Construction Law Update

May 2020

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Legislative Update

Changes to the NCC confirmed – no new definition of 'building complexity' and deferred commencement of a new process to document Performance Solutions

National Construction Code 2019 Amendment 1

Andrew Hales | Karen Hanigan | James Mullins

Background

The *National Construction Code (NCC) 2019 Amendment 1* will be adopted by all Australian states and territories from 1 July 2020.

The Australian Building Codes Board (**ABCB**) had previously issued a preview of the *NCC 2019 Amendment 1* which included the following proposed changes:

- a new defined term, 'building complexity', to be used as a future risk-based classification system to identify buildings for which additional oversight is appropriate; and
- a new provision to require that a good practice process be followed when documenting Performance Solutions.

On 22 May 2020, the Building Ministers' Forum (**BMF**) and the ABCB released their determination that the NCC 2019 Amendment 1 will:

- not include the defined term 'building complexity'; and
- include the new provision for the process to document Performance Solutions, subject to that new provision not coming into effect until 1 July 2021.

Accordingly, neither proposed change will come into effect upon adoption of the NCC 2019 Amendment 1 on 1 July 2020.

Definition of building complexity

The *NCC 2019 Amendment 1 (Preview)* proposed the following new defined term 'building complexity':

> *'Building complexity means those attributes that are complicated or organisational, which increase the likelihood of non-compliance in a situation where the safety and/or health consequences of that non-compliance would be significant.'*

It included a table outlining building complexity levels on a scale from level 0 to level 5, and a decision process flow chart for determining that complexity level.

The BMF has determined that the ABCB publish the definition of building complexity on its website as an exposure draft. The ABCB has invited comments on the exposure draft up until 1 November 2020. All comments must be made online.

Process for the documentation of Performance Solutions

The *NCC 2019 Amendment 1 (Preview)* proposed a new provision A2.2(4), which required a good practice process for the documentation of Performance Solutions. This process includes:

- preparing a performance-based design brief;
- carrying out analysis using one or more of the relevant Assessment Methods;
- evaluating the analysis results against the acceptance criteria in the brief; and
- preparing a final report detailing various matters.

The ABCB has determined to include the new provision A2.2(4) in the NCC 2019 Amendment 1, which will come into effect on 1 July 2021. The ABCB has published the *Regulation Impact Statement* for that determination. Notwithstanding that A2.2(4) will not take effect until 1 July 2021, the ABCB notes that appropriate documentation for Performance Solutions should be occurring now and that the process outlined in A2.2(4) can be used for that purpose.

Next steps

States and territories will adopt the *NCC 2019 Amendment 1* on 1 July 2020, subject to the determinations of the BMF and ABCB. We expect that the ABCB will release further comments on the definition of building complexity shortly after expiration of the consultation period on 1 November 2020. To make comments on the online exposure draft *click here*.

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In the Australian courts

NEW SOUTH WALES

Make your case – the 3Ps of litigation

Cubic Metre Pty Ltd v C & E Critharis Constructions Pty Ltd [2020] NSWSC 479

Andrew Hales | Jessica Nesbit | Jonin Ngo

Key point and significance

A claimant must ensure a case is adequately pleaded, particularised and presented. If not, there is a risk that it will not be entitled to an award of damages for an otherwise legitimate claim.

If a claimant builder is no longer liable to rectify defects, it will not be entitled to claim alleged rectification costs not yet incurred from a subcontractor.

Facts

This case is an appeal from the decision of the NSW Local Court concerning damages for breach of a subcontract between a builder, C & E Critharis Constructions Pty Ltd (**builder**), and a subcontractor, Cubic Metre Pty Ltd (**subcontractor**). The builder was engaged by the owners of a property at Watsons Bay (**owners**) under a head contract to construct their home (**head contract**).

The builder sued the subcontractor for damages for breach of the subcontract because the sandstone supplied by the subcontractor was not fit for purpose as a cladding on a sea wall. The builder's case was pleaded in a way that focused on claiming the costs of rectifying the defective sandstone cladding (**rectification costs**).

The builder also argued that it suffered a loss as a result of the owners withholding $20,408 under the head contract on account of the defective sandstone cladding. However, the builder did not provide any particulars of the reasons for withholding it its statement of claim and did not include any claim for damages arising from the withholding (**withheld monies loss**).

Despite the builder's failure to plead the withheld monies loss, the Local Court found in favour of the builder on breach and on damages but on the basis of the withholding monies loss rather than the rectification costs. The main issue on appeal to the NSW Supreme Court was whether the primary judge had erred in finding that the builder was entitled to the withholding monies loss. The builder cross-appealed for the rectification costs.

Decision

Withholding monies loss

The Supreme Court allowed the appeal and found that the Local Court had erred in finding that the builder was entitled to the withholding monies loss because:

- the Local Court was not entitled, as a matter of law, to find that the builder was entitled to the withholding monies loss as this head of damage *'was neither pleaded nor particularised or part of the Builder's case at first instance'*. The Supreme Court also noted that, in addition to the lack of particulars, the builder's counsel limited its case in the Local Court to the rectification costs and did not seek to plead the case for the withholding monies loss;

- the builder's evidence was insufficient to discharge the builder's onus to prove its entitlement to the withholding monies loss and the builder failed to establish that the loss alleged was not too remote (ie that the loss was sufficiently likely to result from the breach); and
- the withholding monies loss was *'plainly not a direct loss under the Builder's contract with the Contractor but rather alleged to be a consequential loss under the Head Contract between the Owner and the Builder'*.

Rectification costs

The Supreme Court dismissed the cross-appeal on the basis that:

- there was no evidence that the builder was either obliged to, or intended to, rectify the wall (especially given that the limitation period for a claim by the owner had expired); and
- the builder had been paid in full by the owner for the subcontractor's work and, as such, had failed to prove that he had suffered loss or that his damages ought to be measured by reference to the rectification costs.

The court referred to the principle established in *Jones v Stroud District Council* (1988) 1 All ER 5 which allows an owner of property to recover rectification costs to bring the property to the condition it would have been in had the contract not been breached, irrespective of whether the property has actually been rectified. The court stated that there are two qualifications to this principle: first, that the plaintiff must have a proprietary interest in the property and, second, that the plaintiff has proved that the property has been or will be repaired. Neither of those points were made out by the builder.

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What we've got here is a failure to consider

Diona Pty Ltd v Downer EDI Works Pty Ltd [2020] NSWSC 480

Andrew Hales | Jessie Jagger | David Bell

Key point and significance

An adjudicator who fails to expressly consider a contractual argument raised by a party in its submissions will not necessarily fall afoul of the requirement for adjudicators to consider the *'provisions of the construction contract'* under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**). Parties should always clearly and thoroughly articulate their legal arguments at adjudication.

Facts

Diona Pty Ltd (**head contractor**) entered into a subcontract agreement (**contract**) with Downer EDI Works Pty Ltd (**subcontractor**) in relation to safety upgrades on the Great Western Highway at Blackheath. The subcontractor proceeded to adjudication on a payment claim served on the head contractor under the contract.

At adjudication, the subcontractor claimed two extensions of time (**EOT 18** and **EOT 21**) pursuant to clause 28 of the contract which would have reduced the liquidated damages it owed to the head contractor. The head contractor argued that the subcontractor was not entitled to EOT 18 or EOT 21 because, by reason of clause 40 of the contract, the claims were time-barred.

The adjudicator determined that the head contractor should pay the subcontractor $430,990. An amount of $30,000 was determined as being due and payable to the subcontractor for delay costs in relation to EOT 18 and EOT 21.

The head contractor sought injunctive and declaratory relief, contending that the adjudicator's determination was void on the basis that the adjudicator failed to address his statutory function in relation to EOT 18 and EOT 21. The head contractor argued that it was apparent the adjudicator had not, as section 22(2)(b) of the Act required, *'considered'* the *'provisions of the construction contract'* because:

- both parties' submissions at adjudication identified EOT 18 and EOT 21 as claims that the head contractor had rejected;

- the head contractor's adjudication response argued that:
  - its determination of the claims for EOT 18 and EOT 21 were final and could not be disturbed other than by way of a claim under the contract; and
  - the contract contained a time-bar (clause 40) on the making of such a claim which had been enlivened; and
- the adjudicator's determination failed to expressly refer to clause 40, or consider whether EOT 18 and EOT 21 were time-barred under the contract. The determination only mentioned EOT 18 and EOT 21 by reference to clause 28.

Decision

Stevenson J dismissed the head contractor's application to quash the adjudicator's determination. His Honour questioned whether it should be inferred that, despite the adjudicator having acknowledged his obligation to consider the provisions of the contract pursuant to section 22(2)(b) of the Act in the adjudication determination, the adjudicator had nonetheless failed to do so.

Stevenson J noted that the question of whether the adjudicator *'considered'* the provisions of the contract, as required by the Act, is a question of fact.

In coming to a decision on the question posed, his Honour noted that, while the head contractor had further developed its legal arguments in submissions on its application for declaratory relief, the case it put forward in the adjudication response was limited and was *'not put forward with great clarity'*. In the adjudication application, the subcontractor had devoted a number of pages to its contentions concerning EOT 18 and EOT 21. However, in its adjudication response, on the question of EOT 18 and EOT 21, the head contractor referred to clause 40 and simply stated that its determinations of those claims *'are final and cannot be disturbed except by raising a claim under the contract, see relevant clauses of the [contract]'* and that the head contractor had *'granted 20.9 days … [and] reject[ed] all other requests for extension of time'*.

The head contractor also addressed its own claimed contractual entitlement to set off liquidated damages only briefly, and it did not otherwise engage with the subcontractor's contentions regarding EOT 18 and EOT 21.

Stevenson J accepted the subcontractor's submission that there could be a number of possible reasons why the adjudicator had not referred to clause 40 in considering the matter. The adjudicator may have determined that, in circumstances where the head contractor did not clearly articulate its argument, he did not need to deal with that point. Alternatively, it may have been the case that the adjudicator misunderstood the head contractor's argument. But that, without more, was not enough to set aside the determination.

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Chickens and narrow arbitration clauses: what could go wrong?

Inghams Enterprises Pty Limited v Hannigan [2020] NSWCA 82

Andrew Hales | Lachlan Williams | Nick Meyer

Key point

A narrowly drafted arbitration clause excluded a claim for unliquidated damages for breach of an agreement. The clause was limited to disputes related to *'any monetary amount payable and/or owed by either party to the other under this Agreement'* and the court found that a pre-existing claim for damages arising by operation of law was not an amount that was *'payable'* or *'owed'* as a result of an express or implied term of the agreement. The claim for unliquidated damages did not, therefore, concern a monetary amount payable under the agreement and could not be referred to arbitration.

Significance

- The decision stresses the importance of the distinction between monetary amounts which are owed or payable *'under a contract'* and remedies which arise separately by operation of law (ie unliquidated damages).

- Had the parties used a broader formulation, such as the commonly used and recommended *'arising out of or in connection with'*… rather than *'under this Agreement'*, it is likely the outcome would have resulted differently.
- Justice Bell's dissenting judgment elucidates some important insights into the enforceability and practical effectiveness of dispute resolution provisions, most importantly that *'dispute resolution clauses are just as capable of generating litigation as any other contractual clause'*.
- Tiered and tailored dispute resolution clauses, while potentially allowing for a cost-effective and streamlined dispute procedure, are not incapable of resulting in their own disputes stemming from improper interpretation.

Facts

Inghams Enterprises entered into a chicken growing contract with Hannigan under which Hannigan received batches of chicks from Inghams, grew them into chickens before returning them to Inghams (**Agreement**).

In 2017, Inghams purported to terminate the Agreement but Hannigan obtained a declaration in the NSW Supreme Court that termination was wrongful. While Hannigan was successful, he did not seek damages, but he reserved his rights to do so. Inghams resumed supplying chicks to Hannigan in 2019. Hannigan then issued a notice of dispute to Inghams seeking damages for loss of profits, based on Inghams' failure to supply chicks to Hannigan between the purported termination in 2017 and the resumed supply in 2019.

A mediation was unsuccessful and Hannigan contended that clause 23.6 of the Agreement entitled him to refer the dispute to arbitration.

Clause 23.1 provided that:

> *'A party must not commence court proceedings in respect of a dispute arising out of this Agreement ("**Dispute**") (including without limitation any Dispute regarding any breach or purported breach of this Agreement, the interpretation of any of its provisions, any matters concerning a party's performance or observance of its obligations under this Agreement, or the termination or the right of a party to terminate this Agreement) until it has complied with this clause 23.'*

Clause 23.6 provided that:

> *'If… the Dispute concerns any monetary amount payable and/or owed by either party to the other under this Agreement… and the parties fail to resolve the Dispute in accordance with Clause 23.4 within twenty eight (28) days of the appointment of the mediator then the parties must (unless otherwise agreed) submit the Dispute to arbitration using an external arbitrator…'*

Inghams commenced proceedings in the NSW Supreme Court to restrain the arbitration, seeking declarations that:

- Hannigan's damages claim did not fall within clause 23; and
- even if it did, Hannigan had waived any entitlement to arbitrate the dispute under clause 23 because of his commencement of the wrongful termination proceedings.

The primary judge held that Hannigan was entitled to have his damages claim referred to arbitration under clause 23.6.

Decision

The Court of Appeal (Meagher JA, Gleeson JA agreeing, Bell P dissenting) allowed the appeal and found that the primary judge erred in his construction of clause 23.6. The court found that the claim for unliquidated damages was not a claim of an amount *'payable'* or *'owed'* by Inghams to Hannigan under the Agreement, nor was it a dispute which affected or related to the negotiation, adjustment or determination of any such amount. As the claim did not concern a monetary amount payable under the Agreement, and as the obligation to pay damages for breach of contract was not created by the Agreement, the court held that the dispute was not a dispute which fell within clause 23.6 and did not have to be arbitrated.

The court also noted the important distinction between remedies and damages which arise by operation of law and monetary amounts which are payable or owed *'under a contract'*. Whereas liquidated damages are recoverable by a contractual right of recovery, unliquidated damages for breach of contract *'are*

compensation assessed by the court in accordance with common law principles for loss occasioned by breach'.

Justice Bell provided some interesting comments in his Honour's dissent, stating that dispute resolution clauses should be construed broadly and liberally. His Honour emphasised the parties' intended use of:

- the relational preposition phrase *'concerns'*;
- the indefinite pronoun *'any'* in the phrase *'any monetary amount'*;
- the phrase *'including without limitation'*; and
- the broader concept of *'monetary amount'* instead of *'fees'*.

Ironically, the parties, in their attempt to draft a bespoke dispute regime governing when disputes could be referred to arbitration, ultimately resulted in litigation concerning the dispute clause itself, spending arguably more resources and time than if they had attempted to resolve the core issue of the dispute itself.

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Builders to pay up if they don't fix it up

Ippolito v Cesco [2020] NSWSC 561

Andrew Hales | Marie Schultz | Ashley Murtha

Key point and significance

If a builder is responsible for defective residential building work and has refused to return to rectify it, a court is unlikely to make an order for rectification of works if damages are being sought. Builders carrying out residential building work in NSW should therefore consider the risk of having to pay the costs of another builder rectifying defective work if they forego the opportunity to rectify it themselves.

Facts

The owner, Mr Ippolito (owner), engaged a builder, Mr Cesco trading as Grid Projects Pty Ltd (builder), to develop a dual occupancy residential development in Willoughby (development). The contract was an Australian Institute of Architects / Master Builders Australia ABIC SW-2008 H NSW Simple Works Contract for Housing in New South Wales and had a contract price of $3,283,411.

There were a number of defects relating to water ingress that affected the development after completion of the works and after expiry of the defects liability period. The builder carried out some rectification work but a number of defects remained and water leaks continued. The parties fell into dispute over the builder's liability for the remaining defects.

Both parties engaged experts to review and quantify the remaining defects. The owner also engaged another builder to rectify some of the defects given the urgency of stopping the water leaks.

The owner sued the builder to recover the costs already paid to the other builder as well as the estimated costs for the defects still to be rectified. A key issue was whether the builder should be given another opportunity to rectify the remaining defects if it was found to be responsible for them. The builder submitted that, if found responsible, the court should give effect to the principle stated in section 48MA of the *Home Building Act 1989* (NSW) (**HBA**) that a court or tribunal determining a building claim involving an allegation of defective residential building work or specialist work by a party to the proceedings is to have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome.

The builder submitted that the court could give effect to section 48MA of the HBA in one of the following ways:

- an order of specific performance;
- declining to award damages and adjourning the proceedings to allow the rectification work to be carried out;
- remitting the matter to the tribunal, which has power to make a rectification order in place of an order for the payment of money; or
- granting a mandatory injunction to require the builder to undertake rectification work in accordance with the order.

Decision

The court found that the builder was responsible for most of the defective items and held that an award of damages in the amount of $380,509 was the appropriate remedy, rather than an order allowing the builder to return to rectify the defects. In coming to this decision, the court concluded that:

- the owner was entitled to claim damages for breach of contract and section 48MA of the HBA should not be interpreted as seeking to alter that position;
- courts are reluctant to order specific performance of a building contract because of the difficulties in formulating an appropriate order and the expectation that the order will require continual supervision by the court;
- the builder had no right to rectify the defects, whereas the owner had the right to the relief of damages and the court has no discretion to refuse or delay that right;
- it was not appropriate to refer the matter to the Tribunal when the matter has been heard in court and the owner had otherwise made out the facts that entitled him to the relief that he claimed; and
- there was no basis on which the court could substitute a remedy which the owner did not seek (a mandatory injunction) for one that he did seek (being damages for breach of contract).

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The unappealing appeal of an unlicensed contractor

Lawrence v Ciantar [2020] NSWCA 89

Andrew Hales | Maciej Getta | Kawshalya Manisegaran

Key point and significance

A builder is not entitled to obtain any legal or equitable interest in land for the performance of work under the *Home Building Act 1989* (NSW) (**HBA**). If the HBA applies and the contract provides for an interest in land, the builder runs the risk of the contract being void and not being entitled to payment for the work performed.

Facts

This case was an appeal from a decision in the NSW Supreme Court dismissing a claim by Wayne Lawrence (**Mr Lawrence**) for a declaration that he held a one-third interest in a property in Forestville. The respondents are the registered proprietors of the property (**owners**).

The owners obtained conditional approval to subdivide the property into three lots. Mr Lawrence submitted a proposal to the owners to purchase lot 3 of the proposed subdivision in consideration for carrying out the works to complete the subdivision. Mr Lawrence was a licensed builder, but his licence extended only to the entry into building contracts not requiring home warranty insurance.

The parties entered into an agreement which stipulated that a transfer of a one-third share of the property would be executed and provided to Mr Lawrence on completion of the subdivision works. The parties also agreed that Mr Lawrence could lodge a caveat over the property. They entered into a deed of loan which recited that Mr Lawrence had agreed to advance the principal sum for the performance of works for the benefit of the owners. The loan was to be repaid at the earlier of a period of 2 years or when the whole or any part of the property was sold.

There were numerous delays to the subdivision works and Mr Lawrence failed to complete the works for a further 8 months after the extended period for completion. The owners served on Mr Lawrence a notice of rescission under the HBA, on the basis that the agreement was for Mr Lawrence to undertake *'residential building work'* within the meaning of the HBA and the agreement failed to include a cooling off warning as required by the HBA. The owners also terminated the deed of loan and claimed the caveat had no further operation.

The HBA prohibits a contract or agreement from conferring on a builder any legal or equitable interest in land. The critical question in the proceedings Mr Lawrence commenced was whether the agreement between the parties was that Mr Lawrence would carry out the whole of the works under the agreement either by himself or under his supervision, as distinct from merely providing funds for the project.

Mr Lawrence submitted that under the agreement it was open for him to fund a third party to carry out the works and as such the agreement was not caught by the HBA, as *'supervision only'* is excluded from the definition of residential building work.

The court held that the agreement between the parties imposed an obligation on Mr Lawrence to do the work. The HBA applied and Mr Lawrence was not entitled to claim an interest in (or lodge a caveat over) the property and otherwise enforce any rights in the agreement. Mr Lawrence appealed.

Decision

The Court of Appeal dismissed the appeal by finding that Mr Lawrence had agreed to carry out the whole of the works by himself or under his supervision, as distinct from funding a third party builder for the project. The restriction on his licence rendered carrying out the whole of the works by himself impossible. Because the HBA applied, sections 7D and 10 of the HBA meant that Mr Lawrence had no interest in the property and the contract was void.

Of significance was the fact that there was no consideration of an alternate builder in the dealings between the parties; from the outset Mr Lawrence held himself out as a licensed builder who could complete the work, and the language of the agreement implied that the mortgage of the interest over the property was to secure the value of the works to be carried out.

Further, the deed of loan was found not to alter the outcome because the unregistered mortgage which it supported limited the mortgage to the works, implying it was to secure the value of the works, not any amount advanced by Mr Lawrence to the owners pursuant to the deed of loan or otherwise.

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No supporting statement? No worries!

TFM Epping Land Pty Ltd v Decon Australia Pty Ltd [2020] NSWCA 93

Andrew Hales | Jessie Jagger | Emily Miers

Key point and significance

A claimant's failure to serve a head contractor's supporting statement with a payment claim in accordance with section 13(7) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) will not invalidate service of the payment claim. This decision settles a long-standing query as to the effect of such a failure, meaning respondents will no longer be able to rely on this technical breach to avoid the operation of the Act. The Court of Appeal has, however, left open the question of whether a claimant is entitled to payment of amounts claimed for work performed after a reference date has arisen.

Facts

This case was an appeal from a decision of the NSW Supreme Court, which we considered in our October 2019 Construction Law Update available *here*.

TFM Epping Land Pty Limited and Katoomba Residents Investment Pty Limited (together, the **principals**) entered into a design and construct contract with Decon Australia Pty Limited (**contractor**) in respect of a residential apartment building in Epping known as the Juniper Development (**contract**).

The contractor served a progress claim on the principals on 3 June 2019 (**payment claim**). The claimed amount was $6,355,352 (**claimed amount**), which included amounts for work done within the original contract sum, variations claimed under the contract, and for interest on overdue progress claims.

The principals sent an email to the contractor's solicitor on 14 June 2019 indicating (in a section headed *'Your clients' claims'*) that the variations claimed were not agreed (**14 June email**).

The contractor commenced proceedings in the NSW Supreme Court seeking summary judgment of the claimed amount. The primary judge granted Decon's summary judgment application and, in doing so, found that the payment claim complied with the requirements of the Act. The primary judge held that the principals' 14 June email was not a valid payment schedule under the Act.

The principals appealed the judgment. The issues on appeal were whether the payment claim was invalid because it was:

- a claim for payment in respect of variations which were not claims under the contract, but rather quantum meruit claims;
- not made in respect of an available reference date; and
- not accompanied by a supporting statement in accordance with section 13(7) of the Act.

Decision

The Court of Appeal dismissed the principals' appeal. The court found that it was not open to the principals to resist an application by the contractor for judgment on the question of whether the amounts for variations did lawfully arise under the contract. There was nothing on the face of the payment claim which suggested that the claims for variations were not made under the contract.

The principals needed to raise this issue with the contractor in a payment schedule issued under section 14 of the Act. When the principal did not issue a proper payment schedule to the contractor raising the issue, they forfeited the right to argue the defence to the contractor's application.

On the second ground, the court, relying on *Southern Han*, held that the inclusion of interest accruing after the reference date did not mean that the payment claim was not made in respect of the reference date. However, the court expressly declined to decide whether a claimant is entitled to payment of amounts claimed for work performed after a reference date has arisen.

Settling the divergence in NSW case law, (including McDougall J's judgments in *Kitchen Xchange v Formacon Building Services* and *Greenwood Futures v DSD Builders* and Ball J's judgment in *Central Projects Pty Ltd v Davidson*), the court held that a claimant's failure to comply with section 13(7) of the Act by failing to serve a supporting statement with its payment claim will not mean the payment claim was invalidly served. The Act does not expressly state that a payment claim will be invalidated in such circumstances; it provides a sanction for such a failure. As a result, the fact that a claimant does something in contravention of a law does not *'annul'* the thing done (ie the service of the payment claim) but simply imposes a penalty on the claimant which is a separate issue.

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NORTHERN TERRITORY

NT Court of Appeal confirms authority is still essential to creating a binding contract

Halikos Hospitality Pty Ltd & Ors v INPEX Operations Australia Pty Ltd [2020] NTCA 4

David Pearce | Sarah Cahill | Alicia Beggs

Key point

Halikos' appeal was dismissed when the NT Court of Appeal confirmed the Supreme Court decision that there was no binding contract between the parties.

Significance

Corporations must ensure the correct contract formation processes are followed by both parties to a contract.

Facts

Halikos Hospitality Pty Ltd (Halikos) operated hotels and serviced apartments. Halikos initially had an agreement with INPEX to supply accommodation for five years (**2012 Accommodation Agreement**). Halikos claimed that INPEX, through a letter from the INPEX Managers and various other correspondence and interactions, entered into a multi-million dollar variation to the 2012 Accommodation Agreement in relation to additional accommodation for a 15-year period (**Additional Accommodation Variation**).

Halikos brought an action in the Supreme Court of the Northern Territory against INPEX claiming loss and damage for breach of the Additional Accommodation Variation when INPEX failed to perform its obligations on the basis that no such agreement existed. Halikos advanced alternative claims that INPEX was estopped from denying the agreement and for damages for misleading or deceptive conduct. The court found in favour of INPEX, ruling there was never a binding written Additional Accommodation Variation due to a lack of both ostensible authority and intention to create legal relations from INPEX personnel. A previous case note which discusses the Supreme Court decision in more detail can be found *here*.

Halikos appealed the Supreme Court decision based on 13 grounds separated into the following four categories:

Group 1: Reasons Grounds

- Ground 1: The judgment is unsafe due to the delay between conclusion of evidence and giving reasons, the delay between closing submissions and giving reasons and the delay between the pronouncement of judgment and giving of reasons;
- Ground 2: The trial judge erred by binding herself to prepare reasons which supported her judgment, despite further consideration of the matters; and
- Ground 3: The trial judge failed to comprehensively consider the evidence in her reasons.

Group 2: Evidence Grounds

- Ground 4: The trial judge erred by failing to have sufficient regard to significant aspects of the evidence of Halikos' witnesses;
- Ground 5: The trial judge erred in failing to have any, or any sufficient, regard to the evidence of Halikos witnesses that there were two separate agreements (the Additional Accommodation Variation said to have been completed on 13 February 2014 and a broader arrangement that was never completed);
- Ground 6: The trial judge erred in finding Halikos failed to establish the factual basis of its claims;
- Ground 9: The trial judge erred in finding there was no intention by the parties to enter into binding legal relations at a meeting on 13 February 2014;
- Ground 11: The trial judge erred in finding the parties did not adopt a mutual assumption they had entered into a binding agreement;
- Ground 12: The trial judge erred in finding that Halikos did not establish that the representation it relied on was ever made; and
- Ground 13: The trial judge erred in finding that INPEX did not make the representations relied upon by Halikos.

Group 3: Authority

- Ground 7: The trial judge erred in finding the High Court has not more recently applied a wider basis for the conferral of authority; and
- Ground 8: The trial judge erred in finding there was no authority by the INPEX Managers to commit INPEX to a binding agreement.

Group 4: Estoppel by Convention

- Ground 10: The trial judge erred in holding the principles applicable to estoppel by convention are those set out in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at [34].

Decision

Group 1: Reasons Grounds

The court dismissed these grounds of appeal. Ground 1 was dismissed for not being sufficient as a ground of appeal. Ground 2 was dismissed as it was found that at the time of pronouncing judgment, her Honour indicated she could not finalise her written responses, not that she had insufficient time to consider the materials. In relation to ground 3, the court's review of the evidence led to the same conclusions as the trial judge.

Group 2: Evidence Grounds

The court found that it was not sufficient for Halikos to point to factual findings that are merely inconsistent with some of the evidence, to support ground 5. Rather, the court must be persuaded on the balance of probabilities that a different conclusion should have been reached, which it was not. The court considered the trial judge's finding that there was only one agreement consistent with and supported by the bulk of the contemporaneous evidence. The court pointed out that the suggestion that the parties concluded a binding agreement but then continued to negotiate a second broader agreement without obtaining any further authorisation *'does not make sense'*, while dismissing this ground.

The court's rejection of ground 5 made it unnecessary to consider many of Halikos' challenges set out within ground 4. The court held that the trial judge was entitled to have doubts about a Halikos witness and therefore accept evidence from INPEX witnesses. However, even while doing this, not much weight was placed on any oral evidence due to the extensive contemporaneous documentary evidence available. Further, despite Halikos arguing the trial judge failed to have regard to certain pieces of evidence, it was clear her Honour did refer to this evidence and subsequently rejected it. In doing so, her Honour adopted the required approach of making factual findings primarily by reference to contemporaneous materials, objectively established facts and the apparent logic of events.

The court further rejected Halikos' argument that it informed INPEX it would not demolish its existing buildings and construct an apartment unless INPEX provided a commitment of the kind asserted. Overall, it was not apparent to the court how the evidence referred to by Halikos is relevant to, or could rationally affect, the correctness of the findings of the trial judge.

Ground 6 was quickly dismissed, with the court stating this ground duplicates other grounds and therefore does not require separate consideration.

The court considered ground 9 unnecessary to consider due to finding ground 8 should be dismissed (below). However, the court pointed out that the evidence reinforces the conclusions that there was no mutual intent to enter into binding legal relations.

The court considered and dismissed grounds 11, 12 and 13 jointly. The representation Halikos relied on was that INPEX made a promise and/or gave an assurance that the Additional Accommodation Variation had been entered into. All three of these grounds related to the same alleged conduct which consisted of discussions, phone calls, meetings and correspondence before and after a meeting which occurred on 13 February 2014. Essentially, Halikos relied upon an expansive 'attack' on the trial judge's fact finding (which was the subject of ground 4) to support these grounds. The court found there was ample cogent evidence that supported the trial judge's conclusions and factual findings. Further, the court pointed out that the rejection of there being two agreements (in ground 5), and the reasoning behind this, makes it clear that both parties were continuing to negotiate a single broader agreement on the assumption there was no binding agreement in place. This dismissed grounds 11 and 12. Ground 13 also failed because it relied on the same representations as ground 12.

Group 3: Authority

Halikos claimed that two of INPEX's senior executives had ostensible authority to enter into a binding contract. Halikos also claimed through ground 7 that the trial judge took an unnecessarily narrow view of the holding out of authority and failed to correctly apply the approach of the High Court in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451. That is, Halikos claimed her Honour erred in finding that in *Pacific Carriers* the High Court had not applied a wider basis for the conferral of authority. The court held that Halikos misconceived the trial judge's findings because her Honour did not draw any conclusions about this suggested wider basis of authority, rather Halikos had failed to establish the factual basis on which it relied for its contention.

Ground 8 was pleaded in support of ground 7 and was Halikos' second primary contention on ostensible authority. The trial judge found neither of the relevant senior executives of INPEX had ostensible authority to enter into the Additional Accommodation Variation. The court found the trial judge did not err in making these findings, stating they were *'plainly correct'*.

Group 4: Estoppel by Convention

Halikos argued in ground 10 (and INPEX accepted) that the trial judge incorrectly stated that a passage quoted from *Waltons Stores* that is plainly a reference to equitable estoppel sets out the legal principles

applicable to establishing conventional estoppel. INPEX suggested this was an error of form rather than substance as the trial judge went on to apply the correct test. Halikos accepted that applying the right test with the wrong label is not an error of law, but argued that the trial judge did not proceed to apply the correct test. The court held that Halikos failed to identify any relevant error resulting from the mistaken reference to *Waltons Stores* and dismissed this ground.

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QUEENSLAND

Indemnity costs awarded in response to flagrant covenant and injunction breaches

BGM Projects Pty Ltd v Durmaz Corporation Pty Ltd [2020] QSC 87

Andrew Orford | Sarah Ferrett | Danielle le Poidevin

Key point

A flagrant breach of a restrictive covenant and a court-imposed injunction restraining continued breach will be grounds for a mandatory injunction. Hardship caused by imposing a mandatory injunction is to be weighed against several factors, including the extent to which a party knew of the wrongful nature of their actions in proceeding with construction in breach of a covenant, and proceeding regardless.

Facts

BGM Projects Pty Ltd (**BGM**), the developer of the 'On the Beach' estate, issued proceedings seeking a mandatory injunction requiring Durmaz Corporation Pty Ltd (**Durmaz Corporation**) to remove a partially built shed and concrete slab constructed on a property owned by the corporations within the estate (**property**).

The dispute arose out of a contract of sale entered into by Durmaz Corporation when purchasing the property (**contract of sale**). The contract of sale included annexures, executed as deeds by Mr Steve Durmaz (**Mr Durmaz**), as the company's sole director and secretary, by which Durmaz Corporation agreed:

- to be bound by certain restrictive building covenants, including covenants that required submission of plans to BGM for approval before construction and imposed specifications as to the order of construction, permitted materials and acceptable dimensions of buildings (**building covenants**); and
- to secure agreement to the building covenants from a future purchaser of the property, ensuring that they too are bound (**future deeds**).

Durmaz Corporation commenced construction of a large shed on the property in breach of the building covenants requiring approval and restricting the order and dimensions for construction.

Prior to construction, BGM had corresponded with Mr Durmaz, putting him on notice that he had to comply with the building covenants and that injunctive relief with indemnity costs would be sought if he did not cease to act in breach of the building covenants.

Mr Durmaz poured a concrete slab, which was subsequently restrained by an urgent injunction restraining Durmaz Corporation and Mr Durmaz from undertaking further construction work on the property (**June injunction**). In making the orders awarding the injunction, Applegarth J reserved his decision on costs.

After failing to receive approval to build the shed after considerable correspondence with BDM, Durmaz Corporation continued to build the shed on the concrete slab in breach of the June injunction.

Decision

BGM's application for a mandatory injunction succeeded. Durmaz Corporation was ordered:

- to remove the shed (the concrete slab was allowed to remain); and
- to pay BDM's costs of the application on an indemnity basis.

Was BDM entitled to a claim an entitlement under the future deeds?

In determining a subsequent application as to the enforceability of the future deeds, Brown J accepted that the future deeds were enforceable as deeds (having fulfilled the requirements of the *Property Law Act 1974* (Qld)) as it was clear that BGM was intended to benefit from their terms.

Had Dumraz Corporation complied with the terms of the deed?

Given the history, Brown J had *'no doubt'* that Durmaz Corporation knew of the building covenant and that Mr Durmaz, acting for Durmaz Corporation, had constructed the shed in the full understanding he was in breach of the building covenants and the terms of the June injunction (the affidavit evidence, and Mr Dumaz's admissions, provided evidence to this effect).

Should the mandatory injunction be granted?

Dealing first with the fresh proceedings brought by BDM in seeking the mandatory injunction, Brown J questioned why BDM chose not to instead institute proceedings for contempt of the Applegarth J's orders in granting the June injunction. This would have allowed his Honour to determine costs arising from the June injunction and BDM's application for a mandatory injunction simultaneously (thus avoiding the unnecessary cost of fresh proceedings).

In considering whether a mandatory injunction should be granted, her Honour was instructed by the decision of *Miller v Evans* [2010] WASC 127. Here, Hall J noted that the basic concept of mandatory injunction award is *'producing a fair result'*, which necessarily involves balancing the hardship suffered by each party in awarding or refusing the injunction and considering whether damages would instead be an adequate remedy.

Brown J determined that Mr Dumaz, in constructing the shed, had caused Durmaz Corporation to *'flagrantly'* breach the requirements of the building covenants and disregard the terms of the June injunction. Dumaz Corporation knew of the wrongful nature of its actions and proceeded notwithstanding that knowledge. Her Honour acknowledged that, while demolition of the shed would be a cost to Durmaz Corporation, there *'was no evidence that it will suffer significant hardship as a result'*.

Brown J considered any hardship suffered by Durmaz Corporation to be outweighed by the hardship suffered by BGM in refusing a mandatory injunction. The building covenants imposed by BGM ensured that that standard and value of the estate were maintained. Damages were not an adequate remedy for the non-compliant shed.

Her Honour concluded that in the circumstances it was appropriate for the court to exercise its discretion in favour of granting the mandatory injunction for the removal of the shed. Brown J was careful to distinguish the shed from the concrete slab, however, as this could be used for future construction that was compliant with the building covenants.

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SOUTH AUSTRALIA

Not fair adjudicator – jurisdictional error found where decision based on points not raised by the parties

Ausenco Operations Pty Ltd & Anor v Ferretti International Ottoway Pty Ltd & Anor [2020] SASC 46

James Kearney | Daina Marshall | Shelini Hillier

Key point and significance

This case adds to an existing body of case law relating to procedural fairness in adjudications in circumstances where submissions were not heard on matters forming the basis of a determination. The practical implications of the decision may lead to an increase in adjudicators requesting parties to make further submissions to matters not originally contended by either party.

Facts

The plaintiffs (Ausenco Operations Pty Ltd and Downer EDI Engineering Power Pty Ltd, trading as Ausenco Downer Joint Venture (**ADJV**)) and the first defendant (Ferretti International Ottoway Pty Ltd (**Ferretti**)) entered into a written contract for Ferretti to fabricate and supply piping for the construction of mining infrastructure (**contract**).

Approximately 10 months later, Ferretti served ADJV with a payment claim in the sum of $678,081 for works done under the Contract. ADJV responded by serving a payment schedule stating the sum payable was 'Nil' and included a claim that it was entitled to set off $201,110 by way of liquidated damages.

Under clause 9.8 of the contract, Ferretti was liable to pay liquidated damages to ADJV if Ferretti failed to deliver the fabricated piping, or a separable portion of it, *'by the respective Date for Delivery'*. A matter of contention was whether the fabricated piping had been delivered late or not.

Pursuant to the *Building and Construction Industry Security of Payment Act 2009* (SA) (**SOP Act**), the matter went before an adjudicator. The adjudicator determined that, whilst Ferretti was not entitled to the full amount in the payment claim, it was entitled to $410,118. This sum was subsequently paid by ADJV.

The adjudicator concluded that the dates relied upon by ADJV in its claim for liquidated damages, being dates contained in the purchase order and purchase change orders, were not the *'Date[s] for Delivery'* for the purposes of clause 9.8 of the contract. The adjudicator rejected ADJV's claim that it was entitled to liquidated damages on the basis that he was not able to identify the *'Date of Delivery'* contemplated by the contract.

ADJV lodged Supreme Court proceedings contending that the adjudicator failed to afford it procedural fairness in that he rejected its claim for liquidated damages on a basis not contended for by either party, and in respect of which neither party was given an opportunity to make submissions. ADJV submitted that the adjudicator thus fell into jurisdictional error.

Decision

The court found the adjudicator had fallen into jurisdictional error warranting orders that the adjudicator's determination be set aside, and that monies paid by ADJV to Ferretti be repaid.

Justice Doyle emphasised that an adjudicator is not *'left at large'* to make a determination on any ground that he or she considers appropriate under the provisions of the contract. Rather, the parties to the adjudication are entitled to proceed on the basis of the parties' definition of the dispute between them through the payment claim, payment schedule, adjudication application and adjudication response.

The quick and efficient nature of an adjudication was said to make it essential that the parties be able to readily ascertain what is in issue and confine their responses and submissions accordingly.

In this matter, Ferretti did not put any submission to the effect that a *'Date for Delivery'* (as defined in the contract) had not been, or could not be, ascertained for the purpose of clause 9.8 of the contract. Neither party made submissions in relation to this issue.

The court held that the adjudicator ought to have requested submissions from the parties (as he was entitled to under section 21(4) of the SOP Act) in relation to this matter before deciding the issue adversely to ADJV.

Without such a request for further submissions, the adjudicator was constrained to a consideration of the matters raised by the parties. Accordingly, the adjudicator had failed to afford the parties procedural fairness when he determined the matter on considerations not contended by either party.

However, even where jurisdictional error has been established through a failure to afford procedural fairness, the plaintiff must establish a substantial or material failure in order to justify the court's discretionary intervention.

It was found that ADJV was denied an opportunity to make submissions which had a real prospect of influencing the result in relation to the issue of liquidated damages. The denial of procedural fairness was considered to be substantial given it related to an issue that was decisive of ADJV's entitlement to a claimed amount of $201,110, which was a *'material sum'*.

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Long stop date on payment claims and running accounts

Commercial Fitouts Australia Pty Ltd v Miracle Ceiling (Aust) Pty Ltd & Ors [2020] SASC 11

James Kearney | Daina Marshall

Key point and significance

In assessing whether the work the subject of a payment claim was performed within six months of the claim, the court will look to the substance of the claim and payments made. In particular, the court examined the nature of payments made to determine whether they related to specific invoices or, alternatively, whether the relationship was truly one of a running account.

Having found that the only invoice which related to work performed within six months of the claim had been paid, the court concluded that the payment claim could not relate to that work. It followed that section 13(4)(b) of the *Building and Construction Industry Security of Payment Act 2009* (SA) (**SOP Act**) precluded the claim and the adjudication decision was made in want of jurisdiction.

The decision reinforces the need for parties to carefully assess whether the work the subject of the payment claim was performed within six months of the claim, as opposed to whether other work which had been paid for, or is not otherwise the subject of the claim, had been performed in that period.

Facts and issues

The first defendant, Miracle Ceiling (Aust) Pty Ltd (**Miracle**) performed construction work under a construction contract with the plaintiff, Commercial Fitouts Australia Pty Ltd (**Commercial Fitouts**). On 22 March 2019, Miracle served on Commercial Fitouts a payment claim for payment of $43,113.

The payment claim referred to invoices numbered 67 to 79. However, only invoice 79 pertained to construction work performed within the six-month period prior to 22 March 2019. Section 13(4)(b) of the SOP Act states that a payment claim may be served only within a six-months period after the construction work to which the claim relates was carried out. Invoice 79 related to payment of $3,784 and was dated 25 September 2018. Commercial Fitouts had paid this exact amount to Miracle on 27 September 2018.

Commercial Fitouts argued that the payment claim captured work performed under invoice 67, 70, 72 and 74, and that all of this work was performed more than six months before the date of the payment claim. As such, it contended that the claim was not brought within time and there was a want of jurisdiction for the adjudication.

Miracle submitted that the payment claim was not precluded by section 13(4)(b), on the basis that all payments made under the contract were made on a running account meaning the court should find invoice 79, being the most recent invoice the subject of the payment claim, was in fact unpaid despite the specific payment of that invoiced amount.

The court identified the key issue before it as being whether each payment related to a specific invoice or whether each payment was to be treated as reducing the overall balance due.

Decision

The court determined that the adjudication decision was made in want of jurisdiction.

In his decision, Stanley J noted that the test of whether a payment claim satisfies the requirements of section 13 of the SOP Act is *'decided objectively'*.

The payment claim issued by Miracle identified 13 separate invoices. Nine of those invoices had been paid by Commercial Fitouts, including invoice 79. Stanley J stated that, because those invoices had already been paid, the reference to them in the payment claim did not make the work captured by those invoices subject of the payment claim.

Stanley J held there were two reasons for this. First, section 13(2) of the SOP Act requires a payment claim to identify with reasonable specificity the work which is subject to the payment claim. Secondly, the circumstances of payments between Commercial Fitouts and Miracle implied an appropriation of the payments made by Commercial Fitouts to Miracle; the communications between the parties indicated that specific payments had been made in respect to specific invoices.

Whilst there were, at times, part payments made by Commercial Fitouts, Stanley J did not accept Miracle's submission that this meant that a running account was in place. The principles for ascertaining which debt a payment will be appropriated to state that, where a debtor fails to communicate the appropriation of a debt, it can be implied. In this case, the implication that the payments by Commercial Fitouts were appropriated was reinforced by the circumstances in which the payment was made, including that the amount of invoice 79 was specifically paid on 27 September 2018.

Having found that the construction work to which invoice 79 related was not the subject of the payment claim, it followed that the payment claim was not made within six months of the performance of the work claimed as prescribed by section 13(4)(b) of the SOP Act.

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Rectification costs not always guaranteed for defective work

Tincknell v Duthy Homes Pty Ltd [2020] SASCFC 24

Joanne Staugas | Leah Wright | Sarah Johnson

Key points and significance

A builder's failure to perform work to contract specifications may not give rise to damages in the nature of rectification costs where those costs are disproportionate to the benefit achieved. However, the outcome could be different if a claim is made for damages arising from diminution in value.

The correctness of the statement of principle in *Built Environs Pty Ltd v Tali Engineering Pty Ltd* [2013] SASC 84) that the prevention principle has no work to do where a building contract confers a right to an extension of time for delays caused by the owner's breach was endorsed by the court. Builders must adhere to extension of time mechanisms in their contracts to rely on the prevention principle to avoid liquidated damages. At the same time, owners must mitigate their loss.

The subjective belief of a person to whom a representation is made is not ordinarily relevant to determining whether claims arising from representations as to a builder's competence might be misleading and deceptive. However, in this case an owner's belief, given his special knowledge arising from his inspection of other work previously done by the builder, was held to be relevant to the assessment of the accuracy of the representation.

Facts

This case was an appeal against a decision of the District Court relating to the construction of a three-storey residential home at Mannum by Michael and Beth Tincknell (**owners**) who engaged Duthy Homes Pty Ltd (**builder**) for a contract price of $2,300,000 (**contract**).

The builder instituted proceedings against the owners to recover the final progress claim of $271,434, and the owners cross-claimed seeking:

- damages for defective works; and
- liquidated damages for failure to reach timely practical completion, impacting the owners' ability to sell their holiday home and invest the proceeds.

At first instance, the owners were ordered to pay a portion of the final progress claim ($173,049) and the builder was required to rectify only some defective works or alternatively pay compensation where appropriate.

Decision

After extensive expert examination of the factual circumstances, the owners partially succeeded in their appeal resulting in a reduction of the amount payable to the builder to $90,494. However, of the twelve appeal grounds, nine were dismissed, most significantly where the builder's breach of contract was clearly established.

Were damages for defective work unreasonable?

The court dismissed the owners' claim for damages for certain defective work, the most costly being the waterproofing work, for which the court found the cost of repairs to be $166,007 (averaging the sums provided by two experts).

The court considered whether the principles of *Bellgrove v Eldridge* (1954) 90 CLR 613 were correctly applied at trial, specifically that the measure of damages is the cost of the rectification work (to ensure conformity with the contract specifications), unless the performance of that work would not be necessary and reasonable due to a lack of proportionality between the work and the benefit gained.

The owners argued that the cost of the rectification work relative to the contract price was not disproportionate, and the court referred to the finding in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 that the test of unreasonableness will only be satisfied by *'fairly exceptional circumstances'*.

Ultimately, despite the builder and experts acknowledging substantial departures from the contracted work, the court upheld the decision to dismiss the claim as the deficiencies in the work had not compromised the functionality or value of the building in a way that could be reasonably and proportionality remedied. Although there was a risk of water damage, the risk would not be eradicated completely by the remedial works.

In reaching this decision, the nature of the builder's actions were considered and were not found to be *'intentional, sharp, cynical, profit-driven or opportunistic'*; however, the court concluded that *'true nature of the loss'* (or lack thereof) was clearly indicated by:

- the owners' lack of complaint and delay with raising the defective issues;
- unconvincing evidence of water entry at the house; and
- the owners undertaking cabinetry work in *'at risk'* areas knowing the waterproofing was defective.

The court observed that the owners did not claim a diminution in the value of their house as a result of the defective works (only that the works were not to contract specifications) which, if established, may have entitled the owners to damages.

Delay damages and operation of the prevention principle

The court dismissed the owners' claim for liquidated damages for the builder's failure to achieve practical completion in accordance with the contract (by 20 October 2011).

The court did not agree with the builder's argument that the owners' claim should be denied by operation of the prevention principle despite the owners acknowledging they contributed to delays in reaching practical completion.

The principle in *Built Environs* was affirmed which provides that, where a builder fails to protect itself by exercising a contractual right to seek an extension of time, the prevention principle will have *'no operation'* and the builder is liable for any losses for the period from the date for practical completion until practical completion is achieved.

Notwithstanding the builder's failure to adhere to the requirements of the contract, the crucial question to be determined was whether the claim had been validly rejected during the trial on the basis of the actions (or failure to act) of the owners.

The owners argued that their loss was ongoing and would continue until all substantial defects were repaired. However, the court held that, once practical completion had occurred (26 February 2013) and the house was habitable (despite the defect issues), the owners' failure to move in at that time demonstrated they were unlikely to have moved in and sold their holiday home in 2011, had practical completion been achieved by the contracted date.

Misrepresentation as to builder's competence

The court dismissed the owners' claim for damages against the builder, and Mr Duthy (a director of the builder) by way of accessorial liability, for misleading and deceiving the owners by representing under the contract that the builder had the necessary skill and expertise to carry out the works, in contravention of

section 52 of the *Trade Practices Act 1974* (Cth) (**TPA**) (a claim which would now be brought under the Australian Consumer Law).

In dismissing the claim, the court departed from the ordinary position that the subjective view of the representee does not change the reasonableness of a representation. Substantial weight was given to the fact that Mr Tincknell was an experienced builder himself and had inspected previous work of the builder and therefore possessed special knowledge. To prove that the builder engaged in misleading or deceptive conduct at the time the contract was made, the court concluded that a substantial degree of incompetence or lack of capacity would need to have been demonstrated. Despite the defective works established, the court found that the evidence was not sufficient.

The court observed that, in the NSW Court of Appeal in *Kavanagh v Blissett* [2001] NSWCA 79, the assessment of liability resulting from misleading conduct of the directors of the relevant building company was the same as the liability for the breach of the building contract. Accordingly, even if the owners were successful under the TPA, the damages would not have increased.

Following the partially successful appeal, no Special Leave application to the High Court has been filed.

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VICTORIA

Should I stay or should I go (ahead and pay)?

ASEA 1 Pty Ltd v Rudyard Pty Ltd [2020] VSCA 122

Owen Cooper | Tom Johnstone | James Mullins

Significance

This case re-affirms that, in respect of appeals involving the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**), a superior court will be more unwilling than in other circumstances to grant a stay of judgment pending the appeal given the Act's objective to ensure prompt payment to builders and contractors.

Facts

This case involved an interlocutory determination in respect of an appeal of *Rudyard Pty Ltd v ASEA 1 Pty Ltd [2019] VCC 1995*, which we covered in our *March 2020* edition of CLU. At first instance, Rudyard Pty Ltd (**builder**) sought judgment against ASEA 1 Pty Ltd (**owner**) under the Act for the owner's failure to issue a payment schedule in response to the builder's payment claims. The court entered judgment in favour of the builder in the sum of $343,750 plus interest.

The owner sought leave to appeal on a number of grounds and made an application for a stay of the orders made at first instance pending the appeal. In support of its application for a stay, the owner submitted that:

- in the absence of such an order, there was a real risk that the builder would disperse the proceeds of judgment to third parties and, given the builder's financial position, any ensuing successful appeal by the owner would be rendered worthless; and
- if the owner were required to pay the judgment sum before the hearing of the appeal, the owner's right to appeal would be frustrated due to its own financial incapacity to meet the judgment debt.

Decision

Principles for grant of a stay

The court reiterated the following general principles regarding stay applications in reaching its decision:

- the appellant (in this case the owner) bears the onus of establishing that a stay should be granted;
- in Victoria, a stay should only be exercised where the appellant has demonstrated the existence of special or exceptional circumstances;

- special circumstances can exist where it is demonstrated that there is a real risk that an appeal, if successful, would be rendered worthless in the absence of the grant of a stay;
- in such a case the court must balance the real risk that an appeal, if successful, would be rendered worthless in the absence of a stay, against the principle that a successful party is ordinarily entitled to the benefit of the judgement; and
- a stay will not be granted unless the owner demonstrates that it has an arguable ground of appeal.

In addition to the general principles above, the court noted that, in respect of appeals involving the Act, the underlying purpose of the Act (being to ensure prompt payment to builders and contractors) adds weight to the principle that the successful party in the proceeding at first instance is entitled to the benefit of the judgment in its favour.

The application for a stay

The court accepted that the owner's proposed grounds of appeal were at least arguable. However, the court held that the owner failed to demonstrate that there was a material risk that a successful appeal would be rendered worthless in the absence of the grant of a stay. The court had particular regard to the fact the builder was an actively trading entity, with a work force and active involvement in building and construction projects.

The court also considered the risk to the owner if it were required to pay the judgment sum before the hearing of the appeal, and whether the right to appeal would be frustrated due to an incapacity of the owner to meet the judgment debt. On this point the court found that, while the owner lacked assets, it had sufficient financial support available to it from a related entity to enable it to meet the judgment debt.

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Challenging the finality of final progress certificates under building contracts

Kelly v Lombardi (Building and Property) [2020] VCAT 284

Nikki Miller | Tom Johnstone | Sebastian Broome

Significance

This decision confirms that principals should take care to ensure that the procedural requirements of a building contract are closely followed in circumstances where an architect or other independent certifier purports to finally determine the entitlements of parties under the contract. If the procedural requirements are not followed, there is a risk the determination may not be binding. This decision also demonstrates that principals should engage in conduct consistent with the architect's certificate, or else be at risk of having their conduct be construed by a court or tribunal as an agreement not to be bound by the certificate.

Facts

Teresa Kelly (**owner**) entered into a contract with Tony Lombardi (**builder**) to carry out a renovation and extension of her home. Christopher Shields of CMS Architects (**architect**) was appointed to administer the contract.

In October 2013, the architect issued its final certificate which stated that an amount of $16,596 was owed by the builder for defects that had not been adequately rectified by the builder during the defects liability period (**final certificate**). The building contract provided that the effect of a final certificate was to finally determine the entitlements of the owner and builder.

The builder subsequently returned to the site with the owner's consent to carry out works on those defects.

After the builder failed to pay the amount stated in the final certificate, the owner commenced proceedings against the builder. In response, the builder issued a counterclaim for work and labour performed under the contract.

As both claims were in respect of defects and works that had previously been assessed in the final certificate, the tribunal was required to determine whether the parties were bound by the final certificate and prevented from bringing any further claims in respect of those works.

Decision

The tribunal held that the parties were not bound by the final certificate for two reasons.

First, the conduct of the parties following the issue of the final certificate, specifically the further defect rectification works undertaken by the builder, was held to amount to an agreement between the builder and the owner that they would not be bound by the final certificate.

Second, the tribunal held that the final certificate was issued without a proper basis and outside the regime set out in the building contract and was therefore invalid. Under the building contract, the builder was required to submit a final claim for payment within 20 working days after receiving a request from the architect to do so, and any final certificate issued by the architect would then function as a final determination of the parties' entitlements under the contract. Contrary to these requirements, the builder had neither submitted a final claim for payment nor received a request from the architect to do so. The final certificate was therefore deemed by the tribunal to have been issued without a proper basis.

On the basis of the above reasons, the tribunal held that the architect's determination was not binding, and accordingly the tribunal was not bound by the architect's determination of the parties' entitlements when assessing the owner's claim and the builder's counterclaim.

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