Construction Law Update

October 2020

Contents

Legislative update

WESTERN AUSTRALIA

Out with the old, in with the new…

WA's proposed security of payment laws: the *Building and Construction Industry (Security of Payment) Bill 2020*

Tom French | Anjie Berry | Penny Bond | Laura Hamblin

Background

On 23 September 2020, the Minister for Commerce, Hon John Quigley MLA, introduced the *Building and Construction Industry (Security of Payment) Bill 2020* (**Bill**) to State Parliament. The Bill arises out of barrister John Fiocco's review into the State's security of payment laws, *Security of Payment Reform in WA Building and Construction Industry*, commissioned by the State Government in 2018, and contains a number of proposed key reforms.

Overview

The Bill will repeal and replace Western Australia's existing security of payment regime, the *Construction Contracts Act 2004* (**CCA**). The Bill will not apply retrospectively, and the CCA will continue to apply to contracts entered into before the Bill commences operation. Given the Government's heavy legislative agenda, and the State election being held in March 2021, we do not expect the Bill to pass Parliament this calendar year.

The Explanatory Memorandum accompanying the Bill explains it covers three key reform areas:

1. greater national consistency;
2. the creation of deemed trusts to better safeguard retention moneys; and
3. enhancing regulatory oversight of the industry.

The Bill introduces a number of significant changes to the construction industry, including:

- potential voiding of 'unfair' time-bars;
- a broader prohibition on 'pay-when-paid' clauses;
- a tightening of time-frames for payment; and
- changes in respect of the adjudication process, including:
  - contractors who fail to provide a payment schedule to subcontractors will not be entitled to provide an adjudication response;
  - contractors' adjudication responses will be strictly limited to the reasons given in the payment schedule; and
  - where the adjudicator determines a party does not have jurisdiction and the claimed amount is above a minimum prescribed amount, parties may apply to review an adjudication decision to a 'senior adjudicator'.

Voiding 'unfair' time-bars

Section 16 of the Bill provides for potential voiding 'unfair' time-bars. The section applies to any notice-based time-bars, defined to mean clauses that make an entitlement to payment or an extension of time contingent on the provision of notice by a party.

The Bill provides that such time-bars may be declared to be unfair if compliance is not reasonably possible or would be unreasonably onerous (an 'unfair' time-bar). Time-bars can only be declared 'unfair' (and void) by adjudicators, courts, arbitrators, or an expert. The party who alleges that a time-bar is unfair bears the onus of establishing that it is unfair.

To guide decision-makers' reasoning, the Bill sets out the matters that must be considered when determining if a time-bar is 'unfair', being:

- when the party required to give notice would have reasonably become aware of the event;
- when and how notice was to be given;
- the relative bargaining power of each party to the contract;
- the irrebuttable presumption that the parties have read and understood the contract;
- the rebuttable presumption that the party required to give notice possesses the competence of a reasonably competent contractor; and
- whether the matters set out in the notice are final and binding.

We anticipate that the scope and impact of this provision will take some time to develop as it will depend on what courts and tribunals hold to be 'unfair' in various cases.

What to expect from adjudications

The new adjudication process continues the 'pay-now-argue-later' approach of the CCA but introduces payment schedules. Under the Bill:

- a party must make an adjudication application within 20 business days of receiving a payment schedule;
- if no payment schedule has been provided, the claiming party must give written notice (within 20 business days of the due date for the progress payment) of its intention to apply for adjudication;
- the respondent must then be given 5 business days from receipt of the notice to provide a payment schedule;
- following expiry of the 5 business days, the claiming party has 20 business days to make its application;
- respondent contractors have 10 business days from the date of the adjudication application to provide an adjudication response; and
- the adjudicator must determine the application within 10 business days, however, this time can be extended by the parties' consent by an additional 20 business days.

Under the new provisions, contractors' adjudication responses will be strictly limited to the reasons given in the payment schedule. If no payment schedule is provided, contractors will not be permitted to provide an adjudication response. Similarly, if no payment schedule is provided, respondents will not be entitled to apply for a review of the adjudication. We anticipate that this will result in more detailed payment schedules being rendered by principals and head contractors in Western Australia.

The Bill also reduces the time for payment to 20 business days (from 42) for contractors or 30 business days for subcontractors and introduces a new right of review that replaces the existing review to the State Administrative Tribunal. Under the Bill, parties may apply to a 'senior adjudicator' for a review of a determination where the application has been dismissed on the grounds of jurisdiction.

Retention trusts

The Bill also introduces a deemed retention trust scheme for all moneys held under construction contracts in Western Australia (except contracts to which the Government is the principal).

The scheme imposes two distinct deadlines depending on if the money is retention money or security. If the money is retention money, the party entitled to hold the retention money under the contract must pay the money into a trust account with a recognised financial institution within 10 business days of entering into the contract. If the money is security, the account must be established before the security is paid under the contract.

The Bill prohibits:

- retention money from being used to pay third-party creditors; and
- the party holding the retention money from setting off against retention money any liability of the other party under a different contract.

The Bill only permits money to be withdrawn from the trust:

- in accordance with the terms of the contract;
- as agreed between the parties;
- in accordance with an adjudicator's determination, or an order of a court, tribunal or expert determination;
- to repay money paid into the trust in error;
- to transfer the money to another retention trust established under the Bill;
- after the retention money end date; or
- for the purpose of making any other payment authorised by the regulations.

| back to *Contents*

In the Australian courts

AUSTRALIAN CAPITAL TERRITORY

Payment claim served on a non-contracting party - not enough to appeal adjudicator's decision

***Justar Property Group Pty Ltd v Chase Building Group (Canberra) Pty Ltd* [2020] ACTSC 231**

Ben Fuller | Andrew Black | Elizabeth Harris

Key points and significance

Unlike security of payment legislation in other jurisdictions, the *Building and Construction Industry (Security of Payment) Act 2009* (ACT) (**SOP Act**) provides a limited right to appeal adjudication decisions for an error of law. Appellants must be able to show that the error or law is either *'manifest on the face of the adjudication decision'*, or that there is *'strong evidence'* that determining the question will add substantially to the certainty of the law. Cases which have limited significance beyond their own facts are unlikely to meet this threshold.

This case also highlights the importance of knowing who the parties to a contract are, and that respondents should always respond to payment claims even where they consider they have not entered into a contract with the claimant.

Finally, this case reinforces that parties seeking to overturn an adjudication decision in the ACT for jurisdictional error should seek both prerogative relief (in the nature of certiorari quashing the adjudicator's decision) and leave to appeal under section 43 of the SOP Act.

Facts

The applicant, Justar Property Group Pty Ltd (**developer**), owned land that it proposed to develop. An employee of a related entity of the developer, Maxon Group Pty Ltd (**Maxon**), approached Chase Building Group (Canberra) Pty Ltd (**builder**) to work on the project. The Maxon employee made it clear that the land was owned by the developer, although subsequent correspondence from the builder confirming the arrangement was addressed to Maxon.

A payment claim under the SOP Act was served on the developer. The developer did not serve a payment schedule in response. The builder then served a notice of its intention to apply for adjudication under the SOP Act. The developer again failed to serve a payment schedule on the builder.

An adjudicator determined that the builder was entitled to the whole of the claimed amount. As the developer had not served a payment schedule, the developer was not entitled to file an adjudication response. The developer sought to challenge the adjudicator's decision on the basis that there was no contract between the developer and the builder. The developer claimed that, instead, Maxon was the relevant contracting party.

The application for leave to appeal

Section 43(3)(b) of the SOP Act gives parties a limited right to appeal to the Supreme Court on questions of law arising out of an adjudication decision. The Supreme Court must not grant leave to appeal unless the court considers that the determination of the question of law concerned could substantially affect the rights of a party to the adjudication decision (section 43(4)(a)) and there is either:

- a manifest error of law on the face of the adjudication decision (section 43(4)(b)(i)); or
- strong evidence that the adjudicator made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of the law (section 43(4)(b)(ii)).

The developer argued that the adjudicator had made an error of law in finding the existence of a construction contract between the developer and the builder.

Decision

Leave to appeal was not granted as the court held that neither of the tests set out in section 43(4)(b) had been satisfied.

Manifest error on the face of the adjudication decision: section 43(4)(b)(i)

The court applied the test in *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37, holding that (while the error need not be *'egregious'*) it must be apparent on the face of the adjudicator's reasons.

The court held it was open to the adjudicator to find that the proper contracting party was the developer. Importantly, as the developer had not provided an adjudication response, the adjudicator was entitled to accept the uncontradicted evidence of the builder. Accordingly, the court held that there was no manifest error of law on the face of the adjudication decision.

Strong evidence of an error of law and substantial contribution to the certainty of the law: section 43(4)(b)(ii)

The court accepted that there was strong evidence that the adjudicator made an error of law in concluding that there was a construction contract between the developer and the builder. The court did not accept, however, that there was strong evidence that final determination of the question may add, or be likely to add, substantially to the certainty of the law.

In deciding whether determination of the question would have added substantially to the certainty of the law, the court noted:

- *'strong evidence'* that could be considered was not restricted to evidence on the face of the record;
- the fact that the question would be determined by the Supreme Court was not enough (on its own) to *'add substantially to the certainty of the law'*; and
- the decision would have to have significance beyond the factual circumstances of the case to *'add substantially to the certainty of the law'*.

Jurisdictional error

Importantly, the court proceeded on the basis that both the existence of a construction contract and the identity of the parties were *'jurisdictional facts'*. This would mean that if an adjudicator correctly determines that a construction contract exists, but misidentifies the parties, the adjudicator will fall into jurisdictional error and the adjudication will be open to challenge.

Application for prerogative relief

During closing submissions, the developer made alternative submissions seeking prerogative relieve in the nature of certiorari (quashing the adjudicator's decision) on the basis of jurisdictional error. This application was ultimately denied as having been made out of time, and an extension of time was refused on the basis that it would be procedurally unfair to the builder. Noting the court's conclusion on jurisdictional error above, it appears possible that (had it been brought in time) the developer's application for prerogative relief would have been successful. This highlights the importance, when challenging an adjudicator's decision in the ACT for jurisdictional error, of considering both prerogative relief and an appeal under section 43 of the SOP Act.

| back to *Contents*

NEW SOUTH WALES

Court takes concrete view of payment claim formalities

Acciona Infrastructure Australia Pty Ltd v Holcim (Australia) Pty Ltd [2020] NSWSC 1330

Andrew Hales | Claire Laverick | Jack Morgan

Key point and significance

A single payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**) cannot cover work done under multiple separate contracts. That principle arises from consideration of:

- section 13(5) of the SOP Act, which prevents the service of more than one payment claim per reference date per construction contract, so that there can only be one adjudication application for any particular payment claim for any particular contract; and
- section 17(1) of the SOP Act, which does not authorise the lodging of multiple adjudication applications in respect of one payment claim.

Parties entering into 'umbrella agreements' under which purchase orders with common terms will be issued should properly consider whether they want each purchase order to be a separate contract (as in this case) given that each purchase order would need to be the subject of a separate payment claim for the purposes of the SOP Act. Whilst it almost goes without saying, if purchase orders do constitute separate contracts, claimants should ensure they comply with the requirements of the SOP Act in relation to payment claims to ensure they have the benefit of remedies under the SOP Act.

This case also highlights the need for adjudicators to give consideration to whether they have jurisdiction, and also to remind themselves of procedural fairness requirements.

Facts

The plaintiff Acciona (**builder**) and the first defendant Holcim (**supplier**) entered into a goods supply agreement for the supply and delivery of concrete (**GSA**) for the Sydney Light Rail Project. Under the terms of the GSA:

- the builder was required to issue a purchase order if it wished to order goods;
- the supplier's payment claims could only include amounts in respect of goods the subject of a purchase order; and
- upon the issue of a purchase order, a separate contract between the parties was formed on the terms set out in the GSA.

Over the life of the GSA, the builder issued some 12,500 purchase orders and the supplier directed 36 payment claims to the builder. The upstream works were substantively completed in July 2019, at which point the builder stopped paying the supplier's payment claims. The supplier issued 5 further payment claims between July and November 2019 (**Further Claims**). In each payment schedule the builder issued in response to each Further Claim, the scheduled amount was nil on the basis of claimed set-offs.

On 28 May 2020, the supplier lodged a single payment claim covering newly claimed measured works (**New Works**) and the amount of the Further Claims (**Payment Claim**). On 12 June 2020, the builder issued a payment schedule in which the scheduled amount was nil as a result of claimed set-offs. On 26 June 2020, the supplier applied for an adjudication determination under the SOP Act.

The adjudicator found in favour of the supplier. The builder challenged the adjudicator's determination on the following grounds:

- the adjudicator had no jurisdiction as there was no valid payment claim or valid adjudication application, because the Payment Claim impermissibly claimed for work done under two or more contracts (**Ground 1**);
- the adjudicator failed to consider the builder's contention that she lacked jurisdiction (**Ground 2**);

- the adjudicator failed to afford the builder procedural fairness by finding a contractual basis for valuing progress payments upon which the supplier had not relied and which had not been the subject of submissions (**Ground 3**);
- the adjudicator relied on previous payment schedules (rather than the payment schedule the subject of the adjudication application) and, in doing so, failed to afford the builder procedural fairness by not giving it advance notice of her intention of so doing (**Ground 4**);
- the adjudicator failed to afford the builder procedural fairness by rejecting the builder's contention on a particular matter, and also by making credit findings against a builder's witness, both on bases not put by the supplier and not the subject of submissions or advance notice (**Ground 5**); and
- the adjudicator failed to discharge the statutory task of satisfying herself that the supplier had substantiated its claims (**Ground 6**).

Decision

The court upheld the builder's challenge on the basis of Ground 1, Ground 3, Ground 5 and Ground 6 and quashed the adjudication determination:

- **Ground 1**: In accordance with *Trinco (NSW) Pty Ltd v Alpha A Group Pty Ltd* [2018] NSWSC 239 (***Trinco***) (discussed in our *May 2018 CLU*), a single progress claim cannot validly claim for work done under multiple contracts. Since the Payment Claim covered multiple purchase orders, and therefore multiple contracts, the Payment Claim was invalid. This also invalidated the adjudication application. In the absence of a valid payment claim or adjudication application, the adjudicator did not have jurisdiction to consider the dispute. Applying *Trinco*, the court found the adjudication determination to be void.
- **Ground 3 and Ground 5**: The court found the builder should have been given notice of each of these matters and the opportunity to respond. In the absence of the court's finding on Ground 1, this would have vitiated the determination; and
- **Ground 6**: The adjudicator failed to satisfy herself on this matter. While the builder did not adduce material to dispute these details, this did not relieve the adjudicator of her statutory task to be satisfied they were established by the supplier. The adjudication determination was therefore also void on this basis.

Ground 4 was rejected and Ground 2 did not arise given the court's finding of lack of jurisdiction.

| back to *Contents*

A single checkmate for *Chess* – adjudication determination set aside for jurisdictional error

Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd [2020] NSWSC 1423

Andrew Hales | Adriaan van der Merwe | Kawshalya Manisegaran

Key points

Under section 22(2) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**), adjudicators are required to assess the merits of a party's claim and the value of the works having regard to the materials before them. The court found that the adjudicator did not indicate, in his determination, that he had adhered to these requirements in relation to one of the eight variation claims the subject of this case.

Where a challenge to an adjudication determination is partly successful, the court may be inclined to make it a condition of the grant of any declaratory relief that the monies paid into court be released to the claimant in the amount of the unaffected parts of the determination. This would have the effect of avoiding an unfair outcome where the value of the portion of the adjudicated amount affected by error is relatively low.

Facts

In June 2019, Acciona Infrastructure Australia Pty Ltd (**builder**) and Chess Engineering Pty Ltd (**supplier**) entered into a subcontract under which the supplier agreed to supply and install anti-throw screens and

related components. In May 2020, an adjudicator made a determination in favour of the supplier under the SOP Act.

In the Supreme Court, the builder contended that the determination was liable to be set aside on the basis of 18 individual challenges relating to eight variation claims because the adjudicator failed to fulfil his statutory function and denied the builder procedural fairness by not considering aspects of its payment schedule and submissions or forming a view as to what was properly payable.

Decision

The court found that the adjudicator made a jurisdictional error in respect of one of the variation claims.

The adjudicator did not state how he came to be satisfied that the supplier was entitled to be paid the full value of the claim, nor did he draw attention to any material the supplier relied on (as he had done with other claims) or state that he had been provided with information as to how the supplier arrived at the amount claimed.

Further, whilst the court acknowledged that the adjudication determination had to be read as a whole, the adjudicator's awareness of relevant material referred to in the submissions and general statements made in other parts of his determination did not deal with the critical matter which he had to determine with respect to that one claim, being the amount of the progress claim.

With respect to the 17 unsuccessful challenges, the court found that the adjudicator had considered the relevant sections of the adjudication response submissions. In some instances, the court noted that the adjudicator may have misunderstood or misinterpreted parts of the submissions, however, such mistakes were not jurisdictional errors.

Given that the court upheld only one of the challenges in respect of a variation claim valued at $19,826, of which only $2,760 was in dispute, out of a total determination of $640,593, an issue arose as to whether the entire determination should be set aside or whether the court should make it a condition of the grant of relief that the balance of the money held in court be released to the supplier.

Henry J's preliminary views on this aspect of the case (subject to receipt of further submissions from the parties) were that while accepting the force in the builder's submission that any jurisdictional error renders a determination void not voidable, her Honour would be inclined to condition the grant of any declaratory relief, if it were pressed by the builder and made, on the release of the monies paid into court to the supplier to the extent of the unaffected parts of the determination.

| back to *Contents*

Security for SOP review - an unconditional bank guarantee is as good as cash

CPB Contractors Pty Ltd & Ors v Heyday5 Pty Ltd & Ors [2020] NSWSC 1385 and *CPB Contractors Pty Ltd & Ors v Heyday5 Pty Ltd & Ors (No. 2)* [2020] NSWSC 1404

Andrew Hales | Emily Miers

Key point and significance

A party seeking to set aside an adjudication determination in the Supreme Court will usually be required to pay the adjudicated amount into court as security. It is common for a party to provide security by submitting an unconditional bank guarantee. The court has held that an unconditional bank guarantee is as good as cash and a party can substitute such a guarantee for cash already paid into court. The underlying reasons for substitution are irrelevant.

A party will be at risk of an indemnity costs order if it refuses a request for consent to substitution of a bank guarantee from the party providing security.

Facts

CPB Contractors Pty Ltd, Dragados Australia Pty Ltd and Samsung C & T Corporation (operating as a joint venture, **CDSJV**) commenced proceedings to challenge an adjudication determination made under the *Building and Construction Industry Security of Payment Act 1999* (NSW). The adjudication determination

required CDSJV to pay Heyday5 Pty Ltd (**Heyday**) $9.6 million. The court is yet to determine CDSJV's challenge to the determination.

On 7 September 2020, the court granted CDSJV interlocutory relief preventing enforcement of the adjudication determination which was conditional upon CDSJV paying the adjudicated amount plus interest into court. On 10 September 2020, CDSJV paid into court cash totalling $9.9 million.

CDSJV sought Heyday's consent to substitute unconditional bank guarantees in favour of Heyday for the cash held in court. Consent was unreasonably withheld. On 29 September 2020, CDSJV filed a notice of motion seeking leave for substitution.

Heyday opposed the motion and proposed a timetable for evidence and submissions culminating in an oral hearing six days before the hearing challenging the determination. In addition, Heyday served on CDSJV a notice to produce seeking a copy of CDSJV's joint venture agreement, financial statements and proposed terms of the bank guarantee.

CDSJV argued that there was no basis for Heyday to resist the motion and asserted that a guarantee is the bank's promise to pay Heyday to which CDSJV is not a party. CDSJV submitted that in this arrangement, evidence of their financial position is irrelevant.

Decision No. 1

On 12 October 2020, the court held there was no reasonable basis for Heyday to oppose the substitution of cash with an unconditional bank guarantee. The court made it clear that an unconditional bank guarantee is as good as cash and is commonly used in the Technology and Construction List as security.

The court made orders allowing CDSJV to deliver to the court unconditional bank guarantees equalling the amount of cash paid by CDSJV into court on 10 September 2020 in exchange for the return of the cash paid by CDSJV (including any accrued interest). Heyday was also ordered to pay CDSJV's costs of the notice of motion on an indemnity basis.

Decision No. 2

Following receipt of the judgment on 12 October 2020, Heyday sought a stay of enforcement and leave to make further submissions in relation to the notice of motion, which was granted by the court. In an attempt to substantiate the arguments previously raised, Heyday suggested its review of the proposed terms of the bank guarantee was required to ensure that the guarantee was 'unconditional' as this could not be left to the Supreme Court Registry.

In a judgment delivered on 13 October 2020, the court held that the Supreme Court Registry would be able to recognise whether any bank guarantee sought to be lodged in substitution for cash paid into court is or is not 'unconditional'.

The court determined there was no reason to alter the judgment made on 12 October 2020.

MinterEllison acted for CDSJV in the notice of motion and continues to act for CDSJV in the proceedings.

| back to *Contents*

SOPA (de fideo): a good starter, but you can still order the main course

Lindvest DM Pty Ltd v CPDM Pty Ltd [2020] NSWSC 1290

Andrew Hales | Jessica Nesbit | Adam Hanssen

Key point and significance

It is not an abuse of the process of the court for a party against whom judgment has been entered under the *Building and Construction Industry Security of Payment Act 1999* (**SOP Act**) (following the making of an adjudication determination against it) and who does not seek to stay or set aside that judgment, to instead commence proceedings to enforce its contractual rights.

Substantive proceedings seeking a final determination of matters in dispute under a contract can therefore be advanced by a judgment debtor whilst an adjudicated amount remains unpaid.

Facts

Lindvest DM Pty Ltd (**developer**) contracted CPDM Pty Ltd (**project manager**) under a development services agreement to provide project management services in relation to a property development in NSW. On 16 October 2019, the developer gave 60 days' notice of termination without cause. The parties agreed that the effect of this notice was to cause the agreement to come to an end on 16 December 2019.

On 11 December 2019, the project manager made a payment claim to the developer for $109,725. The payment claim was the subject of an adjudication determination made in favour of the project manager for $104,000. The project manager subsequently obtained judgment in the District Court of NSW for the adjudicated amount and applied for a writ for levy of property against the developer. The writ was returned unsatisfied and the developer was therefore presumed to be insolvent.

In the meantime, the developer commenced separate proceedings seeking a declaration that the project manager was not entitled to any payment in accordance with the terms of the contract but, crucially, did not seek to have the adjudicator's determination itself quashed or to set aside or seek a stay of enforcement of the resultant judgment.

The project manager sought an order that the proceedings be dismissed on the basis that their prosecution would be an abuse of process (ie circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute).

The issue before the court was whether it was an abuse of the process of the court for a party against whom judgment has been entered under the SOP Act (following the making of an adjudication determination against it) and who does not seek to stay or set aside that judgment, to instead commence proceedings to enforce its contractual rights.

Decision

The court dismissed the project manager's claim to strike out or stay the proceedings, holding that the developer's claim for final relief in relation to its contractual rights did not constitute an abuse of process despite the judgment on the adjudicated amount being unsatisfied. The court remarked that an adjudication judgment is provisional and that the SOP Act contemplates either concurrent or consecutive proceedings on the adjudication judgment and under the contract.

The court also considered the earlier decision in *Nazero Group Pty Limited v Top Quality Construction Pty Limited* [2015] NSWSC 232 which held that a party seeking relief in court must first pay into court the adjudicated amount, but distinguished that case on the basis that the developer had not sought to quash the adjudication determination itself, or to set aside or seek a stay of the resultant judgment. We considered the significance of that decision in our *2015 Security of Payment Roundup*.

The court also held that the developer's commencement of proceedings did not deny the operation of the SOP Act or subvert its operation because the project manager remained free to enforce the NSW District Court adjudication judgment.

| back to *Contents*

QUEENSLAND

What remuneration is a builder entitled to for works partially covered by their licence?

Chapel of Angels Pty Ltd v Hennessy Building Pty Ltd & Anor [2020] QCA 219

Julie Whitehead | Matt Hammond | Craig Halangoda

Significance

Where a builder has completed works, part of which is not covered by their building licence/s, the builder is entitled to reasonable remuneration for the work carried out:

- within its licence without any penalty; and

- that outside the scope of its licence, as modified under section 42(4) of the *Queensland Building and Construction Commission Act 1991* (Qld) (**Act**).

Facts

This case relates to an appeal of an earlier decision of the Queensland District Court. That decision was the subject of a previous article in *Construction Law Update* for *December 2018 – February 2019*.

Chapel of Angels Pty Ltd (**owner**) engaged Hennessy Builder Pty Ltd (**builder**) to construct a chapel. The owner had paid $632,615 towards the works completed under the contract, however, disputes arose when the work was almost complete. The owner claimed repayment of the $632,615.64 on the ground that the contract was invalid. The builder defended the claim and counterclaimed for the amount owing under the contract or reasonable remuneration as restitution for the work carried out.

The relevant issue considered at trial was whether the builder held a licence of the appropriate class under section 42(1) of the Act. The primary judge held that:

- the builder did not have the required licence and therefore the owner was entitled to recover the $632,615; but
- the builder was able to recover reasonable remuneration for the work it had carried out that was within its licence (unaffected by section 42(4) of the Act), and for the remainder of the work the builder was entitled to reasonable remuneration as modified by section 42(4) of the Act.

The primary judge found that section 42(3) of the Act only prohibited recovery of reasonable remuneration for work carried out that was not within the scope of any licence held by the person carrying out that work. Any work that was within the scope of any such licence may be the subject of a non-contractual claim which is unaffected by the penalties contained in section 42(4) of the Act.

The owner sought leave to appeal but did not make the application in time. Accordingly, the owner sought an extension of time to apply for leave to appeal. The owner argued that a consequence of the conclusion that the construction of the chapel was not within the scope of the builder's licence, is that none of the building work completed was authorised by the licence and the licensed works could not be 'severed' from the unlicensed works.

Decision

The court refused the application for an extension of time.

The court ruled that section 42(1) of the Act cannot be construed as a prohibition against any 'building work' done in connection with the construction of any 'building', unless the person carrying out that work holds a licence of the class appropriate for the construction of the completed building. Section 42(1) is a prohibition that *'a person must not carry out … building work unless that person holds a contractor's licence of the appropriate class under this Act'*. It was found that sections 42(3) and 42(4) are concerned only with the consequences of a contravention of that prohibition and, importantly, it is the building work actually performed which is relevant.

In carrying out that part of the work that was within the builder's licence, the builder did not contravene the prohibition in section 42(1) against carrying out 'building work' without a licence of the appropriate class, regardless of whether or not the balance of the work required to complete the construction of the chapel was within the scope of its licence.

The end result is that the consumer may be found liable to pay reasonable remuneration not limited in accordance with section 42(4) only in relation to the work for which the contractor held a licence of the appropriate class. However, the consumer will benefit from the limits in section 42(4) in respect of any work for which the contractor did not hold a licence of the appropriate class.

| back to *Contents*

The right to a final payment claim survives termination if made within time

EHome Construction Pty Ltd v GCB Constructions Pty Ltd [2020] QSC 291

Andrew Orford | Alexandria Hammerton | Craig Halangoda

Key point

If a construction contract is terminated, the final reference date to be used when calculating the time limit for a payment claim is the date of termination. Additionally, a payment claim is valid even if retention monies form part of the claim.

Facts

The applicant EHome Construction Pty Ltd (**developer**) engaged the respondent GCB Constructions Pty Ltd (**builder**) to construct a five-storey building in Surfers Paradise in October 2018. Between 2 November and 20 December 2019, the builder issued 14 payment claims to the developer, of which payment claim numbers 12, 13 and 14 had not been paid. As a result, the builder stopped work on 20 December 2019 and issued a show cause notice. On 6 January 2020, the builder suspended works under the contract, and the contract was terminated on 4 or 5 February 2020. Subsequently, on 6 March 2020, the builder issued a payment claim (number 15) seeking payment of $889,892 for all work that had been carried out by the builder, less the amounts previously paid by the developer. The claim also incorporated an amount for retentions deducted from the value of previous claims. An adjudication followed and the developer was ordered to pay $614,265.

The developer challenged the adjudicator's decision for a jurisdictional error. The developer had two main arguments:

1. the builder was unable to demonstrate that payment claim 15 had been given before the expiry of the time periods specified in sections 75(2) and 75(3) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**Act**); and
2. the payment claim was not for 'construction work' because it included a claim for amounts on retention.

Decision

The court dismissed the application and ordered the sum of $668,342 be paid to the builder.

Issue 1: Timing of payment claim

The developer argued that the periods referred to in sections 75(2) and 75(3) of the Act (which details the time period for issuing payment claims) could not be ascertained under this construction contract as it was terminated, and therefore there was no reference date to calculate from. However, this argument failed. The court accepted that section 67(2) of the Act determined that the final reference date was the date of termination (being either 4 or 5 February 2020). The time period within which to make a final payment claim was to be determined by that reference date.

The court found that payment claim 15 was properly categorised as a payment claim relating to a 'final payment', and therefore the time period specified in section 75(3) of the Act applied. The applicable time period in this case was under section 75(3)(c) of the Act, being six months after completion of all construction work to be carried out under the contract. The court interpreted this to mean six months from 5 February 2020, because all construction work under the contract necessarily had to be completed on 5 February 2020, the date the contract ceased. The result was that the builder lodged its payment claim within the required period and was therefore valid.

Issue 2: Retention monies

The developer argued that the case of *Grocon (Belgrave St) Developer Pty Ltd v Construction Profile Pty Ltd* [2020] NSWSC 409, applied. That case found that a payment claim was void for including a claim for an amount paid under a guarantee, because it was not a claim for 'construction work'. However, the court dismissed that argument, stating that *Grocon* was not applicable. It was found that retention monies were amounts that had been deducted from the value of construction work and therefore did relate to 'construction work'. This meant that the payment claim was valid.

You've been served…or have you? Service by 'Dropbox' does not comply with BIF

McCarthy v TKM Builders Pty Ltd & Anor [2020] QSC 301

Andrew Orford | Luke Trimarchi | Isabella Impiazzi

Key point

When serving the other side with an adjudication application, it is imperative that all documents are properly attached or included. Merely providing a link to a cloud-based server or website, such as Dropbox which contains the relevant documentation, will be insufficient to satisfy the general service requirements in the *Acts Interpretation Act 1954* (Qld) and those specific to security of payment disputes in the *Building Industry Fairness (Security of Payment) Act 2017* (Qld).

Facts

Legislative requirements for the service of documents

This dispute centred around the use of the cloud-based file hosting website 'Dropbox' to serve adjudication documents to another party. In general, section 39 of the *Acts Interpretation Act 1954* (Qld) (**AIA Act**) provides that personal service of a document on an individual may occur via post, telex, facsimile or similar facility to the receiver's personal or business address. Section 79 of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**) outlines the procedure for commencing an adjudication application and requires a copy of the adjudication application, which may include relevant submissions, to be given to the respondent.

Facts of the case

TKM Builders Pty Ltd (**claimant**) and Mr McCarthy (**respondent**) were parties to a construction contract. The claimant lodged an adjudication application and sent an email to the respondent which attached the application. The accompanying submissions were contained in a Dropbox folder which was accessible via a link contained in the text of the same email. The respondent claimed that he did not open the Dropbox link, meaning he did not 'receive' a copy of the submissions contained in the Dropbox folder. As a result, the adjudicator did not have jurisdiction to deal with the matter because the claimant failed to comply with the service requirements in section 79 of the BIF Act.

The adjudicator held that provision of the Dropbox link was sufficient to show the respondent was in possession of a copy of the adjudication application and the accompanying submissions, and was satisfied that the documents were given to the respondent. The adjudicator ultimately held in favour of the claimant in the payment claim and the respondent has since paid the amount owing.

Decision

Martin J concluded that service of the claimant's submissions via the Dropbox link was not effective. Section 79 of the BIF Act sets out the essential elements of an adjudication application and provides that the application also 'may' contain submissions. If submissions are included, they form part of the adjudication application and must be served accordingly. In this case, the respondent was not made aware of the submissions merely by being presented with a Dropbox link containing them. This meant the adjudication application was not properly served on the respondent.

The BIF Act outlines a strict timetable for the resolution of an adjudication which commences upon the respondent's receipt of the adjudication application. Time does not begin to run, and the adjudicator does not have capacity to decide the matter, until the respondent is given the adjudication application. In this case, the respondent was not given a copy of the adjudication application, meaning the adjudicator did not have jurisdiction to decide the matter.

| back to *Contents*

Always read the specifications – builders and duty of care

Nel v Octoclay Pty Ltd (formerly Dwyer Corporation Pty Ltd t/as Dwyer Quality Homes) [2020] QDC 200

David Pearce | Allie Flack | Craig Halangoda

Key point

The duty of care for a builder is to exercise the due care, skill and diligence that is usual among builders. The question of whether or not a duty was performed is a question of fact, which is judged by what a reasonable person would do in light of the apparent risks.

Facts

In July 2007, the plaintiff Maria Johanna Nel (**owner**) engaged the defendant Octoclay Pty Ltd (**builder**) to construct a new home. The overall height of the dwelling, as originally designed, exceeded the height limitations under the relevant planning scheme. Accordingly, the builder proposed a solution involving a reduction in the pitch of the roof. Importantly, the builder failed to advise the owner about any of the associated issues or risks with the reduction. The owner subsequently approved the pitch reduction in December 2007.

The roof tiles (which are placed on top of the roof pitch) required a particular degree of roof pitch for certain rafter lengths, which was detailed in the manufacturer's specifications. The builder failed to review these specifications and as a result failed to construct the roof to the required degree of pitch. Instead, it was built at a degree which was materially less than that advised in the specifications.

The owner began experiencing leaking issues from the roof, which first occurred in 2009 when two points of water entry were located on the ground floor. The owner contacted the builder who supposedly fixed the issue by installing 'spreader bars' under the tiles to disperse rain water. In late 2015, a further two locations of wet spots were observed by the owner, and, in 2016, a severe rain event caused large-scale water entry. Subsequently, the builder undertook works on the dwelling which involved attaching piping to the roof to reduce some of the water ingress into the property. However, in 2018, an extremely heavy rainfall event caused substantial water penetration and damage to the timber framing within the roof. Expert evidence attributed the cause of the water penetration to the incorrect degree of pitch of the roof and the cost of repairs to be $500,246.

The legal question was whether a duty of care was owed by the builder to the owner and, if so, whether the water damage was within the scope of the duty.

Decision

The court ordered judgment for the owner in the sum of $500,246. The court found that the duty of care specified under the contract required that the builder carry out the works with reasonable care and skill. The contract also made it clear that all plans and specifications were the responsibility of the builder. The court found that the duty of care for a builder is the same as that specified for an architect in *Voli v Inglewood Shire Council & Anor* 110 CLR 74, which is summarised below:

> *'An architect … is bound to exercise due care, skill and diligence… [and] must bring to the task … the competence and skill that is usual among architects practising their profession… but whether or not that duty was performed is ultimately a question of fact, to be judged by what, in the circumstances of the particular case and in the light of the apparent risks, a reasonable man would or would not do...'*

It was found that the builder owed a duty of care which extended to ensuring the degree of pitch was consistent with the specifications required for the roof tiles. Additionally, the court stated that it could not be argued that the builder received negligent instructions from the owner to reduce the pitch, when it was the builder that had suggested the solution and failed to adequately advise the owner of the risks.

| back to *Contents*

An adjudication decision will not be thrown out frivolously

S.H.A. Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd & Others [2020] QSC 307

Sarah Ferrett | James Knell | Isabella Impiazzi

Key point

An adjudication decision will not be void for jurisdictional error if the adjudicator makes only minor mistakes or fails to address a small number of submissions or matters when making the decision. When considering an adjudicator's jurisdiction, there is a distinction between an objective jurisdictional fact (a valid payment claim) and a subjective jurisdictional fact (going to an adjudicator's state of mind, such as a decision as to whether or not an application is frivolous or vexatious). Whilst both are threshold issues, an allegation in respect of the former will require the court to consider the question independently, whereas the latter will merely require the court to examine the extent to which the subjective fact was determined in the manner contemplated by the legislature.

Facts

S.H.A. Premier Constructions Pty Ltd (**principal**) and Niclin Constructions Pty Ltd (**contractor**) were parties to three construction contracts, each of which had achieved Practical Completion and commenced the 12-month Defects Liability Period (**DLP**) (extended by defect notices), when a dispute arose and the contracts were terminated. The contractor simultaneously commenced proceedings and lodged adjudication applications under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**). The adjudicator decided in favour of the contractor, and the principal sought a declaration that the decision was void due to jurisdictional error on three grounds.

Ground 1: Misconception of the adjudicator's function or power

The principal asserted that the adjudicator acted outside the jurisdiction conferred on it by the BIF Act to only consider specific matters outlined in the BIF Act (including the contract and the payment claim, among others) because there could be no other explanation for the conclusions reached. It was asserted that the adjudicator must have relied on other evidence (beyond the mandate of the BIF Act) to make the determination. Alternatively, the principal submitted that the adjudicator's reasons were severely deficient and, on either or both those bases, the adjudicator had fallen into jurisdictional error.

Ground 2: Failure to undertake the statutory task

The principal submitted that in failing to determine whether work was defective as alleged, estimate the cost of rectifying the defective work and consider the rectification costs in the ultimate valuing of the payment claim, the adjudicator had failed to undertake its statutory function thereby committing a jurisdictional error.

Ground 3: The adjudication application was vexatious and did not satisfy statutory timeframes

The principal argued that, under section 84(2)(a) of the BIF Act, the adjudicator should have determined the applications were vexatious because the contractor changed its position on one issue between the initial court proceeding and the adjudication (approbation and reprobation). In that regard, in the proceeding the contractor asserted that the DLP under each contract had not been extended by the issuing of defect notices under each contract, however, in an effort to access an available reference date available under section 75 of the BIF Act, the contractor asserted the opposite position (that the DLP had been extended) in the adjudication. It was further submitted that the adjudicator should have determined that the contractor's payment claims were issued outside of the statutory timeframes in breach of the BIF Act, with the effect that a failure to satisfy these two preconditions meant the adjudicator's jurisdiction was not enlivened.

Decision

The applicant failed on all three grounds and the court dismissed the application because, in respect of each ground above:

1. the adjudicator decided the application based on several relevant factors which were outlined in his reasons and which were discernible and authorised by the BIF Act, such that the adjudicator had not misconceived its own function or power and had not fallen into jurisdictional error;

2. whilst the court agreed that the adjudicator had failed to properly address some of the defect items for valuation, it concluded that despite this minor omission the adjudicator had otherwise correctly identified the statutory task and the adjudicator's omissions were due to accident or mistake only which constitutes an error within jurisdiction and therefore does not amount to jurisdictional error; and

3. an adjudicator must satisfy itself as a precondition to making any determination under the BIF Act that the payment claims comply with the statutory time frames and the application is not frivolous and vexatious, however, only the validity of the payment claim is a question of objective jurisdictional fact. Whilst declining to express a view on the approbation and reprobation point in the context of the application (aside from indicating that the inconsistency might ground a strike out or defence in the proceeding), the court determined that:

   (a) the question of whether or not an application was frivolous or vexatious was a subjective jurisdictional fact, or 'state of mind' determined by the adjudicator; and

   (b) to the extent that the adjudicator discharged its obligation to consider those preconditions in the manner contemplated by the legislature (which the court found it did), it was properly within its jurisdiction to determine the application on that basis.

| back to *Contents*

Stormwater damage: suing the force of gravity?

Turner v Kubaik [2020] QDC 223

Michael Creedon | Megan Sharkey | Isabella Impiazzi

Key point

Landowners are responsible for protecting their own land and buildings from the impact of stormwater runoff which may be intensified by the natural topography of the area. Landowners are not obliged to prevent the natural downhill flow of stormwater onto adjoining land, but liability may arise if a landowner's action causes the water to flow more intensely onto adjoining land than it naturally would.

Facts

These proceedings arose out of a dispute regarding the flow of stormwater from one property to another. The plaintiffs Darren and Bridgitte Turner (**plaintiffs**) and the defendant Mandy Kubiak (**defendant**) were neighbours of adjoining properties since late-2016. The properties were situated on sloping land with the defendant's land at a higher elevation than the plaintiffs'. The previous owner of the defendant's property built a shed (**shed**) and a gravel infiltration pit (**gravel pit**) close to the boundary of the plaintiffs' property, which were the subject of the dispute. In mid-2018, the defendant installed two 10,000-litre water tanks to receive rainwater flowing off the roof of the shed.

According to Brisbane City Council plans, approximately 75% of the defendant's land had a flow path directed onto the plaintiffs' land. A soil composition report prepared for the plaintiffs' land showed a permeable surface layer with less permeable sandy clay below. The report stated that this soil composition would perform poorly when saturated and recommended the site be well drained and appropriately sloped to prevent water build-up. The plaintiffs were aware of these characteristics before purchasing the land and built their residence in accordance with the recommended design.

From 2016, and therefore prior to the installation of the water tanks, the plaintiffs claimed that stormwater runoff from the shed was filling up the gravel pit which did not have the capacity to contain the volume of water flowing into it. The gravel pit would then overflow and the stormwater would run onto the plaintiffs' land. The plaintiffs found areas of their land to be bogged or flooded on several occasions and claimed the excess water caused damage to their land and the foundation of their property. To manage the runoff, the plaintiffs installed a drainage trench and incurred other costs amounting to almost $9,000. The plaintiffs communicated this to the defendant who acknowledged the water problem but denied liability for it.

Proceedings were commenced in mid-2018. The plaintiffs claimed damages for the tort of nuisance and the alleged breach of an oral agreement between the parties for the defendant to reimburse the costs incurred.

Decision

Nuisance

In rejecting the plaintiffs' claim, the court reiterated that a mere interference that causes damage will not amount to a nuisance. Instead, the court held that when water flows from a higher property to a lower property, the owner of the higher property will not be liable for the natural flow of water to the lower property. However, the owner of the higher property may be liable if a structure or development on the land causes the water to flow in a higher concentration than it naturally would.

In this case, while water from the gravel pit did flow onto the plaintiffs' property, it was not substantial or unreasonable enough on its own to constitute an interference with the plaintiffs' use and enjoyment of their land by the defendant. The court held that the flow of stormwater was a natural occurrence due to the slope of the land rather than a consequence of any specific action by the defendant, and therefore the action in nuisance failed.

The court considered it unlikely that water from the shed was continuing to discharge into the gravel pit after the installation of the water tanks. As a result, when the plaintiffs continued to record instances of flooding after the water tanks were installed, it was illustrated that the source of the plaintiffs' water problem was not the defendant's shed or gravel pit.

Oral agreement

The court did not consider there to be an oral agreement between the parties regarding the payment of the drainage trench and other outlays. While the defendant was aware of the plaintiffs' stormwater problems, it did not acknowledge the shed and gravel pit as the root of the problem and did not expressly or impliedly agree to reimburse the plaintiff.

| back to *Contents*

SOUTH AUSTRALIA

Non-compliance with variation process held fatal to entitlement

Crea v Bedrock Construction and Development Pty Ltd [2020] SADC 124

James Kearney | Daina Marshall | Ryan Feuerherdt

Key point and significance

It can be difficult to convince a court to depart from ordering rectification costs as the primary measure of damages as there is a threshold question as to whether those costs are 'unnecessary' or 'unreasonable'.

This case has also reinforced the importance of complying with the contractual framework for claiming variations and the impact this can have on entitlement to recover the cost of work performed outside of the contractual regime. It also covers the circumstances where it is reasonable for an owner to deny a builder the opportunity to re-enter the site to rectify defects.

Facts

Background

In early 2016, Mr Crea contracted Bedrock Construction and Development Pty Ltd (**Bedrock**) to fit out a restaurant in Morphett Street, Adelaide. Bedrock commenced works on 7 January 2016, with Mr Crea taking back possession of the site on 22 April 2016.

Mr Crea claimed that Bedrock had not performed the works in accordance with the contract, and that Bedrock also breached its duty of care by failing to undertake the works in a competent and workmanlike manner. Mr Crea's statement of claim listed 85 defects. On 7 February 2019, the court referred the issue of these defects to an arbitrator, who was tasked with determining whether each alleged defect was in fact a defect and the reasonable cost to rectify each defect. On 10 July 2019, the arbitrator delivered her award, determining that the cost of rectifying all defects was $103,396.

Bedrock objected to the adoption of this award, including on the basis that some of the defects were a result of defective design, some of the defects were incomplete work which it was not given the opportunity to complete, and that it was denied the opportunity to rectify defects. Notably, Bedrock challenged the

quantum of the award for several items on the grounds of the 'unreasonableness exception' in *Bellgrove v Eldridge* (1954) 90 CLR 613 as applied in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272. In particular, Bedrock argued that the entitlement to costs of rectification depends on whether the work is necessary and reasonable.

In addition to the adoption of the award, the court was also asked to determine whether the purported variations to the contract (including delay costs) were valid, entitling Bedrock to additional payment.

Decision

After a lengthy consideration of the detailed facts, the court awarded Bedrock only a small amount in respect of variations and permitted an extension of time (and delay costs) up to the Date of Practical Completion. Mr Crea was awarded a more significant sum for the cost of rectifying the defects, as Bedrock was unable to convince the court that rectification costs should not be awarded.

Variations and delay

The contract contained a clear regime for the carrying out of variations. The court held that the requirement to give notice of a variation 'promptly' was a condition precedent to being able to claim payment for a variation. Without evidence that Bedrock claimed, or attempted to claim, the cost of the variations within the contractual regime, Bedrock had no entitlement to be paid for the work. In circumstances where the work the subject of the variation claims was found not to be 'Extra' work outside of the contract, the court also found there was no basis for recovery on a restitutionary basis or on the basis of an implied promise to pay.

Bedrock made a claim for delay resulting from five different events, including a latent condition and late delivery of the pizza wood oven. The court largely accepted these claims, allowing 27 days' worth of delay costs.

Defects

Bedrock argued that if the court found it was not entitled to return to the site to rectify several defects, each of those defects fall within the unreasonableness exception in *Bellgrove*. The court referred to *Stone v Chappel* (2017) 128 SASR 165 to further analyse the principle that rectification must be a 'reasonable course' to adopt and the factors to be taken into account. Having accepted that the fit-out of the restaurant was intended to be of a high quality, the court held that the primary measure of damages, being rectification costs, was in fact reasonable and that Mr Crea was entitled to those costs.

The court also considered whether Mr Crea acted reasonably in prohibiting Bedrock from accessing the restaurant to rectify the defects. Whilst the court found that Bedrock was prepared to attend the site to rectify the defects, it was also found that the relationship between Mr Crea and Bedrock had deteriorated to the point where Mr Cea was concerned as to whether Bedrock was capable of carrying out the defect rectification work in a competent fashion. It was ultimately held that Bedrock had been given opportunities to rectify the defects, however, lacked urgency and behaved unacceptably, and that Mr Crea's conduct was therefore reasonable.

In total, Mr Crea was awarded $95,599 for the defect rectification costs.

| back to *Contents*

Provision of documents via Cloud potentially insufficient

Wärtsilä Australia Pty Ltd v Primero Group Ltd [2020] SASC 162

James Kearney | Daina Marshall | Ryan Feuerherdt

Key point and significance

Documentation provided via a hyperlink to OneDrive was insufficient to satisfy a contractual requirement to *'provide'* and make *'available to be inspected'* certain documents under a subcontract agreement.

Provision of documents by cloud-based storage systems where electric files are remotely stored by third parties, such as OneDrive and Dropbox, presents a risk that the documents are unable to be accessed, read or downloaded by the intended recipients. Where significance is placed on parties accessing and downloading documents, such as where it constitutes a milestone under a contract, regard should be had to the risks of technical difficulties and questions around when documentation is said to be *'provided'*. As in this

case, this can have an effect on whether a valid reference date for a milestone payment has arisen for the purposes of s 8 of the *Building and Construction Industry Security of Payment Act 2009* (SA) (**SOP Act**).

Facts

Wärtsilä Australia Pty Ltd (**Wärtsilä**) was engaged by AGL to construct the Barker Inlet power station on Torrens Island. Wärtsilä subcontracted Primero Group Ltd (**Primero**) to perform various civil, mechanical and electrical works for the power station. In March 2020, Primero served Wärtsilä with a payment claim under the SOP Act. Wärtsilä disputed the payment claim, contending that there was no available reference date. An adjudicator determined that the payment claim was valid and supported by a reference date of 28 February 2020.

Wärtsilä sought judicial review of the adjudicator's decision on the basis that the adjudicator's determination was invalid as the relevant milestone works were not completed by 28 February 2020.

To be entitled to a progress payment, Primero was required to achieve what was known under the contract as *'SW Completion'*. SW Completion required that, amongst other things, certain Manufacturer's Data Reports (**MDRs**) be *'provided'* to Wärtsilä and other MDRs be *'made available for inspection'* by Wärtsilä. On 28 February 2020, Primero sent Wärtsilä an email containing a hyperlink to OneDrive where those documents had been uploaded, however, Wärtsilä was unable to download the documents.

Wärtsilä argued that the provision of documents by hyperlink was not contemplated by the subcontract and, because the documents were not able to be downloaded, there was no provision of documentation as required by the contract by 28 February 2020.

Primero argued that SW Completion had been achieved on the basis that the subcontract did not expressly provide how the MDRs were to be provided. Primero contended that electronic provision of the MDRs, consisting of more than 100,000 pages, was practical and in accordance with commercial good sense. Primero also invoked the provisions of the *Electronic Communication Act 2000* (SA) (**EC Act**) to argue that the contractual obligation for the provision of documents is satisfied by electronic communication.

Decision

Stanley J held that the hyperlink did not amount to provision of the documents because the hyperlink was merely a means by which Wärtsilä was permitted to download documents stored in the cloud. The documents were not capable of being fully accessed, read and downloaded on 28 February 2020.

Drawing upon the judgments of McMurdo J in *Conveyor & General Engineering v Basetecx Services & Anor* [2014] QSC 30 (referred to in our *Security of Payment Roundup 2014*) and *Clarke v Australian Computer Society Inc* [2019] FCA 2175, Stanley J saw a distinction in the concepts of *'leaving'* or *'sending' and 'providing'* or *'making available'*, with the latter connoting something bilateral. Until Wärtsilä downloaded the documents, they had not been provided and did not amount to making the document available for inspection.

In obiter, Stanley J noted that the relevant sections of the EC Act prescribe circumstances for its operation, including that it is reasonable to expect that the information would be readily accessible when sent via electronic communication. As such, Stanley J held that the EC Act did not relevantly apply to the email containing the OneDrive hyperlink.

| back to *Contents*

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