, is no more than a private contractual mechanism to which parties agree and which, as is dealt with above, does no more than create binding contractual obligations with no statutory backing as a process.

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Motivations of a 'profit-maximising developer' relevant to assessment of causation

Loulach Developments Pty Ltd v Roads and Maritime Services [2019] NSWSC 438

Richard Crawford | Nicholas Grewal | Amy Ryan

Key points

- When considering the cause of a developer's loss, courts will consider the commercial viability of opportunities to have been claimed missed.
- There is no rule that each type of 'economic interest' reflects a distinct cause of action. To the contrary, the court considered that damages in actions for negligence will not uncommonly include more than one category of losses.

Significance

When pursuing a claim against an authority for failure to disclose information during the development approval process, it is not sufficient for developers to establish that an authority's breach of duty is linked to the loss claimed. Developers must adduce evidence to establish that had the relevant authority disclosed the information, the developer would in fact have pursued the alternative opportunity having regard to the commercial context of the specific development. In assessing these claims, courts will weigh the benefit of pursuing the opportunity claimed to have been missed against the time and cost risk of actually pursuing that opportunity.

This case also emphasises the need to take care when placing reliance on information provided by authorities acting in pursuance of statutory regimes, in particular during the development approval process.

Separately, the court did not regard the High Court in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 as purporting to lay down as a rule that each type of 'economic interest' reflects a distinct cause of action To the contrary, the court considered that damages in actions for negligence will not uncommonly include more than one category of losses. The analysis required by section 14(1)(b) of the *Limitation Act 1969* (NSW) does not turn on the 'interest' protected by the common law duty to take reasonable care. It turns upon when the cause of action first accrued.

Facts

Loulach Developments Pty Ltd (**Loulach**) applied for consent to build a residential building on land at the edge of Parramatta CBD (**Land**). For over three decades, a part of the Land had been designated for road widening (**Designated Land**). The Parramatta City Council (**Council**) granted development consent for the building (**First Consent**), subject to a condition requiring the Designated Land to be dedicated to the Council (**Condition**).

Loulach did not construct the building the subject of the First Consent, and eventually the First Consent lapsed. However, in accordance with the Condition, Loulach subdivided the Land into two lots – lot 11 for the development (**Lot 11**) and lot 12 for the dedication as a public road after construction (**Lot 12**).

Before applying for a new development approval, the Roads and Traffic Authority (**RTA**) issued a letter to Loulach confirming that it required *'the whole of Lot 12 […] for the widening of Pennant Hills Road'* (**First Representation**).

Loulach later lodged another development application to construct a building on Lot 11. The Council referred the development application to the RTA. The RTA confirmed with the Council that Lot 12 was affected by a road widening order and any new structures must be clear of the land required for the road (**Second Representation**).

The Council granted the second development consent (**Second Consent**) and the building the subject of the Second Consent was constructed on Lot 11.

Just less than six years after the Second Consent was granted, Loulach filed a claim against the RTA's successor, Roads and Maritime Services (**RMS**) for damages in excess of $5,000,000.

Loulach claimed that Lot 12 was in fact not required for a road, and that the RTA had breached a duty of care owed to Loulach when making the First Representation and the Second Representation. Loulach contended that if it had been told that the RTA no longer required Lot 12, then it would have obtained rezoning and development consent to construct a building occupying the whole of the Land, rather than just Lot 11.

Decision

The court dismissed Loulach's claim in relation to both the First Representation and the Second Representation – albeit for different reasons.

First Representation

In relation to the First Representation, the court held that as a statutory authority the RTA had a duty not to provide negligent information to Loulach, which Loulach intended to rely upon. The court was satisfied that the road widening proposal was abandoned prior to the First Representation, and that the RTA had breached the duty of care owed to Loulach by failing to take reasonable steps to determine whether the road proposal had been reclassified.

However, the court held that RMS' breach of its duty did not cause Loulach to incur the losses claimed. The court was not satisfied that Loulach would have made more money from the development but for the First Representation. In coming to this decision, the court considered how far Loulach had already progressed the design and financing arrangements in respect of the development and found that it was unlikely that a 'profit-maximising developer' in Loulach's position would have done anything differently if the First Representation had informed Loulach that Lot 12 was no longer required for the road widening.

In any event, the court held that Loulach was statute-barred in respect of the First Representation and that, although not all of the loss suffered by Loulach was suffered more than six years before bringing the action, some of the losses, namely the expenses incurred in the development application process, occurred more than six years prior to the commencement of proceedings, with the result that the entirety of the claim is statute-barred.

The court did not regard the High Court in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 as purporting to lay down as a rule that each type of 'economic interest' reflects a distinct cause of action. To the contrary, the court considered that damages in actions for negligence will not uncommonly include more than one category of losses. The analysis required by section 14(1)(b) of the *Limitation Act 1969* (NSW) does not turn on the 'interest' protected by the common law duty to take reasonable care. It turns upon when the cause of action first accrued.

Second Representation

In relation to the Second Representation, the court held that whilst it was foreseeable that Loulach would have relied on the Second Representation, that was insufficient to impose a duty on the RTA. In coming to this conclusion, the court found that any reliance and vulnerability of Loulach was diminished by the regime (within which the Second Representation was made) requiring the RTA to provide submissions to the Council, not directly to Loulach or its agent, nor in response to a request from Loulach or its agent.

The court helpfully summarised that, in a case such as this, where the plaintiff has suffered pure economic loss flowing from a negligent representation to the consent authority for a pending development application, the four most significant features in the evaluative inquiry as to the existence of a duty of care are:

- assumption of responsibility;
- reliance;
- vulnerability; and
- inconsistency with the statutory regime.

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You have the right to remain reasonable

The Owners – Strata Plan No. 89041 v Galyan Pty Ltd [2019] NSWSC 619

Richard Crawford | Ashley Murtha | Jessica Orap

Significance

It is reasonable for an owner to refuse a builder the opportunity to access property to carry out rectification work in circumstances where:

- the builder has not made an attempt or a reasonable attempt to rectify defects; and
- the owner has reasonably lost confidence in the willingness and ability of the builder to carry out rectification work.

Facts

Gaylan Pty Ltd (**Gaylan**) was the owner and developer of a site at Ettalong, NSW. Gaylan engaged ACH Clifford Pty Ltd (**ACH**) to construct 14 residential units at the site (**Building**). For convenience, we will refer to Gaylan and ACH collectively as the **Builder of the Building**.

Following completion of the Building in late 2013 and the sale of lots, the new lot owners began noticing defects. The Owners Corporation of the Building – Strata Plan 89041 (**Owners Corporation**) engaged a separate builder to carry out a defects report. An Extraordinary General Meeting was held in mid-2014 whereby the Owners Corporation resolved to adopt the defects report and refer the matter to NSW Fair Trading because of 'numerous attempts' by lot owners to have the defects rectified.

In August 2015, the Owners Corporation commenced proceedings against the Builder in the NSW Civil and Administrative Tribunal. At around the same time, the Owners Corporation denied the Builder access to the Building. The Owners Corporation would only allow the Builder to return to the Building if a scope of works to rectify the defects could be agreed between the parties.

In March 2016, the proceedings were transferred to the Supreme Court of NSW. On the second day of the hearing, the proceedings settled and the parties agreed, amongst other things, that:

- a referee be appointed to determine the existence of defective works, the scope and cost of rectification of the defective works and a detailed construction program; and
- costs of the proceedings be determined by the court.

On 22 February 2019, the court adopted the referee's report and awarded the Owners Corporation $1,282,486.59.

The key question which remained was whether the Owners Corporation was entitled to costs of the proceedings. This depended on whether or not the Owners Corporation had acted reasonably in denying the Builder access to the Building and rectify the defects.

Decision

His Honour Justice Stevenson found that the Owners Corporation had acted reasonably in denying the Builder access to the Building to rectify the defects. His Honour's reasons were based on the following findings:

- between the time of the Builder's exclusion from the Building in August 2015 and September 2017, the Builder did not propose a workable scope of works to rectify the defects;
- through its solicitor, the Builder adopted an aggressive approach to the Owners Corporation in describing the Owners Corporation's claims 'bogus' and 'frivolous';
- the rectification work which was ultimately proposed by the Builder's expert in early January 2017 fell short of the rectification work which was required, as determined by the referee; and

- the Owners Corporation lost confidence in the Builder's ability or willingness to carry out the works due to the Builder's:
  - failure to provide a scope of work;
  - poor quality of rectification work;
  - failure to attend the Building; and
  - conduct in entering the Building without permission or authority.

Accordingly, costs were awarded in favour of the Owners Corporation.

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QUEENSLAND

An implied waiver may apply across different contracts

SHA Premier Constructions Pty Ltd v Lanskey Constructions & Ors [2019] QSC 81

Julie Whitehead | Petrina Macpherson | Ray Zhai

Key point

A principal may impliedly grant a waiver for strict performance of the contract conditions through its conduct. Such a waiver may apply across multiple contracts for different projects between the same parties if those contracts have the same provisions.

Significance

Correspondence that is not designated as a variation under a contract may nevertheless constitute a variation if a contractor can show that a principal, through its conduct, waived the principal's requirements for strict compliance with the variation provisions.

Facts

A developer, SHA Premier Constructions Pty Ltd (**SHA**), entered into contracts with Lanskey Constructions Pty Ltd (**Lanskey**) for the design and construction of petrol stations at various locations (**Contracts**). Each project was the subject of a separate contract entered into between SHA and Lanskey.

In the Carrara project, there was an early exchange of emails between the superintendent at the time and Lanskey (**Early Emails**), where Lanskey asked the superintendent if some changes were subject to variation approvals. The superintendent requested a variation to be submitted but further stated that *'work orders will be raised on all approved variations and no work to proceed without work orders'*.

There were six work orders issued after the Early Emails subject to the dispute, which were addressed to Lanskey with the Carrara site address and descriptions of the works referring back to Lanskey's earlier quotations (**Work Orders**). The Work Orders contained the words *'Construction Quote Approved'*.

In the Yeppoon project, Lanskey received an email from SHA requesting that Lanskey proceed with the work and stating that SHA would issue a 'work order' (**Email Order**).

Neither the Work Orders nor the Email Order satisfied the requirements for valid variations under the Contracts. SHA refused Lanskey's payment claims for the works done in relation to the Work Orders and the Email Order. Lanskey referred the matter to adjudication under the *Building and Construction Industry Payments Act 2004* (Qld). The adjudicator found that Lanskey had made valid payment claims. SHA applied to the Supreme Court seeking an order declaring the adjudication decisions void.

Decision

The Queensland Supreme Court dismissed SHA's application and affirmed the adjudicator's decision.

The court found that the Early Emails were significant because:

- the words *'work orders will be raised on approved variations'* and *'no works to proceed without work orders'* were consistent with a general direction in relation to variations on the Carrara project;
- that general direction was given by the superintendent of that project; and

- the project was conducted thereafter in accordance with that direction.

The court found that the Work Orders given later were entirely consistent with the direction given by the superintendent at the commencement of the project. As all approved variations would be the subject of work orders and no work was to proceed without work orders, those Work Orders could be properly seen as confirmation of approved variations. The court looked at the conduct of the parties and found SHA, by its conduct, waived the requirement for strict compliance with the variation provisions under the contract.

The court found that SHA's conduct in respect of the additional work on the Yeppoon project constituted a waiver, and consequently the works carried out pursuant to the Email Order was a variation. The court did not explicitly state whether it gave any weight on the wording 'work order' included in the Email Order.

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Movement of retaining walls remains not a cause of property loss

Delta Pty Ltd v Mechanical and Construction Insurance Pty Ltd [2019] QCA 62

Andrew Orford | Laura Berry | Ray Zhai

Key point

The movement of a retaining wall, even to a dangerous degree, would not likely result in property loss unless the movement damages the wall itself or some other tangible property. Doubt exists on whether a loss of functionality of the retaining walls could constitute a property loss.

Significance

The costs incurred to remedy issues from defective retaining walls are likely to be regarded as economic loss and may not be covered under public liability insurance.

Facts

The essential facts of the case were previously reported in the *October 2017* issue of the Construction Law Update

In summary, the contractor Delta Pty Ltd (**Delta**) argued that the costs incurred to remedy issues from movements of retaining walls, caused by defective rock anchors, were 'property loss' covered by the public liability insurance.

Additionally, the subcontractor Team Rock Anchors Pty Ltd (**TRA**) agreed to pay to Delta an amount *'in full and final settlement'* of the proceedings between the parties *'upon demand'* (**Settlement Amount**). TRA agreed to remain liable to Delta for the Settlement Amount, but its liability in respect of the Settlement Amount was limited to the amount actually recovered by Delta under the subcontractor's insurance policy with Mechanical and Construction Insurance Pty Ltd (**Insurer**). TRA assigned its claim against the Insurer for a nominal amount.

Decision

The Queensland Court of Appeal dismissed the appeal.

The court confirmed that movement of a retaining wall, even to a dangerous degree, would not result in property loss unless the movement damages the wall itself or some other tangible property.

The court refused to consider Delta's additional argument that property loss included the loss of functionality of the retaining walls, as it was not pleaded in the case, which cast some doubts on whether that argument could lead to a different conclusion.

Furthermore, the court agreed with the trial judge that Delta would only acquire a right to sue in the shoes of TRA if the Insurer's liability to TRA had been ascertained and determined to exist, either by judgment of the court, or by an award in arbitration or by agreement. However, the court found that, by agreeing to remain liable to Delta for the Settlement Amount and using the word 'but' instead of 'subject to', the settlement deed did not require the limitation to be construed as detracting from TRA's liability. The court held that the settlement deed rendered TRA legally liable to pay the Settlement Amount, and therefore Delta acquired the standing to sue.

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Failure to serve an adjudication application form is fatal

Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor [2019] QSC 91

Andrew Orford | Sarah Ferrett | Samantha Byrne

Key point

Service of an adjudication application, including the adjudication application form, upon a respondent as soon as possible after the application is lodged with the registrar is essential for there to be a valid adjudication decision. If service of an adjudication application form does not occur 'as soon as possible', an adjudicator may decline jurisdiction to decide the matter.

Facts

The applicant, Niclin Constructions Pty Ltd (**Niclin**), sought orders in relation to four adjudication applications (**Adjudication Applications**) made by it under with the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIPA**). (This legislation has since been repealed and replaced by the *Building Industry Fairness (Security of Payment) Act 2017* (Qld).)

On 28 November 2018, Niclin lodged the Adjudication Applications with the Queensland Building and Construction Commission (**QBCC**) and, on the same day, delivered those Adjudication Applications to the respondent, SHA Premier Constructions Pty Ltd (**SHA**).

In serving the Adjudication Applications upon the respondent however, Niclin failed to serve the adjudication application forms themselves (the form accompanying the Adjudication Application required by the QBCC and lodged with the Adjudication Applications on the QBCC) (**application forms**) on SHA.

In SHA's adjudication responses dated 13 December 2018, it raised this service issue submitting to the adjudicator that it was fatal that Niclin had not served the application adjudication forms with its submissions. It was argued service of the forms was a mandatory requirement as the wording in section 21(5) of the BCIPA used the word 'must'. Section 21(5) states:

A copy of the adjudication application must be served on the respondent.

Niclin served the application forms on SHA the following day (on 14 December 2018).

Three of the four Adjudication Applications were the subject of adjudication decisions by an adjudicator on 18 January 2019. The adjudicator decided that he did not have jurisdiction to determine the three standard claims because the application forms had not been served upon SHA. Niclin sought orders that those three adjudication decisions be declared void on the basis that the adjudicator did have jurisdiction to determine the relevant Adjudication Applications in the absence of the application forms. Niclin also sought orders that its three Adjudication Applications be remitted to the adjudicator to perform the duty required of him under the BCIPA which is to consider the Adjudication Applications on their merits.

At the time of those Adjudication Decisions, there was also a fourth Adjudication Application that had not yet been the subject of a decision by the adjudicator. The same argument about jurisdiction had been raised by SHA.

Decision

The court held that service of an application form was necessary to confer jurisdiction upon an adjudicator and the adjudicator had not made an error in declining jurisdiction.

The court found that:

- the purpose of section 21(5) of the BCIPA was to provide a respondent with notice of the adjudication application and a reference point for the applicable timeframes for the provision of its adjudication response; and
- section 21(3)(b) of the BCIPA required that an adjudication application be made in the approved form.

The court also found that if there is no service of the application form, then the adjudicator has no timeframe for making his or her decision. The court found that the objective of section 21(5) of the BCIPA is for each party to know precisely where it stands such that service of the adjudication application and the

accompanying application form under section 21(5) of the BCIPA is required before an adjudication can be validly undertaken.

The court also found that while the BCIPA provides no timeframe for service, the application form plainly contemplates something close to contemporaneous service of the adjudication application upon the respondent with the making of the adjudication application to the registrar. The court held service was to be 'as soon as possible' after the Adjudication Applications were made. The court found that, in the context of the BCIPA, which imposes brutally fast timeframes, service 12 business days after the lodging of the Adjudication Applications was not 'as soon as possible'. Claimants should be aware that the failure to serve an adjudication application on a respondent with the application form will constitute a failure to comply with its obligation to:

- make its adjudication application in the approved form as required by section 25(3)(a) of the Act; and
- serve its adjudication application in accordance with section 21(5) of the Act,

and as such, will not enliven the jurisdiction of an Adjudicator.

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Certain events occurring outside Queensland may lead to the cancellation of a builder's licence in Queensland

Vickers v Queensland Building and Construction Commission & Ors [2019] QCA 66

Michael Creedon | Luke Trimarchi | Samantha Byrne

Key point

A company's actions in another State can have an impact on a builder's licence held in Queensland. If a 'trigger' event happens outside of Queensland, such as being the director of a company in liquidation in another State, then provisions under the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**) may apply resulting in the cancellation of a builder's licence in Queensland.

Facts

The appellant, Michael Anthony Vickers (**Vickers**), was the director of two construction companies, Midson Construction (NSW) Pty Ltd (**the NSW company**) and Midson Constructions (Qld) Pty Ltd (**the Qld company**). The NSW company was placed into liquidation on 3 January 2018. As a consequence of its liquidation, Vickers was sent a Notice of Reasons for a proposed cancellation of his builder's licence in Queensland. Vickers and the Qld company sought various forms of relief against the proposed cancellation of his builder's licence, including declaratory and injunctive relief, and judicial review.

There were two outstanding issues on appeal:

- was the NSW company a 'construction company' within the meaning of section 56AC(7) of the QBCC Act; and
- was section 56AC of the QBCC Act constitutionally invalid?

Vickers central argument was that the NSW company was not a 'construction company' for the purpose of section 56AC(7) of the QBCC Act. That section provides that a construction company includes a company that carries out building work or building work services in 'this or another State'. Vickers argued that the section confined the definition of a 'construction company' to a company which actually undertakes building work or building work services on 'buildings' constructed in Queensland, on the basis that this was logical and consistent with the scheme of the QBCC Act. Further, Vickers contended that the inclusion of the words 'in this or another State' in section 56AC as too remote from the 'peace, welfare and good government' of Queensland, and therefore the provision was constitutionally invalid.

Decision

The court held that a company failure outside Queensland could trigger the withholding of a licence or the cancellation of a licence in Queensland. The court held there is no limit which constrains 'building work or building work services' to activities carried out only in Queensland. The court considered such a construction is consistent with the operation of the QBCC Act. Whilst the consequence of the events in section 56AC is upon the grant or continued holding of a licence in Queensland, the triggering events might occur outside

Queensland, as in the case of bankruptcy of an individual under section 56AC of the QBCC Act. The court held that it is self-evident that the QBCC Act addresses the risk to Queensland consumers arising from builders in Queensland becoming insolvent, even if that is triggered by an insolvency outside Queensland. The court considered a Queensland licence holder or builder who is associated with a company failure in another jurisdiction is no less a risk to consumers in Queensland than if that licensee or builder was associated with a company failure in Queensland. The court held the plain words of section 56AC of the QBCC Act apply to a construction company, of which the person was a director or secretary, which has carried out building work or building work services either in Queensland or any other State of Australia, where the company has gone into liquidation or been wound up.

The court also disagreed with the argument raised by Vickers that section 56AC of the QBCC Act was constitutionally invalid. The court considered that the section does not regulate conduct in another State, but rather identifies simply that an individual's or company's conduct in another State will have a consequence in Queensland, the consequence being that a company or person might not be granted a licence, or a licence which they hold might be subject to cancellation. To the extent that there is any extraterritorial element, the court held it is slight and indirect.

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VICTORIA

DBCA 'no fault' termination payments and defect rectification costs

Shao v AG Advanced Construction Pty Ltd [2019] VSCA 93

Owen Cooper | Tom Johnstone | Samantha Tyrrell

Key point

Where an owner terminates a major domestic building contract using the section 41(1) 'no fault' provision of the *Domestic Building Contracts Act 1995* (Vic) (**Act**), the cost of rectification of any defective work is required to be taken into account in calculating the reasonable price for the work under section 41(5) of the Act, rather than as a damages claim in subsequent proceedings.

Facts

Wenli Shao (**owner**) validly terminated her major domestic building contract with AG Advanced Construction Pty Ltd (**builder**) pursuant to section 41(1) of the Act, which permits termination if the contract price rises by more than 15% or the time for completing the work exceeds 150% of the original time period. The owner commenced proceedings in the Victorian Civil and Administrative Tribunal (**VCAT**) seeking damages owing to alleged defects in the construction of the house.

Tribunal's decision

The Tribunal held that the builder was entitled to a reasonable price for the work it had done pursuant to the contract up to the date of termination under section 41(5) of the Act. The Tribunal calculated the reasonable price by subtracting the defect rectification costs of $93,153 from the price for the work assessed by an expert building consultant.

However, the Tribunal also held that the warranties implied into the contract by section 8 of the Act gave the owner an entitlement to damages for defective workmanship, and it ordered the builder to pay the owner damages in the amount of $93,153.

The builder appealed the decision to the Supreme Court, arguing that the owner was not entitled to recover damages for defective workmanship after electing to terminate the contract under section 41(1) of the Act.

Supreme Court's decision

The associate judge held that the appeal should be allowed and held that the Tribunal's order that the builder pay the owner damages in the amount of $93,153 be set aside. Her Honour held that the Tribunal erred in making the builder *'pay twice for defects for which it is liable'*. Her Honour explained that the cost of rectification of defects may be utilised to calculate the reasonable price for the work carried out under the contract or be the subject of a separate award of damages under section 8 of the Act, but not both.

The owner appealed the associate judge's decision to the Court of Appeal.

Decision

In the Court of Appeal, Whelan, Kyrou and McLeish JJA upheld the associate judge's orders. Their Honours clarified that the cost of rectification of defects is required to be taken into account in calculating the reasonable price for the work under section 41(5) and therefore is legally unable to be the subject of an award of damages.

Therefore, parties to a domestic building contract need to be aware that if the contract is terminated under section 41(1), any deductions for known defects must be included in the reasonable price payable to the builder, rather than reserving such amount for later court proceedings.

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Defective works? Double whack from the ACL and DBCA

Greco v Basiri (Building and Property) [2019] VCAT 555

Jeanette Barbaro | Tom Johnstone | Chris Grant

Key point

This is an important reminder that consumer protective legislation will overlay guarantees and imply warranties into domestic building contracts in favour of the owners. Parties need to be aware of these obligations regardless of whether they have entered into a formal contract.

Background

The owners engaged with a builder to carry out renovation works at their home. No written contract was entered into by the parties. The builder carried out the renovation works, the parties agreed to the price and scope of works to be completed and the owners paid the builder in full.

The owner subsequently claimed the renovation works were carried out defectively by the builder.

Outcome

Senior Member Kirton held that the owner was entitled to the benefit of both *The Australian Consumer Law* (Cth) (**ACL**) and the warranties under the *Domestic Buildings Contracts Act 1995* (Vic) (**DBCA**).

Australian Consumer Law

The builder was supplying services to the owners in trade or commerce. On this basis, the owners were entitled to the benefit of the guarantee under section 60 of the ACL, which states that the services supplied are to be rendered with 'due care and skill'.

Domestic Building Contracts Act

The builder was performing renovation works within the meaning of 'domestic building works' as defined in DBCA. Therefore, the owners were entitled to the benefit of the implied warranties regarding work set out in section 8 of the DBCA, including the warranty created by section 8(a) which provides that work should be carried out in a proper and workmanlike manner.

Defective building work

Senior Member Kirton held that the builder had performed the renovation works defectively (identifying a number of works that were incomplete or defective) and had breached the guarantee under section 60 of the ACL that the services supplied would be rendered with due care and skill.

It was further held that, by virtue of the defective work, the builder had breached the warranty implied under section 8(a) of the DBCA that the work was to be carried out in a proper and workmanlike manner.

In determining whether the building work was rendered with due care and skill and had been carried out in a workman like manner, Senior Member Kirton had regard to expert evidence, an on-site inspection and reference to the *Guide to Standards and Tolerances* published by the Victorian Building Authority.

As a result, Senior Member Kirton held that the owners were entitled to damages in respect of the rectification of defective work assessed in the sum of $25,345.90 plus the cost for obtaining the expert report and for all VCAT fees.

This case serves as a reminder of the statutory guarantees and warranties that will be implied into building contracts (particularly domestic building contracts), regardless of whether the parties had a formally documented agreement.

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