Construction Law Update

October 2019

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VICTORIA

Payment claims served early no longer valid under Victorian SOP Act

Building and Construction Industry Security of Payment Act 2002 (Vic)

Nikki Miller

The case *MKA Bowen v Carelli Constructions* [2019] VSC 436 marks a change in the legal position in Victoria with respect to the early service of payment claims under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Vic Act**).

The decision makes it clear that a payment claim served prior to a reference date is not a valid payment claim under the Act. This will be the case even where the relevant construction contract contains a clause deeming an early payment claim as effective only from the next reference date.

We have provided a full analysis of the case, including the facts and decision, on our construction blog Onsite. You can access the full summary *here*.

As always, if you have any questions, please contact us.

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In the Australian courts

COMMONWEALTH

Respect my privity!

Clarence City Council v Commonwealth of Australia [2019] FCA 1568

Andrew Hales | Maciej Getta | Lauren Topper

Key point and significance

It is a fundamental rule that someone who is not a party to a contract is not bound by or able to enforce that contract, even where a term of that contract purports to benefit them as a third party. This case confirms that this rule still applies and a person who is not a party to a contract may only be able to obtain relief under that contract in a very limited set of circumstances.
While rare, third parties wishing to enforce payment obligations under a contract must ensure that those payment obligations are drafted clearly and unambiguously and might consider becoming a party to the contract itself to avoid difficulties in seeking such enforcement.

Facts

The Commonwealth of Australia entered into two long-term leases (**Leases**) with the operators of the Hobart and Launceston airports in Tasmania; Hobart International Airport Pty Ltd and Australia Pacific Airports (Launceston) Pty Ltd, respectively (collectively, the **Lessees**).

The Clarence City Council and the Northern Midlands Council (collectively, the **Councils**) were not a party to either of the Leases.

As the Commonwealth was the owner of the land, no rates would have been payable by Lessees to the Councils. However, the Commonwealth wanted to establish a level playing field with other enterprises that were liable to pay rates to the Councils. So the Commonwealth contractually obliged the Lessees to pay 'notional rates' to the Councils based on the part of the leased land on which *'trading or financial operations'* were undertaken.

The Lessees had been paying the 'notional rates' to Council since 1998, and the Commonwealth considered those rates were correctly calculated. Recently, the Councils believed that they were entitled to more rates and that the Lessees had miscalculated the area of the airports that was *'rateable'*. The Councils, not being party to the Leases, applied to the court regarding the proper interpretation of the notional rates term.

Decision

The Federal Court decided that the Councils did not have standing to bring the proceedings because the Councils were not party to the Leases.

The Councils had relied on the principle established in *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 (***CGU***), namely that they had a real interest in the declarations sought because they had an economic advantage that may accrue over and above any benefit or advantage that might be derived by an ordinary citizen.

In *CGU*, liquidators asked for a declaration regarding the policy of insurance between *CGU* and its directors, in circumstances where the liquidators and the company that had been placed into liquidation were not parties to the policy of insurance. The Councils submitted that because the liquidators were able to ask for declaratory relief, the Councils would be entitled to do the same. The Court rejected this argument on the basis that, in *CGU*, the directors relied on a statutory right to have standing to bring the claim.
The Court reiterated that there is only one true exception to the doctrine of privity in Australian law. The High Court held in *Trident General Insurance Co Limited v McNiece Bros Pty Ltd* (1988) 165 CLR 107 that if a third party is to be entitled to rights in relation to a contract to which it is a stranger, those rights must have some basis beyond the mere contract, and that, if they have no such basis, the law will not recognise them. The Councils have appealed the decision and a hearing is expected to be held in 2020.

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Quantum meruit claims following repudiation no longer deliver windfall gains to builders

Mann v Paterson Constructions Pty Ltd [2019] HCA 32

Ben Fuller | Andrew Black | Jennifer McRae

Key point and significance

Where a builder accepts a principal's repudiation of a contract and elects to terminate, quantum meruit claims are **not** available in respect of completed work for which the builder already has a right to payment under the contract. For incomplete work (where no right to payment has accrued), builders may claim on a quantum meruit basis, but the contract price will act as a ceiling on the amount recoverable. This decision overturns *Sopov v Kane Constructions Pty Ltd (No 2)* (2009) 24 VR 510 (***Sopov***) which controversially held that quantum meruit claims could allow builders to recover amounts substantially exceeding the contract price.

Facts

Mann (**owner**) entered into a contract with Paterson Constructions Pty Ltd (**builder**) to construct two double-storey town houses. The contract price was $971,000. Prior to completion, the owner repudiated the contract. The builder accepted the owner's repudiation and elected to terminate the contract.

The builder applied to the Victorian Civil and Administrative Tribunal (**VCAT**) for relief on a quantum meruit basis (a Latin term meaning 'as much as he deserved'). On this basis, the builder claimed the value of the work done (as assessed by a quantity surveyor), rather than the outstanding portion of the contract price. VCAT found that the builder had lawfully terminated the contract and ordered the owner to pay the builder $660,526, an amount which (when added to the amounts already paid by the owner) exceeded the contract price by over $600,000.

The owner appealed to the Supreme Court of Victoria, which affirmed VCAT's decision. The owner then appealed to the Victorian Court of Appeal, which noted the past criticism of quantum meruit claims in cases of repudiation but held that the court was bound by existing authorities (such as that court's decision in *Sopov*, and the Privy Council's decision in *Lodder v Slowey* [1904] AC 442) which established that quantum meruit claims were available where a building contract was repudiated by the principal.

The owner appealed to the High Court on the following three grounds:

- the Court of Appeal erred in holding that the builder was entitled to sue on a quantum meruit basis for works carried out;
- alternatively, if a quantum meruit claim was available, then the Court of Appeal erred in finding that the contract price did not act as a ceiling on the amount recoverable; and
- finally (on a separate issue), that the Court of Appeal erred in holding that section 38 of the *Domestic Building Contracts Act 1995* (Vic) (which limits a builder's ability to claim for variations under a domestic building contract) did not apply to quantum meruit claims.

Decision

In its decision the High Court differentiated between two types of claims:

- claims for work performed where a right to payment had already accrued prior to termination (eg for stages of the works completed prior to termination); and
- claims for work performed where there was no accrued right to payment under the contract (eg for incomplete stages at the time of termination where the contract is 'entire' and not divisible into separate stages).

In respect of the first type of claim (for work where a right to payment had already accrued), the High Court held unanimously that the builder could not claim on a quantum meruit basis. In this instance, recovery of the accrued amounts (or damages for breach of contract) are the only remedies available to the builder.

In respect of the second type of claim (for work where there was no accrued right to payment), the majority (Nettle, Gordon, and Edelman JJ, with Gageler J agreeing) held that the builder could claim on a quantum meruit basis, but that the contract price acted as a ceiling on the amount recoverable. While, at first glance, this would mean that quantum meruit claims are not substantively different (in amount) to claims for breach of contract, the court emphasised that quantum meruit claims (due to their historical origins as an action for debt) can provide substantial procedural advantages (for example, the availability of default judgment, and the irrelevance of factors such as causation and remoteness). Kiefel CJ, Bell and Keane JJ (in the minority on this point) held that the builder could not claim on a quantum meruit basis for this type of claim either.

The High Court did note that the contract price was, on its face, a limit on the amount recoverable under a quantum meruit claim, but that in rare cases (for example where the principal has acted unconscionably) recovery in excess of the contract price may be permitted.

In relation to the third ground, the High Court unanimously held that section 38 of the *Domestic Building Contract Act* prevented the builder from claiming on a quantum meruit basis for variations.

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NEW SOUTH WALES

What's in a name? Get your contracting entities right – Post-contractual evidence is not relevant to establish the identity of parties in a wholly written contract

BH Australia Constructions Pty Ltd v Kapeller [2019] NSWSC 1086

Andrew Hales | Phoebe Roberts | Jonin Ngo

Key point and significance

This case demonstrates the importance of getting the identity of a contracting entity right before entering into any written contract, lest going through the legal minefield of post-contractual evidence.
The court may nevertheless impute an intention that a different party was intended to be a contracting party.

Facts

This case is an appeal from the decision of the appeal panel of the NSW Civil and Administrative Tribunal (**Appeal Panel**) concerning a dispute as to the identity of a builder in a written document that the defendants,

Mr Kapeller and Ms Cesnik (**homeowners**), had entered into in September 2015 to build their home (**contract**).

The contract referred to two different builder entities:

- possible builder #1 – Blissful Constructions Pty Ltd (Constructions), the former name of the plaintiff, BH Australia Construction Pty Ltd, at the time of the contract; and
- possible builder #2 – Blissful Developments Pty Ltd (Developments), which was neither licensed nor insured, and to which voluntary liquidators had been appointed in April 2018.

The contract referred to the name and ABN number of Developments as the builder but referred to the builder licence number and insurance details of Constructions. The contract contained a number of other errors and inconsistencies with respect to the entities.

The *Home Building Act 1989* (NSW) (**HB Act**) requires that:

- a builder is not entitled to demand for payment of work done and recover monies under any other right of action without the required insurances in place; and
- a builder must not perform residential building work without the required insurances in place.

The Appeal Panel held that a reasonable person would have concluded that the parties intended to contract with Constructions, as it would be unlikely that a reasonable observer would have concluded that the parties intended to contract with an unlicensed builder and that Developments would not enter into a contract that it could not enforce. In the course of doing so, the Appeal Panel had regard to post-contractual evidence to assist in identifying the identity of the contracting party (even though it found that it did not assist either party). The Builder contended on appeal that the Appeal Panel had erred in law.

Decision

The Supreme Court dismissed the appeal and found in favour of the homeowners, and held that:

- post-contractual evidence could not be used to establish the identity of the parties, as it was common ground between the parties in this case that a contract had been formed by the execution of a written document. The court confirmed that post-contractual evidence could be used to assist with interpretation of the terms of a contract, but not to establish the identities of parties where the contract between the parties is wholly written (as opposed to one formed by oral statements or conduct); and
- the parties must have intended that Constructions was the builder, for the reasons set out below.

The court gave the following reasons for imputing such an intention:

- it was an obvious mistake that the same paragraph in the contract referred to the name and ABN of Developments, but the insurance and licence number of Constructions;
- the builder must be taken to have wanted to comply with the law, so as not to perform residential building work without insurance pursuant to the HB Act;
- the builder was not entitled to demand for payment of work done and recover monies under any other right of action without insurance by virtue of the HB Act;
- the homeowners must be taken to have wanted to contract with a builder that was licensed and insured, given the importance of insurance; and
- it was a construction of a 'home', and the fact that Constructions was licensed and insured as a builder, and Developments was not, is not unrelated to those companies' names.

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'No injunction' clause unlawfully ousts jurisdiction but can be used to construe a contract

G&S Engineering Services Pty Ltd v MACH Energy Australia Pty Ltd [2019] NSWSC 407

Andrew Hales | Nicholas Grewal | Tom Lawler

Key point and significance

The court confirmed that a 'no injunction' clause in respect of security provided under a contract can be a purported ouster of the jurisdiction of the court and thus, as a matter of public policy, unenforceable.

However, it can nevertheless be used for the purpose of ascertaining the parties' intention and construing the relevant clause or contract as a whole.

Facts

G&S Engineering Services Pty Ltd and DRA Pacific Pty Ltd (**contractors**) contracted with MACH Energy Australia Pty Ltd (**principal**) to carry out works relating to a coal handling and preparation plant, and train load out facility for a coal mine in the Hunter Valley, NSW.
On 1 and 18 March 2019, the principal notified the contractors of its intention to call on the contractors' security because the contractors had failed to achieve practical completion of various separable portions within the time required. The principal alleged that it was entitled to $3.8 million in liquidated damages and, therefore, the principal claimed to be entitled to call on the security.
However, previously, on 22 December 2018, the principal had varied the contract to descope the works such that the contractors were no longer required to complete the remainder of the works comprising separable portions 2 and 3. As a result, the contractors could not complete the works required to trigger the issuance of a certificate of 'functional completion'.
The contractors sought an interlocutory injunction to restrain the principal from calling on the security.

Decision

Notwithstanding the fact that the contract contained a clause ostensibly preventing the contractors from seeking an injunction to prevent the principal drawing down on the security, the contractors were still entitled to seek such an injunction because the *'no injunction'* clause was unenforceable on the basis that it ousts the court's jurisdiction.
However, the 'no injunction' clause demonstrated that the parties intended that the clause governing the right to have recourse to security constituted a risk allocation mechanism enabling the principal to obtain the amount it contended to be due, notwithstanding a dispute about its entitlement to such amount and even if, subsequently, it is found not to be entitled to those amounts.

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You've got mail! Does your email constitute a payment schedule? Will a personal undertaking by a director avoid security for costs?

***Vannella Pty Limited atf Capitalist Family Trust v TFM Epping Land Pty Ltd; Decon Australia Pty Limited v TFM Epping Land Pty Ltd; Vannella Pty Limited v TFM Epping Land Pty Ltd* [2019] NSWSC 1379**

Andrew Hales | Claire Laverick | Patrick Raccanello

Key points and significance

Whilst a payment schedule need not be a formal document (and could be an email), principals should always be alert to the requirements of sections 14(2) and 14(3) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**). Factual and legal matters that ought to be, but are not, raised in a payment schedule cannot be used as grounds for resisting summary judgment.
A substantial reduction in a company's liquid assets will not necessarily persuade a court to order security for costs, particularly if there are other assets which can be liquidated. A personal undertaking may be sufficient for a company to avoid an order for security for costs.

Facts

Decon Australia Pty Limited (**Decon**) and TFM Epping Land Pty Limited (**TFM**) and Katoomba Residents Investment Pty Limited (together, the **defendants**) entered into a design and construct contract in respect of a residential apartment building in Epping known as the Juniper Development (**contract**). Vannella Pty Limited as trustee for the Capitalist Family Trust (**Vannella**) and TFM were parties to a joint venture arrangement relating to the development (**JVA**).
The decision concerns four notices of motion filed in three separate proceedings relating to the development; one notice filed by Decon seeking summary judgement in relation to a payment claim and a payment schedule that was sent via email (**Decon proceedings**) and three notice filed by the defendants seeking security for costs from Decon and Vannella in each of the three proceedings.

Decon proceedings

Decon served a progress claim on the defendants on 3 June 2019 claiming an amount of $6,355,352, which included amounts for work done within the original contract sum, variations claimed under the contract, and for interest on overdue progress claims.

On 14 June 2019, the defendants sent an email to Decon's solicitor indicating (in a section headed *'Your clients' claims'*) that the variations claimed were not agreed (**14 June email**). The defendants subsequently claimed that the 14 June email constituted a payment schedule.

Decon submitted that the 14 June email did not meet the requirements of section 14(2) of the SOP Act (because it did not identify the progress claim, indicate the amount that the defendants proposed to pay or provide reasons for any difference). As a result, Decon claimed that the defendants had failed to provide a payment schedule within the time required under section 14(4) of the SOP Act and therefore had become liable to pay the full claimed amount. Decon sought summary judgment in the proceedings.

The defendants submitted that the progress claim was not valid for the following reasons:

- including interest in the progress claim made it invalid, as interest does not form part of the price for contract works and is akin to a claim for damages;
- it did not identify the work to which the progress claim related (other than the variations). The defendants asserted, amongst other things, that the progress claim was ambiguous (including because it failed to state that it included a claim for the release of retention monies); and
- the variations claimed did not form part of the work under the contract, because they were not the subject of directions and had not been valued in accordance with the contract. Therefore, claiming them was not a claim for construction work under the SOP Act.

The defendants asserted that the 14 June email constituted a payment schedule on the basis that the heading *'Your clients' claims*' was a sufficient identification of the progress claim, it stated the amount intended to be paid (nothing) and provided reasons for non-payment (including that the variations were not agreed).

The main issues before the court were whether:

- the defendants had become liable to Decon to pay the claimed amount as a consequence of having failed to provide a payment schedule within the time required and failed to pay the claimed amount; and
- Decon had shown that the matters raised by the defendants could not succeed and did not involve any substantial questions to be tried (in order to meet the threshold for summary judgment).

Security for costs

The defendants submitted that Decon and Vannella did not have the financial ability to meet any adverse costs orders on the basis that both were limited liability companies with nominal paid up capital, no real property and both were subject to various PPSR charges. Decon and Vannella asserted that:

- paid up capital is not a true measure of ability to satisfy costs orders in circumstances where the evidence shows that each company has a trading history and ongoing construction projects;
- registration of charges on the PPSR is an ordinary incident of trading; and
- the orders were unnecessary as the sole director of each company (Saab) had given a personal undertaking to be jointly and severally liable for any adverse costs order made in any of the proceedings.

Decision

Decon proceedings

The court granted Decon summary judgment against the defendants in the amount claimed.

Relevantly, the court was satisfied that the matters raised by the defendants could not succeed, finding that:

- interest can be claimed in a progress claim (per the Court of Appeal in Coordinated Constructions), as it is an amount that a construction contract requires to be paid as part of the total price;
- a progress claim does not fail to meet the SOP Act requirements if it does not successfully identify all of the construction work for which payment is claimed;
- section 13(3)(b) of the SOP Act cannot be relied upon to assert that a progress claim must expressly state that it seeks the release of retention monies; and

- factual and legal matters as to whether the variations were proper claims under the contract or whether Decon was entitled to claim the release of retention monies were not grounds for resisting summary judgement. These are matters which should have been raised in a payment schedule, and the defendants had not done so.

While a payment schedule does not need to be a formal document, the 14 June email did not constitute a payment schedule because it did not:

- identify the payment claim to which it related. The reference in the 14 June email to 'Your clients' claims' was general and could have related to any prior payment claim submitted by Decon or the claims made in the other proceedings between the parties;
- indicate an amount that the defendants proposed to pay instead of the claimed amount;
- specify reasons for withholding payment (other than general observations regarding variations, loss and damage); and
- specify areas of dispute with respect to the claim.

Security for costs

It was not necessary for the court to consider the applications against Decon, as the defendants had stated these would not be pressed if the court granted summary judgment. However, the court stated it would not have ordered security for costs in any event. Whilst Decon's liquid assets had reduced substantially over the previous two years, the court was not satisfied this meant there was a real risk that Decon would be unable to pay and had regard to Decon's ability to liquidate or have recourse to other assets.

Vannella's financial position was different, and the court was not satisfied that the evidence provided was sufficient. Nor did the court have a detailed picture of Saab's financial position. However, the court was satisfied with the undertaking from Saab and therefore declined to order that Vannella provide security for costs for the following reasons:

- Saab was the sole shareholder, sole director and a substantial creditor of Decon (which the court had already established had a significant net asset and equity position);
- the court felt that the threat of bankruptcy against Saab and the consequences of failing to comply with an undertaking given to the court would be a deterrent against not fulfilling the undertaking (which should be a comfort to the defendants);
- the undertaking would put the defendants in a no more disadvantageous position than if Saab had commenced the proceedings to which Vannella was a party in person; and
- the value of security sought was not sufficiently high for the court to exercise its discretion.

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Give me 20 good reasons (for scheduling nil)

Canterbury-Bankstown Council v Payce Communities Pty Ltd [2019] NSWSC 1419

Andrew Hales | Georgie Roest | Brianna Smith

Key point and significance

The importance of giving reasons

When preparing a payment schedule under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the **Act**) you must include all reasons for withholding payment.

More specifically, in circumstances where you do not consider that a claimed variation should be assessed (for reasons such as the relevant work does not constitute a variation under the contract, or you did not direct the contractor to perform the relevant work), it is prudent to include an alternate position which assesses the claimed variation in accordance with the provisions of the contract. If the matter is referred to adjudication

and you have not included an alternate position, there is a real risk that you will not be able to advance an alternate valuation, and will have to run an 'all or nothing' response.

Abuse of process – a 'heavy burden'

The decision also reiterated that the concurrent pursuit of a claim for payment in court proceedings and by adjudication under the Act would not constitute an abuse of process. There would need to be an additional circumstance that could generate an abuse of process. The court confirmed that it was a 'heavy burden' to establish an abuse of process.

Facts

Canterbury-Bankstown Council (**owner**) entered into a building contract with Payce Communities Pty Ltd (**builder**) for the fit out of a library and senior citizens community centre. A dispute arose between the parties as to the extent and cost of associated variations.

Adjudication Determination

In October 2019, the builder served a payment claim on the owner claiming the costs of the disputed variations (**PC 1**). The owner served a payment schedule, scheduling an amount of nil. The builder referred the matter to adjudication, where it was determined that the builder was not entitled any payment on the basis that no reference date was available for PC 1. However, the adjudicator did not deal with the merits of the claim for the disputed variations.

Supreme Court Proceedings

In April 2019, the builder commenced Supreme Court proceedings against the owner seeking payment for, amongst other things, the value of the disputed variations.

Whilst the Supreme Court proceedings were on foot, the final reference date arose under the contract. The builder served its final payment claim on the owner (**PC 2**), which claimed, amongst other things, the disputed variations. In support of PC 2, the builder referred to and relied on the evidence it had adduced for the Supreme Court proceedings.

The owner responded to PC 2 by serving a payment schedule, which scheduled an amount of nil. The owner then sought to restrain the builder from invoking the adjudication regime under the Act in respect of PC 2, on the basis that concurrently pursuing a claim for payment in court proceedings and by adjudication constituted an abuse of process.

Decision

The Supreme Court found that the concurrent pursuit of a claim for payment in court proceedings and by adjudication under the Act is not, in itself, an abuse of process. There must be some additional circumstance, such as an 'improper or illegitimate purpose' or the use of a process that is 'unjustifiably oppressive' in order to establish an abuse of process. The court determined that the owner had failed to establish that an abuse of process had occurred, leaving it open to the builder to refer the matter to adjudication under the Act (whilst maintaining the existing Supreme Court proceedings).

The court also noted that there was 'real doubt' as to whether the owner could adduce detailed evidence concerning the disputed variations in the event that the builder referred PC 2 to adjudication, as the owner had neither set out detailed reasons for rejecting the variations nor provided an alternate assessment of the valuation of the variations in its corresponding payment schedule.

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NORTHERN TERRITORY

Prohibited simultaneous adjudication: you allege it, you prove it!

Ichthys LNG Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor [2019] NTSC 71

Andrew Orford | Petrina Macpherson | Chris Nliam

Key Point and significance

In the Northern Territory, an adjudicator is prohibited from adjudicating more than one payment dispute between the same parties without their consent. However, whether a contravention of this law occurred is a question of fact, which the party alleging the contravention will bear the onus of proving. It is therefore important that such a party provides adequate proof to substantiate its claim.

Facts

On 8 November 2018, JKC Australia LNG Pty Ltd (**JKC**) made an adjudication application (**First Application**) claiming an amount of money from Icthys LNG Pty Ltd and INPEX Operations Australia Pty Ltd (**INPEX**). An adjudicator was appointed to adjudicate the dispute in respect of this application. The adjudicator issued a determination on 6 January 2019 (**First Determination**).

Meanwhile, on 21 December 2018, JKC made two further adjudication applications (**Second Application**). The same adjudicator was appointed for the Second Application. In its adjudication response, INPEX disputed the adjudicator's jurisdiction on the basis that the Second Application was in relation to two payment disputes. In his adjudication determination (**Second Determination**), the adjudicator found that he had jurisdiction and decided the dispute against INPEX.

INPEX brought two applications in the Supreme Court of the Northern Territory, seeking orders that both the First and Second Determinations be quashed, or in the alternative, a declaration that they have no legal effect.

In the Supreme Court proceeding, INPEX argued that First and Second Determinations were affected by jurisdictional error because the adjudicator made decisions regarding them simultaneously without the consent of both parties, in contravention of section 34(3)(b) of the *Construction Contracts (Security of Payments) Act 2004* (NT) (**Act**). This section provides that an adjudicator may *'with the consent of the parties, adjudicate simultaneously 2 or more payment disputes between the parties.'*

Nothing in this case turned on the fact that INPEX advanced two different arguments in its adjudication response to the Second Application and in its Supreme Court applications.

Decision

The court rejected INPEX's argument and dismissed the applications.

The court endorsed the position that 'simultaneously' for the purpose of section 34(3)(b) of the Act is intended to operate in the temporal sense, that is, in the sense of adjudication determinations *'occurring or operating at the same time'*. This is as opposed to the competing view that 'simultaneously' only refers to circumstances where evidence in one adjudication is used in the other.

However, the court held that whether the adjudicator adjudicated the First and Second Applications simultaneously was a question of fact which INPEX bore the legal and evidential onus of proving on the balance of probabilities. INPEX needed to do more than just allege that the adjudicator's appointments overlapped.

The court's reasoning was that under the Act, there is no requirement for the parties to give consent before an adjudicator can be appointed. Rather, what the Act prohibits is an adjudicator adjudicating payment disputes simultaneously without the parties' consent. INPEX did not furnish any proof that simultaneous adjudications occurred nor could the court find any proper basis for drawing an inference to that effect.

INPEX's case failed because it relied solely on the fact that the adjudicator's appointments overlapped, not taking into account the fact that the adjudicator was duly appointed under the Act. In addition to alleging an

overlap, it was important that INPEX provided proof that the adjudicator adjudicated the First and Second Applications simultaneously.

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QUEENSLAND

Opposing a payment claim? Make sure you comply with the Act!

Melaleuca View Pty Ltd v Sutton Constructions Pty Ltd & Ors [2019] QSC 226

Andrew Orford | Sarah Ferrett | Chris Nliam

Key Point and significance

Although the court will not adopt an overly technical approach in assessing a payment schedule, the document must still meet the minimum requirements of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**) in order to be valid. This includes referencing the correct payment claim and stating an amount to paid. Where a contract provides for two reference dates, the Court will honour a valid payment claim brought in respect of either reference date.

Facts

Melaleuca View Pty Ltd (**Melaleuca**) entered into a contract with Sutton Constructions Pty Ltd (**Sutton**) in March 2018 for the construction of 16 townhouses. The contract provided that Sutton could submit monthly progress claims to Melaleuca in addition to a claim upon achievement of Practical Completion of the works. Sutton sent a payment claim to Melaleuca on 5 February 2019 which (Melaleuca alleged, but did not establish), included claims for work done up to 1 February 2019 (**first payment claim**) and a second payment claim on 15 February 2019 (**second payment claim**) following the agreed Date of Practical Completion.

On 19 February 2019, Melaleuca sent a letter to Sutton *'in response to its communication dated February 15, 2019*'. That letter did not:

- identify the second payment claim as the payment claim to which it related; or
- identify an amount of payment that Melaleuca proposed to make.

When Sutton lodged its adjudication application on 1 April 2019, it submitted that Melaleuca failed to serve a payment schedule. Melaleuca contended that:

- the first payment claim utilised the only available reference date at the time, being the Practical Completion reference date, such that the second payment claim was invalid for want of an available reference date under the Contract; and
- its 19 February correspondence was a payment schedule for the purpose of the Act.

The adjudicator determined that Melaleuca had not provided a payment schedule as required by section 69 of the BIF Act because it failed to state the payment that it proposed to make and did not identify the correct payment claim (the second payment claim). The adjudicator declined to consider Melaleuca's adjudication response as a consequence of its failure to provide a payment schedule as required by the Act and decided the adjudication in favour of Sutton.

Melaleuca applied to the Supreme Court alleging jurisdictional error on the following grounds:

- that Sutton served two payment claims in respect of the second reference date in contravention of section 75(4) of the BIF Act. As the first payment claim contained claims for works carried out after 21 January 2019, it could not have been in respect of that reference date; and
- that the adjudicator incorrectly decided that its response to Sutton was not a payment schedule under the BIF Act.

Decision

The court dismissed Melaleuca's application and rejected Melaleuca's submissions on the basis that:

- even if the first payment claim was invalid (which was not established), the second payment claim the subject of the adjudication application was not; and
- Melaleuca did not identify the correct payment claim and did not identify the proposed amount to be paid, both of which were required in order to satisfy sections 69(a) and 69(b) of the BIF Act.

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Parties beware – a superintendent by any other name does not always sound as sweet

SHA Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd [2019] QCA 201

Julie Whitehead | Matt Hammond | Jane Evelyn

Key point and Significance

This case illustrates that when a superintendent is not named under a contract, a progress payment regime may be void, leaving the contractor vulnerable to no payment for works completed unless it pursues damages for a breach of contract in the courts.

Facts

This case was an appeal from a decision of the District Court of Queensland with the essential facts and decision at first instance previously discussed in our May 2019 edition of the Construction Law Update.
The appellant (**SHA Premier**) entered into a design and construction contract with the respondent (**Niclin**), for the construction of some petrol stations. A dispute arose about progress claims made by Niclin, which were not paid by SHA Premier. A discrete question was raised in the District Court as to whether the claim was a valid payment claim under the *Building and Construction Industry Payments Act 2004* (Qld). The issue turned on an interpretation of various clauses in the contract between SHA Premier and Niclin. The learned primary judge resolved the issue in favour of Niclin and ordered SHA Premier to pay $399,894.06 together with interest.
SHA Premier appealed the to the Queensland Court of Appeal on the basis that as it was not nominated as the superintendent under the contract, none of Niclin's payment claims was due and payable.

Decision

The court set aside three of the orders directed by the learned primary judge, finding that because SHA Premier was not a superintendent under the contract, any payment claim submitted by Niclin was ineffective. In reaching its decision, the court discussed the proper construction of a 'superintendent' under the contract. First, the court looked at a number of clauses that made clear that the contract had proceeded on the basis that the superintendent was to be a separate entity to the principal. Morrison JA, who delivered the lead judgment, then turned to the definition of 'superintendent'.

The contract identified the superintendent as 'S.H.A Premier Construction Pty Ltd nominated person'. Given that unclear language, the court had to determine whether this meant 'S.H.A Premier Constructions Pty Ltd**'s** nominated person [emphasis added]' or 'S.H.A Premier Constructions Pty Ltd **or** nominated person [emphasis added]'. His Honour held that the first alternative was to be preferred over the second construction, commenting it would be fanciful to conclude that the parties intended the principal to act as a superintendent considering the conflicting interests that would arise.

Having decided that, the court had to consider whether a term should be implied into the contract to the effect that if SHA Premier had not nominated a superintendent it was itself to perform the superintendent's obligations. That question was answered in the negative with His Honour finding that the contract remained effective without implying such a term.

The failure by SHA Premier to nominate a superintendent had two main consequences:

- first, it amount to a breach of SHA Premier's obligations under the contract, entitling Niclin to pursue a claim for damages; and
- second, because there was no superintendent to respond to any payment claim submitted by Niclin, the requisite progress certificates were not issued, and no obligation arose for SHA Premier to pay a progress payment under the contract. This also entitled Niclin to pursue damages caused by these breaches, illustrating that the contract did not require the implied term (described above) for it to be effective.

The parties agreed that if the conclusion of the court was that SHA Premier did not nominate itself as superintendent any response to the payment claim was ineffective. As such, the consequence was that the appeal was allowed and the orders were set aside.

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The silence of the principals

CCIG (Australia) Pty Ltd v Amicus Hospitality Group Pty Ltd [2019] QSC 232

Michael Creedon | Mark Wheelahan | Nicholas Davison

Key point and significance

An expiry date on a bank guarantee will not absolve a contractor of the requirement to provide a replacement security or extinguish the contractor's liability under a contract to provide unconditional security, unless there is some conduct by a principal that communicates an acceptance of the expiry date on the bank guarantee. Silence by a principal will not be enough to communicate such an acceptance.

Facts

The applicant, CCIG Australia Pty Ltd (**CCIG**) entered into a lump sum contract with the respondent, Amicus Hospitality Group Pty Ltd (**Amicus**) for upgrades and refurbishment to the Daydream Island Resort. Amicus provided two unconditional bank guarantees in favour of CCIG as security for performance; the first returnable following practical completion and the second upon issue of the final completion certificate. Both guarantees contained expiry dates. CCIG did not communicate either an objection or approval of the guarantees, nor did it raise with Amicus any issue regarding the bank guarantees not conforming with the contract as a result of the expiry dates.

An extension of time for works was agreed by the parties. No adjustment was made to the expiry dates. The first guarantee was returned after practical completion. The second guarantee expired prior to final completion.

Amicus refused to provide a new guarantee as security in substitution for the expired guarantee. It argued that CCIG's acceptance of the bank guarantees, without objection, constituted an implied approval of the security and constituted performance of Amicus's obligation. CCIG commenced proceedings seeking a declaration and an order for specific performance.

Decision

CCIG's conduct in not addressing the issue of the expiry dates with Amicus did not imply approval of the expiry dates.

The Court held that, as a matter of construction, the absence of an express provision enabling an extension or replacement of the guarantees indicated that the guarantees were contemplated to be unconditional. The obligation to provide bank guarantees in the amount and in the form that complied with the general conditions of the contract was a once and for all obligation. Unless CCIG approved the bank guarantees with expiry dates, Amicus failed to fully perform its obligations under the contract when it provided the bank guarantees with expiry dates.

In the circumstances of this case, the Court found that there was no conduct by CCIG that conveyed an implied approval of the bank guarantees with expiry dates. CCIG's silence towards the expiry dates was equivocal and could not be relied upon by Amicus as an implied approval. Accordingly, CCIG was entitled to enforce compliance and the Court made orders:

- giving a declaration that the proper construction of the contract obliged Amicus to provide security in the form of an unconditional bank guarantee; and

- ordering Amicus to specifically perform its obligations under the contract to provide an unconditional bank guarantee replacing the guarantee that had expired.

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SOUTH AUSTRALIA

Unlicensed builder allowed to recover under quantum meruit

Caruso v Built It Pty Ltd (In Liq) (No 3) [2019] SASC 147

James Kearney | Daina Marshal

Key point and significance

This decision adds to the substantial body of South Australian authority which holds that section 6(2) of the *Building Work Contractors Act 1995* (SA) (**BWCA**) does not preclude an unlicensed builder from recovering on a quantum meruit basis in a case where the building owner has accepted the benefit of the work performed. *Caruso* is of particular interest in light of the High Court's recent decision in *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 ***(Mann)***, which held that a builder's ability to commence a claim on a quantum meruit basis is limited to situations where a builder has performed works but has not accrued a right to payment under a contract.

The High Court also found in *Mann* that section 38 of the *Domestic Building Contracts Act* 1995 (Vic) (**DBCA**), did not allow recovery in restitution where that section applied. An interesting question arises as to whether the Supreme Court would have concluded that section 6(2) of the BWCA allows recovery in quantum meruit in light of the High Court's decision.

Section 38 of the DBCA provides that a builder shall not be permitted to recover any money in respect of owner-initiated variations except in accordance with the relevant provision of the DBCA. Nettle, Gordon and Edelman JJ held that section 38 reflects a legislative intent to cover the field of remuneration payable and that to permit any alternative form of recovery for work would have the effect of frustrating or defeating that intent. Their Honours placed emphasis on the word 'any' in section 38, stating that it prohibits the recovery of any money, and that means both under contract or in restitution. It is arguable that this reasoning is applicable to section 6(2) of the BWCA, although the wording of the two provision differs. A point of distinction is that the BWCA precludes payment 'under or in relation to a contract' in section 6(2) of the BWCA. It is to be seen whether that is considered a sufficient distinguishing feature.

Subject to this broader question of whether quantum meruit is in fact available, where section 6(2) of BWCA applies, the decision in *Mann* will not otherwise preclude recovery on a quantum meruit as no right to payment has accrued under the contract.

Facts

In September 2017, Built It Pty Ltd (in Liq) (**builder**) obtained a judgment in the Magistrates Court against Mr Caruso (**owner**) for building work undertaken between May 2013 and March 2014.

After an order was made for the builder to be wound up in November 2017, the owner sought to set aside the Magistrates Court judgment, contending that it was obtained through fraud or irregularity.

The owner contended that Mr Zollo, a director of the builder, had contravened an undertaking he had given to the owner in the course of his involvement in the building work. He submitted that the effect of this contravention was that the building works to which the judgment sum related were unauthorised.

Section 6(2) of the BWCA is a protective provision which operates to prevent a builder from recovering a fee for work that it was not authorised to perform under a licence. The owner submitted that by reason of section 6(2), the builder was not entitled to be paid for its work. While the builder was licensed throughout the period of the relevant building work, the owner challenged the entitlement of the builder to that licence and the suggestion that the building work was 'authorised by a licence'.

Decision

Whilst section 6(2) prevented the builder from enforcing its claims for payment under contract against the owner, the court held that it was nevertheless entitled to payment on a quantum meruit basis in respect of the work it had done between May 2013 and March 2014.

In coming to this decision, Parker J considered the judgments of Duggan J in *Stankovic v Auferheide* [2003] SASC 378 (***Stankovic***) and Perry J in *DG Australia Pty Ltd v Alexander* [2003] SASC 176 (***DG Australia***). *Stankovic* held that section 6(2) prohibits recovery by an unlicensed builder 'under or in relation to a contract' and that the prohibition cannot be construed as applying to a claim based on a quantum meruit. In *DG Australia*, Perry J considered that, if the legislature had intended to prevent recovery on a quantum meruit basis by this provision, this could have easily been expressly stated in the Act. Recovery on a quantum meruit obliges the building owner, who has benefited from work done, to account for the benefit accruing for his or her acceptance of the performance of the unenforceable contract.

The evidence showed that the owner accepted the benefit of the building work performed on his behalf by the builder, and as such, Parker J found that the builder could recover reasonable remuneration for that work from the owner on a quantum meruit basis.

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VICTORIA

Unpaid amounts can be claimed in successive payment claims

Levi v Z&H Building Development [2019] VSC 633

Alison Sewell | Tom Johnstone | Alisdair Reeves

Key point

The Victorian Supreme Court has confirmed the following two principles of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Vic Act**):

- items may be claimed in successive payment claims so long as they remain unpaid; and
- objective factors such as language, content, mode of submission and context will be taken into account in determining whether a claim is in the nature of a final payment claim. Whilst not defined in the Vic Act, a final payment claim is a final balancing of account between the parties which, depending on the words of the relevant contract, may only be submitted after a certain date or circumstance, such as actual or practical completion.

This case clarifies that contractors are entitled to continue to pursue unpaid payment claims until the final payment claim.

Facts

Levi Pty Ltd (**head contractor**) engaged Z&H Building Development Pty Ltd (**subcontractor**) in order to perform certain construction and engineering works.

Having served the head contractor with an August and September payment claim, on 28 December 2018 the subcontractor served a further payment claim for the claims included in the September payment claim and a final retention sum of $17,000 which totalled $101,365.58 (**December Payment Claim**). The head contractor provided a payment schedule for the December Payment Claim for a lesser amount, and consequently the subcontractor made an adjudication application. The adjudicator determined that the head contractor was liable to pay the builder $77,687.92.

The head contractor sought judicial review of the adjudicator's determination on the grounds that:

- the jurisdictional time limit for service of payment claims was not complied with; and
- the claim was a final payment claim (which could not be submitted under the building contact until the date of practical completion).

Decision

The court upheld the adjudicator's determination and dismissed the head contractor's review application.

Time limit for service of payment claims – seeking previously claimed amounts in subsequent claims

The court found that the subcontractor had validly served payment claims in August, September and December 2018 in accordance with sections *9(1)* and *14(1)* of the Vic Act. The court held that a claim for an item of work, goods or services may be claimed again as components of successive payment claims, provided the original payment claim was valid and timely pursuant to the Vic Act. The court held that the time limit for service of claims (three months after the relevant reference date) is a limit on the payment claim itself and not the item or amount claimed within the claim.

Determination of the reference date – the nature of a final payment claim

The court determined that the December Payment Claim was not in the nature of a final payment claim. In reaching this decision, the court held that:

- the adjudicator had, as a matter of fact, determined that certain defective and incomplete works were yet to be completed at the time the December Payment Claim was made;
- a reference to '100% complete to date' in a payment claim is not in itself determinative. Instead, one must objectively construe the language, content, mode of submission and context of the claim; and
- the words 'final retention sum' are not of themselves determinative of the status of the payment claim in which such a claim is included.

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Payment claims served early no longer valid

MKA Bowen v Carelli Constructions [2019] VSC 436

Nikki Miller | Chris Hey | Tori Landale

Key point and significance

This decision marks a change in the legal position in Victoria with respect to the early service of payment claims under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Vic Act**).
Since Vickery J's decision in *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd & Ors* (2010) 30 VR 141, it has been accepted that a bona fide payment claim served prematurely could be valid. However, this is no longer the case, even where the relevant construction contract contains a clause deeming an early payment claim as effective only from the next reference date.
Accordingly, to engage the operation of the Vic Act, claimants must ensure that payment claims are only served on or after the relevant reference date under the contract. In particular, where a reference date falls on a non-business day, parties must serve the payment claim on or after the non-business day (and not on the business day prior).

Facts

MKA Bowen Investments Pty Ltd (**principal**) engaged the first defendant, Carelli Constructions Pty Ltd (**contractor**) to design and construct an apartment complex in Mont Albert, Victoria.
Under clause 37.1 and Item 33 of the contract, payment claims were to be submitted on the 25th day of each month (being the relevant reference date). Where a payment claim was served early, clause 37.1 of the contract stipulated that the early payment claim *'shall be deemed to have been made on the date for making that payment claim in accordance with Item 33'.*
On 26 November 2018 (in reliance on the 25 November 2018 reference date), the contractor served a payment claim on the principal for $39,087. On 21 December 2018 (in reliance on the 25 December 2018 reference date), the contractor served a further payment claim on the principal for $411,358 (**December Payment Claim**). In response to the December Payment Claim, the principal provided a payment schedule to the contractor in the amount of $7,182.
The contractor referred the December Payment Claim to adjudication under the Act. The adjudicator determined that the contractor was entitled to payment of $209,470. The principal commenced proceedings in the Supreme Court of Victoria seeking to quash the adjudication determination because the December Payment Claim was not validly served under the Act as it was not served *'on and from'* the relevant *'reference date'*.

Decision

The court held that the December Payment Claim was not a valid payment claim under the Act as it was served before the relevant reference date. Accordingly, the adjudication determination was quashed.
Following the High Court of Australia's reasoning in *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence* [2016] HCA 52 and the New South Wales Court of Appeal in *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* [2017] NSWCA 289 (***All Seasons***), the court considered that sections 9(1) and 14(1) of the Vic Act did not permit the service of a payment claim prior to the relevant reference date. In reaching this conclusion, the court had particular regard to the words *'on and from each reference date'* which appear in section 9(1)(a) of the Vic Act.
The court considered that the provision of the contract which purported to deem early payment claims as being made on the relevant reference date did not cure the invalidity of the December Payment Claim. Citing *All Seasons*, the court emphasised that the Vic Act establishes a time-critical regime for the submission of payment schedules and referral to adjudication. The court was concerned that uncertainty would arise if such deeming provisions could have the effect of circumventing the temporal requirements of the Vic Act. Accordingly, the clause was held to be of no effect and did not cure the invalid early service of the December Payment Claim.

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Termination on proper grounds – take care when ending a contract

Plyboard Distributors Pty Ltd v Apostopoulos (Building and Property) [2019] VCAT 573

Alison Sewell | Tom Johnstone | Bianca Pyers

Key point and significance

This decision highlights the importance of parties having a proper ground to terminate a contract.
The decision also sets out factors that distinguish a subcontracting arrangement from an owner builder relationship for the purposes of the *Domestic Building Contracts Act 1995* (Vic) (**Act**). This is relevant, as the nature of the relationship between a principal and its contractor under the Act determines the level of protection afforded to the principal and whether the mandatory requirements from the Act need to be included in the relevant building contract.

Facts

Plyboard Distributors Pty Ltd (**builder**) entered into a contract with Mr and Mrs Apostolopoulos (**owners**) to provide cabinetry works at the owner's house in Vermont South.
The builder carried out the cabinetry works and brought them to near completion before Christmas 2017. The parties agreed that the builder would return to complete the remaining cabinetry works sometime in January 2018 after the owners had returned from holiday. However, following the Christmas break the owners claimed that the cabinetry works were defective and did not allow the builder to enter the owners' house, which prevented the builder from returning to complete the works. The owners also refused to pay the builder the remaining balance of the contract sum, being $48,959.
The builder commenced recovery proceedings in VCAT claiming $48,959 plus interest. The owners counterclaimed stating that the cabinetry works were both incomplete and defective, and argued that the builder was not entitled to payment as the cost of rectification exceeded the contract price.

Decision

The tribunal held that the owners had not lawfully terminated the contract (in the absence of an express contractual term) such that the owners could not counterclaim for the incomplete work.
The tribunal noted the established law that repudiation occurs where a party has shown an intention no longer to be bound by the contract or indicated that it will only fulfil the contract in a manner substantially inconsistent with its obligations.
The tribunal found that the builder was entitled to the opportunity to finish its work and, in the process, to address any shortcomings. The builder had never presented the cabinetry works as having been completed. On this basis, the tribunal found that the builder was not in breach of the contract and, as a consequence, there was no valid ground for the owners to refuse to allow the builder to return to the house and complete its work. In these circumstances, the builder was entitled to treat the contract as discharged and seek damages for breach. Accordingly, the builder had not repudiated the contract, and the owners were not entitled to terminate the contract.

The tribunal also discussed the relationship between the builder and the owners, and whether the contract between the parties constituted a contract between a builder and a subcontractor and therefore not a domestic building contract for the purposes of the Act. The tribunal held that:

- the contract was entered into in the owners' trading name (Cavello Homes);
- correspondence between the parties (comprising emails and quotations) was in the name of Cavello Homes;
- the owners had at all times held themselves out as Cavello Homes and not as individuals; and
- the builder had no knowledge of the background relationship between Cavello Homes and the owners.

In light of the above factors, the tribunal held that the contract was not a domestic building contract for the purposes of the Act, so the protective provisions in favour of owners did not apply to the contract.

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