Construction Law Update

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In the Australian courts

COMMONWEALTH

High Court confirms parties can contract out of limitation periods

***Matthew Ward Price as Executor of the Estate of Alan Leslie Price (Deceased) & Ors v Christine Claire Spoor as Trustee & Ors* [2021] HCA 20**

Petrina Macpherson | Sarah Cahill | Tia Shadford

Key point and significance

The High Court has confirmed that parties can contract out of the time limitations imposed by the *Limitation of Actions Act 1974* (Qld).

Parties to construction contracts need to be aware that a court may give effect to clauses which prevent a party from relying on limitation periods in defence of future claims. The right to plead the expiry of a relevant time period as a defence is a benefit conferred on individuals. It is not contrary to public policy for the relevant parties to agree to give up that right and such an agreement is enforceable.

Facts

In 1998, Law Partners Mortgages Pty Ltd (**Law Partners Mortgages**) lent $320,000 to members of the Price Family (**appellants**). As security for this loan, Law Partners Mortgages and the appellants entered into a Bill of Mortgage (**Mortgage**) which secured a number of mortgages over land. The appellants did not make their repayments by the fixed date for repayment, making only a partial repayment some four months later.

In 2017, the respondents (as the successor in title to Law Partners Mortgages, and as mortgagee) brought proceedings against the appellants for payment of the outstanding amount, and to recover possession of the land over which they had secured mortgages. The respondents applied to the Supreme Court of Queensland for summary judgment or for a strike out of the defences.

In defence of the claim, the appellants argued the respondents were statute-barred from advancing their claims pursuant to sections 10, 13 and 26 of the Limitation of Actions Act and, on this basis, were unable to recover the monies owed or enforce the rights under the mortgages. In reply, the respondents relied on clause 24 of the Mortgage which, they claimed, amounted to a covenant on the part of appellants not to plead a defence of limitation. As such, the respondents claimed that the parties had, in effect, 'contracted out' of the provisions in the Limitation of Actions Act, and the appellants could subsequently not rely on them in defence of the claim.

The primary questions for the court was whether parties could 'contract out' of the provisions of the Limitation of Actions Act and whether clause 24 operated to exclude the appellants from raising a defence on reliance of the expiry of a limitation period under the Limitation of Actions Act.

Decision of the Supreme Court

The primary judge dismissed the respondents' application for summary judgment and entered judgment for the appellants. Dalton J rejected the respondents' contention that the public policy considerations surrounding 'finality of litigation' underpinning the Limitation of Actions Act prevented a party from contracting out of the provisions of the Limitation of Actions Act in all circumstances. Her Honour found that parties could contract out of the provisions, however, the parties were unable to do so in this instance as:

- section 24(1) of the Limitation of Actions Act did not confer a benefit on an individual to rely on the Limitation of Liability Act provisions and, as such, prevented the parties from being able to contract out of the time periods in this instance; and
- clause 24 did not extend to the provisions of the Limitation of Actions Act and therefore did not prevent the appellants from relying on them in defence of the claim.

Decision of the Court of Appeal

The respondents were successful on appeal. The Court of Appeal found that the primary judge was correct in finding that a party can contract out of the limitation of liability provisions but rejected the finding that the parties could not contract out in this instance. The appellant's construction of the Mortgage was held to be correct and the parties were found to have contracted out of the limitation period.

The appellants sought leave to appeal the decision to the High Court of Australia.

Decision

The High Court unanimously dismissed the appeal, holding that the Court of Appeal was correct in finding that the parties could contract out of the limitation period imposed by sections 13 and 10 of the Limitation of Actions Act and that clause 24 of the Mortgage allowed them to do so.

The High Court found that whether a party can contract out of a statutory right to plead a defence of limitation is dependent on the scope and policy of the Limitation of Actions Act. More specifically, this involved consideration of whether the benefit conferred by the provisions of the Limitation of Actions Act conferred a personal or private benefit on parties.

The High Court ultimately held that, in line with long settled authority, section 13 (and similarly section 10) of the Limitation of Actions Act provided a defendant with a statutory right to plead that a limitation period is to be given effect, as a defence to an action. The right to plead the expiry of the relevant time period as a defence was held to be a benefit conferred upon individuals. As a benefit conferred on individuals, the right to rely on limitation periods was therefore a right that a party could waive and subsequently contract out of.

In accepting the respondents' claims regarding the exclusion of limitation periods, the High Court rejected the appellants' contention that such a finding would fail to give effect to the public policy intent of the Limitation of Actions Act, namely 'finality in litigation'. It was found that conferring the right on an individual to elect to plead a limitation period in a particular case was still giving effect to the 'finality in litigation' principle. This leaves the decision about whether to forgo the provisions to the individual, which, in the High Court's view, makes contracting out entirely compatible with the provisions and underlying policy considerations of the Limitation of Actions Act.

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NEW SOUTH WALES

When can an agreement for residential building works without a written contract be enforceable?

Anjoul v Anjoul [2021] NSWSC 592

Andrew Hales | William Vu

Key point

As always, put everything in writing and keep records. Failure to do so initially can be remedied in a later agreement, but consider carefully the drafting (including the recitals) and note that such agreements will not override certain statutory requirements, such as in the *Home Building Act 1989* (NSW) (**HB Act**)

Facts

A disagreement between former in-laws as to who should pay for renovations to a residential property led to a dispute. No written contract was entered into between the parties, Ashley Anjoul (**Ashley**), who was the former sister-in-law of the plaintiff, Jerry Anjoul (**Jerry**).

The parties' submissions and evidence significantly diverged on what the facts were, including how the renovations came to be, who was responsible for the renovations and what payments had actually been made. They agreed that in April 2009, NSW Fair Trading issued Ashely an owner-builder permit. Jerry subsequently asked a number of subcontractors to work on the renovation. There were no written contracts with the subcontractors nor were any invoices or evidence of payment tendered as evidence to the court.

In early 2010 the renovation was complete. Jerry remained unpaid for four years. Jerry contended that Ashley and her husband, Anthony Anjoul, had promised, but failed, to fully pay for the renovation, so Jerry paid for the works himself and was entitled to reimbursement. Ashley contended that she believed Anthony and Jerry were solely responsible for determining Jerry's reimbursement or alternatively that Jerry would not seek reimbursement as he would source materials and services without cost from family and friends. Ashley further contended that Jerry was prohibited from any reimbursement as he was not licensed, not insured and there was no building contract as required by the HB Act.

The HB Act requires parties to enter into a written contract in order to be entitled to damages or to enforce any other remedies for breach of contract.

In 2014, Ashley and Jerry signed a *'deed of acknowledgement of debt'* (**deed**) which provided that Ashley acknowledged a debt of $743,353 was owed to Jerry by Ashley and that, if she divorced her husband, she would be required to pay any outstanding amounts to Jerry immediately. The terms also provided that Ashley had independently verified the debt. The deed also allowed for Jerry to lodge a caveat over the property.

Around this time, Ashley's husband was arrested and subsequently incarcerated for a substantial period, during which Ashley suffered from anxiety and depression. Ashley also signed a letter purporting to acknowledge she had received legal advice about entering into the deed.

Ashley argued that the deed was unenforceable on a number of grounds: (1) there was in fact no debt due; (2) the deed did not create a charge over the property; (3) the requirement to immediately repay the debt upon Ashley's divorce was a penalty; (4) the deed was an unjust contract under the *Contracts Review Act 1980* (NSW); and (5) she entered into the deed under duress or due to unconscionable conduct and it was unenforceable under applicable equitable principles.

Decision

The court dismissed grounds 1, 2 and 3 and held that the deed was enforceable and created a charge over the property in favour of Jerry. The fact that Jerry only held a contractor's licence for specialist work did not prohibit the claim as Jerry had carried out some work and paid for other trades and materials as agent for Ashley as an owner-builder, not under a contract between himself and Ashley. Jerry was therefore not prohibited under the HB Act from claiming for the renovation works.

The court agreed with Ashley's contentions in grounds 4 and 5. Despite finding the deed was voidable and should be set aside, the court deferred making such an order on the basis that Ashley should not be entitled to the entire benefit of the renovations for free. The lack of records made it difficult for the court to make an assessment and the parties were given further time to make potential reimbursements.

The moral of the story is that parties, even amongst family, should always ensure they comply with requirements under the HB Act and as identified on the *Fair Trading website*.

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When is an expert determination final and binding?

CPB Contractors Pty Ltd v Transport for NSW [2021] NSWSC 537

Andrew Hales | Zoe Zhang

Key point and significance

For the purpose of deciding whether an expert determination is final and binding, an expert determination that finds no further compensation is payable is a determination that involves 'paying a sum of money'.

This decision clarifies the interpretation of the exceptions to the provision making expert determination final and binding in the New South Wales Government GC 21 (Edition 2) 'General Conditions of Contract' (**GC21**).

Facts

CPB Contractors Pty Ltd (**CPB**) and Transport for New South Wales (**TfNSW**) entered into a GC21 contract for works in relation to the widening of the M1 Pacific Motorway. TfNSW issued a series of site instructions to CPB to remove excess spoil accumulated during the course of the project.

A dispute arose between CPB and TfNSW about the rate that should be used to calculate the amount that CPB was entitled to be paid for the spoil removal works. CPB made six separate payment claims totalling $11.4m which were rejected by TfNSW due to CBP seeking payment calculated in accordance with a contract schedule of rates (on a per square metre basis) as opposed to the $1.4m payable on the dayworks rate contented for by TfNSW. GC21 provides for such disputes to be referred to expert determination.

The expert determined that CPB was not entitled to further payment for the works the subject of four of the six payment claims.

GC21 provides that an expert determination is final and binding unless the determination:

- does not involve paying a sum of money; or
- requires one party to pay the other an amount in excess of $500,000.

CPB commenced proceedings in the New South Wales Supreme Court in reliance on the first exception. TfNSW applied for a stay of the proceedings. CPB argued that the question is what the 'determination', not the 'matters for determination', 'involves' and that in a case where the issues involve a claim for payment of money, a determination that no money is payable is in effect a dismissal of the claim, and does not involve 'paying' a sum of money; as the determination is that no money is to be paid.

Decision

Stevenson J stayed the proceedings (in part) on the basis that the expert determination was final and binding.

His Honour concluded that the use of both 'involve' and 'requires' in subsequent subclauses meant there was intentional differentiation between the two and thus they have different meanings in GC21. In the context of GC21, 'involve' means something like 'concern' or 'have to do with' so that a determination involves 'paying a sum of money' if it concerns or has something to do with the paying of a sum of money.

A determination that a party was not entitled to compensation did involve the paying of a sum of money and any other interpretation was a narrow interpretation of the exception clause which would be contrary to the purpose of the contract.

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Hearsay evidence admissible to prove false statutory declaration and damages under the ACL

Maaz v Fullerton Property Pty Ltd [2021] NSWCA 79

Andrew Hales | *Nicholas Grewal* | *Ashley Murtha*

Key points and significance

A statutory exception to the hearsay rule meant that statements made out of court by persons not called as witnesses could be relied on as evidence at trial as the statements were contained in 'business records' and were made in the course of the business.

A person who signs an untrue statutory declaration in support of a payment claim asserting that all subcontractors have been paid is likely to be held liable to the recipient of the declaration for loss suffered in an action for misleading or deceptive conduct pursuant to the Australian Consumer Law.

If a claim is made under the Australian Consumer Law the calculation of loss suffered is governed by the principles of tort and not by reference to the contract.

Facts

The appellant, Mr Maaz, was the sole director of a builder contracted by the respondent, Fullerton Property Pty Ltd, to construct an apartment building in Bankstown.

Mr Maaz signed statutory declarations in support of the builder's payment claims asserting that all subcontractors had been paid. Fullerton paid the builder in reliance on those statutory declarations.

As it turned out, the builder had not actually paid the subcontractors, and Fullerton ended up having to pay the subcontractors directly. Fullerton took Mr Maaz to the District Court alleging that Mr Maaz had engaged

in 'misleading or deceptive conduct' under the Australian Consumer Law by signing the false statutory declarations. The trial judge found in favour of Fullerton, and Mr Maaz was ordered to pay the sum of $388,318, including $50,000 for exemplary damages.

Documents created by the builder's subcontractors containing statements that the subcontractors had not been paid by the builder played a key role as evidence in the trial. The trial judge deemed the documents to be admissible on the basis that they constituted 'business records' and thus fell within a statutory exception to the hearsay rule.

Mr Maaz appealed the trial judge's decision contending that:

- the statements contained in the subcontractors' documents should not have been admissible as an exception to the hearsay rule;
- even if the statements were admissible, the trial judge should not have given any weight to them; and
- the award of damages was greater than what should have been awarded by reference to the terms of the contract, and there was no loss suffered by Fullerton unless the cost of the development exceeded the fixed price set out in the contract.

Decision

The appeal was dismissed and the decision of the trial judge was upheld.

On the question of admissibility, it was held that the trial judge was correct to allow the evidence by way of an exception to the hearsay rule. Following a review of the documents it was concluded that although the statements contained in the subcontractors' documents were in principle hearsay, the documents they were contained in were in fact 'business records' of either the subcontractors or Fullerton, and as such the statements were admissible (and properly admitted) by way of the exception to the hearsay rule.

As to the weight that should have been given to the evidence, it was held that this is essentially a matter for the trial judge to decide, and in this instance the trial judge was justified in treating the subcontractors' documents as reliable. The court found there was no reason to doubt the authenticity or accuracy of the documents and noted that Mr Maaz did not provide any evidence to contradict them.

Regarding the calculation of damages, the court noted that the relevant contract was between Fullerton and the builder, whereas the proceedings were brought by Fullerton against Mr Maaz in his individual capacity. Furthermore, the claim against Mr Maaz was in tort and under the Australian Consumer Law not in contract. As a result, the court found that the contract did not control the amount of the loss suffered by Fullerton for relying on the false statutory declarations made by Mr Maaz.

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When was the payment claim served?

MGW Engineering Pty Ltd t/a Forefront Services v CMOC Mining Pty Ltd [2021] NSWSC 514

Andrew Hales | Jessica Nesbit | Tom Lawler

Key point and significance

To assess when the statutory time frames in relation to payment claims begin to run, you must first identify when service of the payment claim occurred.

Payment claims are:

- personally served, when they come to the attention of the relevant person (this does not need to be the person directed to receive notices under the contract, but some step must be taken to bring the document to the attention of a relevantly responsible person); and
- lodged during normal office hours at the ordinary place of business, when steps are taken which have the effect of bringing the documents to the attention of the relevantly responsible person.

If a payment claim is said to have been served in a *'manner … provided under the construction contract'*, a provision that deems service after a particular time of the day, e.g. 4:00pm, to be effected on the following business day, will apply and be effective for the purposes of s 31(1)(e) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**).

Facts

Forefront Services (**Forefront**) was contracted by CMOC Mining Pty Ltd (**CMOC**) to provide various services at the Northparkes copper and gold mine at Goonumbla in central NSW (**Mine**).

At 5:15pm on 3 February 2021, an employee of Forefront handed payment claims made under the SOP Act to a Senior Emergency Management Advisor of CMOC, who was on duty at CMOC's access control room near the main gate to the Mine.

If the payment claims were served on 3 February 2021 for the purpose of the SOP Act, Forefront was entitled to $6,161,020, being the amount of the payment claims. If they were served on 4 February 2021, Forefront was only entitled to $180,912, being the amount of the payment schedule lodged by CMOC on 18 February 2021.

This is because 18 February 2021 was 11 business days after 3 February 2021, which exceeds the 10 business day time limit for service of a payment schedule under the SOP Act.

On 25 January 2021, CMOC had written to Forefront requiring Forefront to suspend all works *'on Site'*. Following service of the payment claims, Forefront purported to suspend all works, including the fabrication of steel, delivery to the Mine and shop and erection drawings, on the basis that its payment claims had not been paid and that CMOC had not provided a payment schedule in the required time.

Forefront contended that the payment claims were served in accordance with section 31 of the SOP Act on 3 February 2021 because they were served:

- *'personally'* on CMOC;
- by lodgement *'during normal office hours'* at CMOC's *'ordinary place of business'*; or
- in a *'manner … provided under the construction contract'* between the parties.

Decision

The court did not accept any of Forefront's submissions and found the payment claims were served, for the purpose of the SOP Act, on 4 February 2021 as contended by CMOC.

Personal service

The court held that the word *'personally'* in section 31 of the SOP Act suggests some step must be taken to bring the document to the attention of a relevantly responsible person within the corporation. The payment claims were not marked to the attention of the company secretary, as required by the contract, but were marked to the attention of the company representative. The payment claims were not served *'personally'* on CMOC unless they came to the attention of one of the persons detailed as the company representative in the contract. This occurred on 4 February 2021 because the company representative in question did not work at the Mine on 3 February 2021.

Lodgement during normal office hours at the ordinary place of business

'Office hours' for the purpose of the SOP Act means the hours that the administrative or clerical staff of the person to whom service is to be made normally keep. Although the Mine is operational every hour of every day, the court found the normal operating hours of the Mine finished between 4 to 4:30pm each day. The payment claims were lodged after this time. Further, for documents to be 'lodged' under the SOP Act, more is required than simply leaving the documents with an employee at the ordinary place of business within the normal office hours. Some further step is necessary that has the effect of bringing the documents to the attention of the relevantly responsible person.

Service in a manner provided under the contract

The contract required notices to be served no later than 4pm, otherwise service would be taken to have been made on the following business day. This contractual provision did not modify the operation of the service requirements under the SOP Act, because the provision was facultative and did not require service in that manner. Therefore, the provision was not void, it gave effect to section 31 of the SOP Act. As a result, the payment claims handed to an employee of CMOC at 5:15pm on 3 February 2021 were deemed to have been served in a manner provided under the contract on 4 February 2021.

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Taking inconsistent positions can undermine a jurisdictional challenge

Phoenix Builders Pty Ltd v Deca Australia Pty Ltd [2021] NSWSC 581

Andrew Hales | Jack McFadden

Key points

As cash flow is the life blood of the industry, the court will only grant an injunction preventing payment of an adjudication determination in favour of a contractor experiencing cash flow issues where there are strong reasons to do so. Parties should also ensure that jurisdictional arguments raised in adjudication and subsequent proceedings are consistent to ensure that the strength of their arguments is not undermined.

Facts

Deca Australia Pty Ltd (**subcontractor**) entered into a contract to undertake demolition and excavation works for Phoenix Builders Pty Ltd (**head contractor**). The head contractor alleged that a site meeting took place at which it was agreed that:

- the subcontractor would be paid 65% of the contract price for all works completed to date on a final basis;
- the contract would come to an end; and
- any further construction work would be on the basis of a new contract (**Agreement**).

The head contractor then paid 65% of the contract price to the subcontractor and the subcontractor sent an email to the head contractor which was said to be evidence of the new contract.

The subcontractor issued a payment claim. The head contractor's payment schedule alleged that the payment claim was not valid as the original contract no longer existed and there was no entitlement to make the progress claim. The payment schedule did not address that the Agreement contemplated payment on a final basis.

The subcontractor filed an adjudication application. The head contractor's adjudication response did not press any jurisdictional issues and had other inconsistencies with the Agreement alleged by the head contractor. The adjudicator considered that it was authorised to determine the adjudication, deciding that the head contractor was obliged to pay the subcontractor $240,805.

Subsequently, the head contractor requested details of the subcontractor's financial position as it had been subject to a winding up order and various defaults were noted on a company search. The subcontractor advised that most of the amounts had been paid.

The head contractor commenced proceedings ex parte seeking an interim order to restrain the subcontractor from enforcing the adjudication determination on the basis of the subcontractor's cash flow issues. The court was not told that the jurisdictional challenge had been put before the adjudicator but then withdrawn.

Decision

The court refused to grant an injunction having regard to the strength of the head contractor's claim and the balance of convenience.

The court considered the apparent strength of the parties' substantive cases, noting that the strength of the head contractor's case was undermined by:

- the inconsistent manner in which the issue was put to the adjudicator and then withdrawn, and then pressed again in the proceedings; and
- the fact that the head contractor's other claim for breach of contract was put in wide and general terms.

In considering the balance of convenience, the court took into account the strength and basis of the applicant's claim and the likelihood that the contractor would be unable to repay the determination if required.

The court considered the subcontractor's alleged cash flow issues to determine whether the moneys would be recoverable if paid to the subcontractor, noting that defaults of roughly $177,000 existed.

Accepting the cash flow issues, the court noted the underlying policy of the *Building and Construction Industry Security of Payment Act 1999* (NSW) is that contractors should have their bills paid promptly as cash flow is the life blood of the industry. Noting the adjudication determination amount of $240,000, the money which the subcontractor was prima face entitled to was an amount which would likely address the cash flow problems.

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I just want to feel secure! You owe me that much

Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd [2020] NSWCA 90

Andrew Hales | Claire Laverick | Naomi Graham

Key point and significance

The requirements for obtaining an order for security for costs against a corporation are less onerous if the application is made under section 1335(1) of the *Corporations Act 2001* (Cth) instead of relying on rule 51.50 of the *Uniform Civil Procedure Rules 2005* (NSW).

If there is reason to believe that a corporation will not be able to pay the costs of the defendant if successful in their defence, special circumstances do not need to be established for an order for security for costs to be made. A rational basis for the belief based on a practical common sense approach to examining a corporation's financial affairs is sufficient.

Facts

Giorgio Armani Australia Pty Ltd (**Armani**) engaged Valmont Interiors Pty Ltd (**builder**) to fit out its Sydney International Airport store. A dispute arose and the builder commenced proceedings in the District Court for payment of amounts due for variations requested by Armani. Armani cross-claimed for defective works. Separate judgments were given on the claim and cross-claim and the amounts set off against each other. The builder was ordered to pay Armani's costs of the proceedings on an ordinary basis up to a date, and on an indemnity basis thereafter.

At the time the builder commenced an appeal, it was indebted to Armani in the sum of $104,638 together with post-judgment interest and costs estimated in the sum of $385,000. Armani sought financial statements from the builder to assess whether it should make an application for security for costs. The builder failed to provide information despite requesting various extensions. Following a final warning, Armani filed a notice of motion on 9 April 2021 and a notice to produce seeking production of financial statements it had requested since 4 December 2020.

The original notice of motion invoked r 51.50 of the *Uniform Civil Procedure Rules 2005* (NSW), which required Armani to establish special circumstances warranting an order for security for costs. This was amended to invoke section 1335(1) of the *Corporations Act 2001* (Cth), which removed the requirement to establish special circumstances if it appeared by credible testimony that there was a reason to believe that the builder would be unable to pay Armani's costs. The builder provided limited financial material, confined to special-purpose financial statements for year end 30 June 2020 and bank statements from 1 July 2020 to 31 March 2021 for one of two bank accounts.

Decision

The court ordered the builder to provide security in the amount of $50,000 for Armani's costs of the appeal.

In reaching this decision, the court considered principles outlined in *Treloar v McMillan* [2016] NSWCA 302 at [9]-[15], commenting that the test for whether section 1335(1) is satisfied is an undemanding one, which only requires a rational basis for the belief (*Wollongong City Council v Legal Business Centre Pty Limited* [2012] NSWCA 245 at [29]-[30]), a practical common sense approach when examining a corporation's financial affairs (*Livingspring Pty Ltd v Kliger Partners* (2008) 20 VR 377), and a consideration as to whether an order for security would work an injustice.

The builder's cash position at 30 June 2020 would have been entirely eroded by payment of its debt to Armani. Since then, its position had frequently fluctuated to a level below what would be required to service its debt. In addition, other indicators of poor financial health were present. The court was therefore satisfied that there was sufficient evidence for there to be reason to believe that the builder would be unable to pay Armani's costs if not successful in the appeal.

The court also noted the question of delay, as the matter was due to be heard one week after the date on which the security application was listed. However, as this was largely due to the builder's extensive delay in producing the financial information, in this case, the court still felt able to exercise its discretion to award security (albeit a reduced amount, on the basis that $50,000 was a generous sum for a one-day appeal of this kind).

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Don't (e)stop me now! I'm having such a good time, I'm having a ball

Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd (No 2) [2021] NSWCA 93

Andrew Hales | Naomi Graham

Key point

Parties to a contract may lose the ability to rely on notice requirements and time bars, in particular where they have caused a counterparty to adopt an assumption that they will not be enforced. It is up to the party who induced that assumption to undo that understanding in clear terms. This includes identifying the category of claims in respect of which the notice requirements will be enforced and providing sufficient notice of that departure from the assumption to allow the counterparty to comply with any notice requirements.

Facts

Giorgio Armani Australia Pty Ltd (**Armani**) engaged Valmont Interiors Pty Ltd (**builder**) to fit out its Sydney International Airport store. A dispute arose and the builder commenced proceedings in the District Court for payment of amounts due for variations requested by Armani. Armani cross-claimed for defective works.

The contract contemplated a fixed contract sum which included all items, except client supplied items. The parties agreed that the joinery would be supplied by an international third party, Sun Bright Construction Co Ltd (**Sun Bright**) engaged by Armani, and an allowance would be made in the contract sum for this.

Sun Bright was unable to provide all the materials to satisfy the fit-out program. As a result, Armani directed the builder to supply the items that Sun Bright was unable to.

The builder provided the outstanding joinery items but Armani refused to pay for the goods and for other variations on the basis that the builder was precluded from claiming payment because it had failed to comply with the contractual variation clause. This clause provided that where the builder considered a direction was a variation, the builder was required to give notice to Armani and failure to do so resulted in the builder releasing and waiving any entitlement to claim, including quantum meruit.

On 11 April 2016, Armani sent an email to the builder in the context of ongoing correspondence relating to the shop façade, rather than the joinery, in which it notified the builder that from that date it would enforce the conditions precedent to a claim under the variation clause. Ongoing correspondence otherwise indicated that strict compliance by the builder with this procedure was not required.

The builder commenced proceedings seeking damages for breach of contract or, in the alternative, quantum meruit. It asserted that Armani was estopped from relying on the conditions precedent to a claim under the variation clause because Armani had approved additional works and agreed to payment for those works without reference to this clause. Armani cross-claimed in respect of alleged defective building works and asserted the 11 April 2016 email displaced any estoppel.

In the District Court, the primary judge held that an estoppel operated until 11 April 2016, at which point it came to an abrupt halt. The judgment sum in favour of builder included amounts for variations up to this date, as Armani was estopped from relying on the builder's failure to comply with the variation clause. Following this date, the variation process applied and Armani could rely on the builder's failure to comply. The builder's claim for joinery was rejected on the basis that the costs were incurred after 11 April 2016 and there was no estoppel operating.

The builder appealed the decision. The key issue to be determined was whether the estoppel ceased to operate from 11 April 2016, which otherwise precluded Armani from relying on the waiver and release in the variation clause in relation to the supply and installation of joinery.

Decision

The Court of Appeal allowed the appeal in part, holding that the estoppel which precluded Armani relying on the waiver and release in the variation clause continued to operate beyond 11 April 2016 as it related to the joinery and did not halt with Armani's email. In particular:

- Armani's email notifying the builder that it would rely on this clause did not displace the assumption that the builder would be compensated for the cost of supplying the joinery material that Sun Bright was unable to;

- Armani's statement that the project included no variations signified that Armani's direction to supply the joinery was not a variation but a separate request; and
- the builder, having received that request, was entitled to expect payment for supply of joinery materials unless it was otherwise made clear. The builder's supply of materials following 11 April 2016 demonstrated it had not been made clear to the builder that it would not receive payment.

The 16 April 2016 email which the primary judge relied on did not make it clear to the builder that Armani, expressly or impliedly, no longer intended to pay for the joinery which it instructed the builder to supply, either because of non-compliance with the contractual variation clause or otherwise. It was sent in the context of variations to the façade and did not address or refer to the topic of joinery. Armani had a duty to discharge this assumption which had materially changed. Unless there was a sufficiently clear communicated correction or withdrawal of the basis of the assumption, an estoppel based on the assumption has continuing effect.

Further, sufficient notice regarding the intended departure is required. If the departure from the assumption is not communicated clearly, the party acting in accordance with it bears the risk of any detriment suffered. To be effective, the notice must be given to allow the counterparty sufficient time to comply with any notice requirements. In this case, such notice of the change in circumstances was required before the builder would have been required to provide written notice under the variation clause that it considered a direction had been given. Because Armani did not provide notice by this time, the builder continued to rely on the assumption induced by Armani that the written notice requirements would not be enforced and the builder suffered detriment.

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QUEENSLAND

Pleading in construction disputes: global claims are still no go!

Alexanderson Earthmover Pty Ltd v Civil Mining & Construction Pty Limited [2021] QSC 86

Michael Creedon | Sarah Cahill | Daniel Szabo

Key points

A plaintiff in a construction claim is required to expressly and separately plead causation for each alleged breach of contract. A global claim, where the claimant is unable or unwilling to identify this level of detail, is liable to be struck out as the defendant needs to know with precision the case which it is required to meet. Where a plaintiff sufficiently pleads a separate duty, breach and causation, multiple claims relating to a single obligation or related alleged breaches are not global claims.

Further, prior negotiations and draft contracts are generally irrelevant and must not be pleaded, save to establish objective facts known to both parties to interpret ambiguous contract terms. Statements and actions of parties reflecting actual subjective intentions are not admissible and should not be pleaded.

Facts

The plaintiff, Alexanderson Earthmover Pty Ltd (**Alexanderson**) was engaged by the defendant, Civil Mining & Construction Pty Limited (**CMC**) as a subcontractor for excavation and related works for the Wiggins Island Coal Export Terminal. Following completion of the works, Alexanderson commenced proceedings for monies owing.

Alexanderson's statement of claim has been subject to several challenges by CMC. CMC had brought strikeout applications and opposed applications by Alexanderson for leave to file amended statements of claim. The court previously found that the statement of claim contained global claims which did not adequately plead causation, in particular by not disentangling causes of standby for particular plant and equipment. We have covered a number of these applications in previous CLUs (*June 2020* and *November-December 2019*).

This is a decision on Alexanderson's application for leave to file a fifth further amended statement of claim (**5FASOC**). Alexanderson's draft 5FASOC alleged CMC breached its obligation to provide *'sufficient*

access'. Alexanderson separated its claims in relation to particular work fronts: the GPN work front, the OLC work front and the Rail Receival South. The lack of sufficient access occurred in different time periods, including a period of no access and three partial access periods. Plant and equipment were divided into four groups: A and B, which worked on the GPN and OLC work fronts respectively, and C and D, which were supplementary groups working to support Group A or B. Alexanderson claims damages for standby hours, delay to completion, or supervision or labour costs because of the lack of sufficient access provided.

CMC opposed the application, arguing the draft 5FASOC remained deficient.

Decision

The court refused leave to file the draft 5FASOC but granted leave for Alexanderson to replead and file a further amended statement of claim addressing the deficiencies identified by the court.

In summary, the court found issues with:

- the way causation was pleaded in claiming supervisory and labour costs;
- the references in the pleadings to prior negotiations and draft contracts; and
- pleading obligation dates inconsistently.

The court otherwise recognised that, while Alexanderson might have difficulties proving causation for its other claims, they are not global in nature; Alexanderson had overcome its previous deficiencies and pleaded causation appropriately.

Alleged global claims

Standby and access delay claims

Alexanderson claims that CMC failed to provide sufficient access to each of the work fronts, impacting Alexanderson's ability to meet planned productivity and causing plant and equipment to be placed on standby. Alexanderson seeks damages calculated at standby rates for the hours that plant and equipment were on standby.

CMC asserted Alexanderson pleaded causation on a global basis without also pleading it is impractical to disentangle the loss attributable to different breaches (as is necessary to advance a global claim) and this was not brought about by Alexanderson's own conduct.

Multiple breaches interacting?

CMC argued Alexanderson was asserting multiple different breaches of multiple different obligations, and the causative effect of such breaches could not be disentangled, which made the claim global in nature. Alexanderson argued it had pleaded a single obligation, being to provide sufficient access, and had pleaded multiple separate breaches of this obligation referring to specific work fronts and periods of 'no or partial access'. The court accepted that Alexanderson had pleaded multiple breaches of a single obligation and, in doing so, had appropriately separated its claims. The court did find issue with the way Alexanderson had pleaded dates for the obligation to provide sufficient access – this is discussed under the heading *'Deficiencies in pleadings'* below.

Causation

The court found Alexanderson disclosed a reasonable cause of action in terms of causation and had not pleaded a global claim.

CMC argued Alexanderson pleaded multiple breaches for each work front, being the failure to provide sufficient access to multiple haul roads or other access points, and had not disentangled the impact of impeded access to each different access point. CMC argued that because the plant and equipment in Groups A and B were interchangeable and were in fact interchanged, Alexanderson was unable to separate the effect of the lack of sufficient access on particular plant and equipment. CMC claimed that the commonality of the Beales Creek crossing to both the GPN and OLC work fronts also meant Alexanderson's delay and standby claims could not be disentangled.

The court determined that Alexanderson's claim was that, in each no or partial access period, CMC had breached a single obligation for each work front to provide sufficient access to that work front, and the different access points were physical elements of the alleged breach. For example, the GPN work front required access via two haul roads and the Beales Creek crossing, and sufficient access meant full access to all three of these. Providing no or partial access to multiple access points were not separate breaches,

but a single breach of the obligation for the GPN work front. Therefore, Alexanderson could plead causation as the lack of sufficient access to the work front overall, which caused Alexanderson not to achieve its planned productivity and the plant to be placed on standby.

The court also dismissed CMC's concerns regarding the interchangeability of plant and equipment. Given plant and equipment were interchangeable, by pleading the number and type of trucks planned and actually used by a group at a work front, the court found that Alexanderson pleaded a sufficient basis for causation. The court noted it will be a matter for evidence to prove that certain trucks were used or not used for a certain number of hours on a particular day, and that interchangeable trucks did in fact have interchangeable capacity loads.

Finally, the court rejected that the causative effect of the lack of sufficient access via the Beales Creek crossing could not be calculated separately for each work front, as evidence could establish the level of interference and resultant delay to each based on planned productivity and work routes.

Planned productivity as part of causal chain

Alexanderson pleaded the following causal chain: that no or partial access caused Alexanderson to not meet its planned productivity and caused the standby hours. CMC argued this contained a global element as standby hours were calculated by reference to the difference in productivity for an entire group and presumed standby hours based on output. Further, CMC argued the causal chain was ambiguous and confusing, with planned productivity in the middle acting both as a measure and cause of standby. Instead, CMC argued the conventional 'measured mile' approach should be used.

The court rejected these arguments. The court accepted that Alexanderson had separately identified planned and actual productivity for particular types of plant and equipment in the productivity and standby schedule. The court found this was sufficient such that standby was not calculated on a global basis. Further, the court found Alexanderson's causal chain was not objectively ambiguous and confusing. The standby hours flowed logically from the physical impediment to access, and Alexanderson pleaded a proper basis for the inference that plant and equipment were on standby based on lower actual productivity.

Delay and completion claim

Alexanderson also seeks damages for delay to completion. Alexanderson calculated delay caused by CMC's breaches as an express number of days for each work front by reference to the difference between planned and actual productivity whilst excluding delays caused by other factors like wet weather. CMC contended the claim remained global because the draft 5FASOC did not disentangle the multiple events for each work front contributing to delay, and because the plant and equipment of Groups A and B were interchangeable and thus the effect of a particular delay on a particular item of plant was not identified.

The court again accepted that, although interchangeable, plant and equipment were reasonably identified by groupings in the draft 5FASOC, and that the Beales Creek access was separately pleaded and calculated for both the GPN and OLC work fronts. The court relied on its previous analysis and found Alexanderson had adequately pleaded its claim and disclosed a reasonable cause of action. It again noted that ultimately it will be a matter of evidence at trial to prove whether an item of plant or equipment was used or was on standby.

Deficiencies in pleadings

Supervisory and labour damages

Alexanderson claims damages for supervision or labour costs for each work day post the planned completion date. CMC argued this claim remained global in nature because it did not causatively link supervision costs to any particular group of plant.

The court held the pleading still claimed supervision and labour costs on a site basis. Whilst Alexanderson contended the supervisor would have to be on site regardless of which work front caused the delay, the court said this was not apparent from the pleading. Further, for labour costs, Alexanderson should have linked costs to particular plant and equipment for particular periods consistent with the way it had framed its other claims.

Prior negotiations

Alexanderson pleaded what it argued were *'relevant pre-contractual negotiations and factual matters'*. It accepted certain subsections were not relevant but contended others establish objective background facts relevant to understanding the commercial context, or to interpreting 'sufficient access' an ambiguous undefined term.

CMC argued Alexanderson had not pleaded facts that inferred mutual intention or concurrence but instead showed subjective intentions and expectations and thus were immaterial or irrelevant (and evidence of such would be inadmissible).

The court noted that the test was not whether evidence of allegations would be inadmissible at trial, but whether the allegations themselves are irrelevant and would have a tendency to delay or prejudice the trial. The court found that 'sufficient access' was arguably ambiguous and accepted Alexanderson could plead some of the objective background facts where there was mutual concurrence or where they were relevant to the genesis and aim of the contract. Examples include facts relating to access points and crossings, and to how work was to be carried out. The court refused to grant leave for paragraphs which it held did not meet the above criteria as they were irrelevant and liable to be struck out.

Draft contracts

Alexanderson particularised in the draft 5FASOC each of the draft contracts exchanged between the parties before execution of the final contract. Alexanderson accepted it could not rely on the content of draft contracts but argued they could be used to show that the contract was not entered into prior to the date of the final contract, as the alleged date the contract was entered into is in dispute.

The court rejected this argument and found the draft contracts are irrelevant to the contract date allegation, and such particulars are liable to be struck out. The court noted if these draft contracts became relevant because of a matter in the defence, Alexanderson could raise them in its reply.

Conflicting dates for 'sufficient access' obligation

Alexanderson pleaded an obligation to provide sufficient access by 19 October 2011 but elsewhere in the draft 5FASOC pleaded an obligation to provide sufficient access to specific areas by other dates. Alexanderson argued these dates all predated the no and partial access periods and thus did not impact the claims. The court, however, found the conflicting dates gave rise to an objective ambiguity and Alexanderson needed to provide clarity in its pleading as to the interrelationship between the different dates.

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The road to arbitration is very broad…

Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd [2021] QSC 75

Julie Whitehead | Amy Dunphy | Charlotte Lane

Significance and key point

This case is a reminder that parties who enter into a contract containing an arbitration clause will be required to submit disputes to arbitration. In circumstances where the arbitration clause does not impose any qualification on the nature of the disputes to be referred to arbitration, the courts will give a broad interpretation to the clause and the degree of connection between the dispute and whether it falls within the clause's reach.

Facts

Civil Mining & Construction Pty Ltd (**CMC**) was contracted by the Queensland Department of Transport and Main Roads (**TMR**) to undertake roadworks construction (**project**). CMC entered into a written subcontract (**subcontract**) with a civil engineering roadworks subcontractor, Cheshire Contractors Pty Ltd (**Cheshire**) to undertake works on the project.

A dispute arose between CMC and Cheshire after Cheshire notified CMC of its intention to make a claim for additional costs incurred allegedly as a result of directions given by CMC to Cheshire regarding the use of material not included in the project specifications. After going through dispute resolution process specified in the subcontract, Cheshire filed a proceeding in the Supreme Court of Queensland seeking that CMC pay the sum of $1,393,616 plus GST and interest and return a bank guarantee.

Rather than file a defence, CMC brought an application to stay the proceeding and refer the matter to arbitration. CMC contended that the parties were subject to an arbitration agreement under the subcontract and the matters, which were the subject of the proceeding, fell within the ambit of that arbitration agreement. In response, Cheshire contended that the matter ought not be referred to arbitration for reasons including that its claim did not rely on the contract but, rather, arose by operation of law outside the contract.

Issue

The court stated that the determinative questions arising under section 8(1) of the *Commercial Arbitration Act 2013* (Qld) (**Act**) were:

1. was there an *'arbitration agreement'*?;
2. was CMC's Supreme Court claim *'brought in a matter which was the subject of an arbitration agreement'*?; and
3. was the agreement *'null and void, inoperative or incapable of being performed'*?

Decision

Henry J found that:

1. CMC and Cheshire were parties to an arbitration agreement under the subcontract by virtue of the form of an arbitration subclause within the contract's disputes clause;
2. the matters, which were the subject of the proceeding, fell within the ambit of that arbitration agreement; and
3. the materials before the court did not satisfy his Honour that the court should make a finding that the arbitration clause is in operative.

Henry J opined that a dispute pursuing rights said to arise outside of a contract should nonetheless be regarded as arising out of or closely connected with the contract where the dispute turns upon whether or not the parties' rights are constrained by the strict operation of the terms of the contract. The facts of this proceeding involved such a dispute in that CMC relied upon the restrictions of the subcontract's payment provisions in contending that Cheshire was not owed money, whereas Cheshire relied on CMC's conduct to ground a right to further payment notwithstanding the contractual provisions upon which CMC relied. Further, there was nothing in the subcontract's disputes clause to suggest that it ought to be read down as applying to amounts payable under the contract as distinct from amounts payable by operation of law.

Henry J was of the view that the parties' decision not to impose any qualification on the nature of the disputes referred to in the subcontract's disputes clause supported a *'liberal width'* being given to the degree of connection the dispute had with the subcontract in order to come within the clause's reach. The dispute in this instance arose between the parties out of the commercial relationship created by the subcontract. But for that relationship, Cheshire would not have been performing the works for which it sought further payment. The connection between the subcontract and the performance of the work gave the dispute the degree of close and consequential connection with the contract. Henry J also concluded that there was no substance to Cheshire's arguments as to the inoperability of the contract's arbitration clause.

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Only the amounts in the payment claim count!

LKB Group Pty Ltd v Niclin Constructions Pty Ltd & Ors [2021] QSC 93

Andrew Orford | James Knell | Tia Shadford

Key point

This decision serves as a reminder that in an adjudication under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**), an adjudicator is limited to deciding the amount of a progress payment only by reference to the amount stated in payment claim. If an adjudicator considers amounts outside the payment claim, he or she may fall into jurisdictional error.

Facts

The principal, LKB Group Pty Ltd (**LKB Group**), and the contractor, Niclin Constructions Pty Ltd (**Niclin**), were parties to a construction contract.

On 6 October 2020, Niclin served LKB Group with a payment claim in the amount of $1,010,691 for construction work included in the original contractual scope of works and variations (**Payment Claim**). Niclin lodged an adjudication application under the BIF Act in respect of the Payment Claim. The adjudicator determined that the amount payable to Niclin was $493,754.

LKB Group applied to the Queensland Supreme Court, arguing that the following parts of the adjudicator's decision were affected by jurisdictional error and therefore void:

- the adjudicated amount included amounts for variations that had already been claimed, approved and paid by LKB Group to Niclin, which were not included in the payment claim (**previously paid variations**);
- the adjudicator awarded Niclin an additional $157,464, being an amount that Niclin alleged was incorrectly deducted by LKB Group for liquidated damages on the basis that the adjudicator determined that Niclin was entitled to an extension of time of 108 days. LKB Group had previously deducted an amount of liquidated damages equivalent to 130 days beyond practical completion. The adjudicator determined that the 130 days should be reduced to 108 days and ordered that LKB Group pay Niclin $157,464 to account for this incorrect deduction;
- the adjudicator allowed $8,450 against the Niclin's claimed amount with respect to a variation, despite the adjudicator indicating in his decision that he intended to delete that amount; and
- LKB Group was ordered to pay 100% of the adjudicator's fees and expenses. LKB Group submitted it should only be liable for 50% of those costs.

Decision

Jackson J found that parts of the adjudicator's decision had been infected with jurisdictional error and ordered that a reduction be made to the adjudicated amount. However, his Honour determined that the unaffected parts of the decision should remain binding on the parties.

Issue 1

Having regard to the provisions of the BIF Act, the court found that the adjudicator had acted in excess of his jurisdiction by taking into account the previously paid variations. The previously paid variations were not included as an amount in the Payment Claim and therefore should not have been considered by the adjudicator. The court noted that the provisions of the BIF Act do not allow an adjudicator to add amounts not included in the relevant payment claim, and an adjudicator will be acting outside of their jurisdiction if they do so. Accordingly, the court ordered that a reduction be made to the adjudicated amount.

Issue 2

The court determined that the adjudicator had not fallen into jurisdictional error by determining that LKB Group pay Niclin $157,464. The adjudicator determined that this amount was properly categorised as a deduction for liquidated damages which, Niclin claimed, had been wrongly deducted. It was not a variation. On this basis, the court looked to the terms of the contract and confirmed that the adjudicator had correctly given effect to the provisions of the contract in allowing the repayment. The contract allowed extensions of time to the date for practical completion and imposed obligations on Niclin to pay liquidated damages for any failure to achieve practical completion by the agreed date. The contract also contained express provisions for the calculation of the liquidated damages payable, and the court considered that the adjudicator had correctly considered those contractual terms to arrive at the reduction from 130 to 108 days.

Issues 3 and 4

The inclusion of $8,450 in the adjudicated amount was found to be a clerical error, not a jurisdictional error.

Jackson J upheld the adjudicator's decision to require LKB Group to pay 100% of the adjudicator's fees and expenses. The adjudicator provided reasons as to why he ordered the LKB Group to pay 100% of the fees and expenses, which included the fact that the LKB Group had increased the workload of the adjudicator by refusing to supply the adjudicator with a digital copy of the adjudication response. The court concluded that its finding that part of a decision was affected by jurisdictional error did not enliven the separate power of the court to review an adjudicator's decision as to the proportion of the adjudicator's fees and expenses to be paid by a claimant or respondent.

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Should I stay or should I go?

One Sector Pty Ltd v Panel Concepts Pty Ltd [2021] QDC 54

Andrew Orford | Petrina Macpherson | Mikayla Colak

Key point

If a party wishes to stay a court proceeding and have the dispute referred to arbitration, the party must make the application as soon as possible and certainly before it makes any statement concerning the nature of its claim or defence and before it submits to the court's jurisdiction.

Statements made in support of an application to set aside a default judgment may be considered a first statement on the substance of the dispute for the purpose of section 8 of the *Commercial Arbitration Act 2013* (Qld) (**Act**).

Facts

Panel Concepts Pty Ltd (**Panel Concepts**) was a subcontractor of One Sector Pty Ltd (**One Sector**) under a contract for the construction of an industrial complex. One Sector sued Panel Concepts for damages for breach of that contract and applied for and was granted default judgment.

Panel Concepts brought an application to set aside the default judgment. In support of the application, Panel Concepts' solicitor swore an affidavit that contained a number of statements regarding the grounds of Panel Concepts' defence. The parties resolved that application by consent and Panel Concept agreed to file and serve a notice of intention to defend and defence.

Before filing its defence, Panel Concepts applied to stay the proceeding pursuant to section 8(1) of the Act, so that the dispute could be referred to arbitration under the dispute resolution clause in the contract.

One Sector opposed the stay application on a number of grounds including that Panel Concepts:

- brought its application too late; and
- had already chosen to participate in the court proceedings and should be held to that choice.

Section 8 of the Act specifies that one of the requirements for a court to stay proceedings and refer a matter to arbitration is that the party making the application must not do so after it has submitted its first statement on the substance of the dispute. One Sector argued that the statements made in the affidavit filed in support of Panel Concepts' application to set aside the default judgment comprised the Panel Concepts' first statement on the substance of the dispute.

Decision

Barlow J dismissed Panel Concepts' application. His Honour referred to a number of authorities that considered what constitutes a *'first statement on the substance of the dispute'*. Amongst these authorities, common actions which could be considered a *'first statement'* included:

- failing to protest the jurisdiction of the court in respect of a substantive dispute;
- proceeding with and adopting the procedures of the court before seeking a stay; and
- opposing interim relief but failing to seek a stay at all or at least immediately afterwards.

His Honour found that the weight of these authorities was to the effect that a party who submits to a court's jurisdiction by making some statement of the nature of its claim or defence (for a reason other than to invoke the court's jurisdiction and power to grant interim relief) is thereafter prevented from seeking a stay under section 8 of the Act or its equivalents.

His Honour considered that Panel Concepts could have sought to set aside the default judgment on the basis that the judgment was irregularly entered and, at the same time, sought a stay. However, Panel Concepts brought its stay application after it had applied to set aside the default judgment and the statements contained in the affidavit filed in support constituted Panel Concept's first statement on substance of the dispute. It was therefore too late for Panel Concepts to seek a stay under section 8 of the Act. Further, Panel Concepts' agreement to file an unconditional notice of intention to defend and defence constituted an election to defend the litigation before the court rather than by arbitration.

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Can a principal revoke a superintendent's authority to issue a payment schedule?

RHG Construction Fitout and Maintenance Pty Ltd v Kangaroo Point Developments MP Property Pty Ltd [2021] QCA 117

Andrew Orford | Alex Hammerton | Daniel Szabo

Key point

Construction contracts can validly deem a particular document, such as a superintendent's determination, to be a payment schedule for the purposes of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**), if the contractual effect of the document is to determine the amount owing and it imposes on the principal an obligation to pay (and meets all other statutory criteria).

Where a construction contract gives a superintendent the power and duty to respond to a payment claim as the principal's agent, the principal cannot revoke this agency without an express contractual power to do so. This is especially the case in the standard form AS 4902-2000 contract, which the court expressly considered.

Facts

Kangaroo Point Developments MP Property Pty Ltd (**KPD**) challenged an adjudication decision on the basis that the contractor, RHG Construction Fitout and Maintenance Pty Ltd (**RHG**), had not identified the correct payment schedule in its adjudication application and thus the adjudicator had no jurisdiction to determine the dispute.

Exchange of payment schedules

Following receipt of a payment claim on 27 July 2020, KPD had its lawyers write to RHG on 6 August 2020 stating they held instructions to respond with a payment schedule and not to consider anything from the superintendent to be a payment schedule for the purposes of the BIF Act. The superintendent issued a payment schedule on 10 August 2020 and KPD's lawyers issued a payment schedule on 17 August 2020. RHG attached the superintendent's payment schedule to its adjudication application and the adjudicator decided the matter on the basis of the payment claim and that payment schedule.

First instance decision

As discussed in our *March/April 2021 CLU*, the court at first instance decided that because RHG had not identified the correct payment schedule, the adjudication application was invalid and the adjudication decision void. The superintendent's payment schedule was found to not be the payment schedule under the BIF Act for two reasons: first, KPD had revoked the superintendent's authority to respond to the payment claim; and second, because the superintendent's payment schedule gave the superintendent's opinion rather than stating *'the amount of payment, if any, that the respondent proposes to make'* as required by section 69 of the BIF Act.

RHG appealed the decision arguing that the contract deemed the superintendent's payment schedule to be binding on KPD and therefore met the requirements of the BIF Act.

Decision

The court unanimously allowed the appeal, overturning the decision at first instance, which had declared the adjudication decision void. It found that the contract effectively deemed the superintendent's payment schedule to be a payment schedule for the purposes of the BIF Act and rejected KPD's argument that the superintendent's authority had been revoked.

Deeming provision

The court's decision turned on the contractual effect of the superintendent's payment schedule.

The parties had used the standard contract AS 4902-2000 general conditions of contract for design and construct. Under clause 37.2 of the general conditions of contract:

- the superintendent was required to respond to payment claims with a payment schedule setting out the amount which, in the superintendent's opinion, was due;

- the principal was required to pay the amount due in the superintendent's payment schedule (subject to set offs) within 5 days; and
- the superintendent's payment schedule was deemed to be a payment schedule issued as the principal's agent for the purposes of security of payment legislation.

By triggering an obligation to pay, the superintendent's payment schedule did, in fact, state the amount the principal proposed to pay. Together with the deeming clause, which made the superintendent the principal's agent, this meant the superintendent's payment schedule met the definition of payment schedule in the BIF Act.

Without applying the deeming provision, the court noted the contract would require the superintendent to issue a non-effective payment schedule and the BIF Act would require KPD to produce a competing, separate payment schedule with no contractual mechanism for dealing with differences between the two. Allowing this would not give the contract a *'business-like interpretation'*.

Although the contract referred to the predecessor to the BIF Act, the court applied section 206 which takes references to the former Act as a reference to the BIF Act and found the clause still effectively applied.

Revocation

The court quickly dismissed the argument that KPD had revoked the superintendent's authority to issue a payment schedule. The contract made the superintendent KPD's agent with the authority to issue payment schedules, and the contract did not give KPD the power to revoke that agency. Therefore, the superintendent retained its power and duty to respond despite the letter sent by KPD's lawyers.

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Just like oil and water, BIF claims and contract claims do not mix!

Somerset Civil Pty Ltd v Eaglerise Developments Pty Ltd; Eaglerise Developments Pty Ltd v Somerset Civil Pty Ltd [2021] QDC 70

Andrew Orford | Laura Berry | Tia Shadford

Key point and significance

A claim under section 100 of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**) for the recovery of an unpaid progress payment, as a debt owing to the claimant, cannot be consolidated with proceedings in which counterclaims or defences under the contract are raised against the claimant.

When considering whether a BIF claim should be heard before or at the same time as a claim under the contract, the parliamentary intention of the BIF Act to facilitate the quick recovery of payment claims is a compelling factor but not a definitive principle.

Facts

Eaglerise Developments Pty Ltd (**Eaglerise**) engaged Somerset Civil Pty Ltd (**Somerset**) to complete civil works as part of the development of a townhouse. The parties fell into dispute about halfway through the completion of the works, at which point Somerset served a $160,000 payment claim under the BIF Act on Eaglerise.

In response, the superintendent under the contract delivered a payment schedule to Somerset (with a scheduled amount of $60,000), which was purported to be given under the BIF Act on Eaglerise's behalf. Eaglerise paid the scheduled amount and disputed any obligation to pay the remaining $100,000 claimed by Somerset.

Somerset suspended work because of Eaglerise's non-payment of the entire payment claim. Somerset asserted that it was entitled to recover the whole of the payment claim on the basis that it had not been provided with a valid payment schedule pursuant to the BIF Act. Eaglerise disputed Somerset's entitlement to suspend works under the BIF Act, which ultimately led to the termination of the contract.

Proceedings in the Magistrates Court

Somerset commenced a proceeding against Eaglerise under section 100 of the BIF Act to recover an unpaid amount as a debt owing to it by Eaglerise.

Section 100(3) of the BIF Act provides that a respondent to a proceeding under that section is not entitled to bring any counterclaim or raise any defence in relation to matters arising under the relevant construction contract.

Eaglerise then commenced its own proceeding against Somerset. This proceeding covered the same issues as Somerset's proceeding and added a number of additional claims under the contract, including Somerset's alleged repudiation of the contract.

While Somerset's proceeding was for an interim payment under the BIF Act, Eaglerise's proceeding sought to finally resolve the rights of the parties under the contract.

Proceedings in the District Court

Both of the parties applied under rule 79 of the *Uniform Civil Procedure Rules 1999* (Qld) for an order in relation to the potential consolidation of the two proceedings. Somerset sought to have its application for interim payment heard and determined before Eaglerise's proceeding, whereas Eaglerise sought to have the matters heard together.

Decision

The court ordered that both proceedings be placed on the Commercial List of the District Court, with Somerset's proceeding to be heard before Eaglerise's proceeding.

Porter DCJ found that it would be contrary to the BIF Act to consolidate the proceedings. Specifically, section 100(3) of the BIF Act prevented consolidation because it expressly prohibits a respondent from bringing any counterclaim or defence against the claimant in relation to matters arising under the contract.

In considering whether the matters should be heard together, his Honour made the wider observation that parliament intends for claims under the BIF Act to be recovered promptly. While this was a compelling reason for the Somerset proceeding to be heard first, his Honour did not treat this as a definitive principle and was of the view that other relevant factors should be considered, including that a great deal of the issues in Eaglerise's proceeding would be resolved if Somerset's proceeding succeeded. His Honour concluded that, taking into account all of the factors considered, it was appropriate for Somerset's proceeding to be heard first.

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Failure to observe strict adjudication requirements fatal

Total Lifestyle Windows Pty Ltd v Aniko Constructions Pty Ltd & Anor [2021] QSC 92

David Pearce | Laura Berry | Mikayla Colak

Key point

A respondent must include in its payment schedule any reason for withholding payment that it may wish to rely on in an adjudication. Failure to do so prevents these reasons from being considered by an adjudicator.

Facts

Total Lifestyle Windows Pty Ltd (**Total**) and Aniko Constructions Pty Ltd (**Aniko**) entered into an agreement under which Total was to supply and install various windows and doors to an apartment building being constructed by Aniko.

Total made a payment claim under the agreement which proceeded through adjudication. The adjudicator found in favour of Aniko and held that it was not required to make any payment to Total.

Total challenged the validity of the adjudication decision on the basis that the adjudicator had:

- considered reasons included in Aniko's adjudication response that were not included in its payment schedule; and
- failed to consider the witness statement that had been submitted by Total, which formed a significant part of Total's case and contradicted the case advanced by Aniko.

Aniko argued that the adjudicator could consider the alleged 'new reasons' in its adjudication response because:

- they were in response to matters raised for the first time in the adjudication application;
- section 82(3)(c) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**) allows a respondent to include submissions relevant to an adjudication response in its response; and
- section 88(2)(b) of the BIF Act requires an adjudicator to consider the provisions of the relevant construction contract.

Decision

The court found that the adjudicator erred in considering the new reasons in Aniko's adjudication response and by failing (on the face of it) to consider Total's witness statement. As a result, parts of the adjudication decision were deemed to be invalid and the adjudication application was remitted to the adjudicator to be decided according to law.

New reasons

The court rejected Aniko's assertion that the adjudicator could consider its new reasons after finding that:

- section 69(c) of the BIF Act requires a respondent to include all its reasons for withholding payment in its payment schedule and not just those that are specifically raised or prompted by the payment claim;
- the respondent's right to include submissions relevant to its adjudication response must be read subject to section 82(4) of the BIF Act, which provides that an adjudication response must not include any reasons for withholding payment that were not included in the payment schedule; and
- the adjudicator's obligation to consider the relevant construction contract must be read subject to the prohibition on considering reasons included in an adjudication response that were not included in the payment schedule which is imposed by section 88(3) of the BIF Act.

Failing to consider a relevant document

In his decision, the adjudicator stated that *'he had regard to the payment claim to which the Application relates, together with all submissions, including relevant documentation'*. However, the adjudicator did not explicitly refer to the witness statement submitted by Total. The court held that, in accepting Aniko's case, the adjudicator should have referred to the statement. By failing to refer to a document of such considerable importance, the adjudicator allowed the inference to be drawn that he had not referred to the statement. Merely stating that one has had regard to all relevant documentation is not enough to dispel such an inference.

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