Construction Law Update

September 2019

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Legislative update

NEW SOUTH WALES

New proposed Regulations for building certifiers

Building and Development Certifiers Regulation 2019 (NSW)

Karen Hanigan

The NSW Minster for Better Regulation and Innovation, Kevin Anderson, has released draft regulation to strengthen and simplify the rules for the registration of private certifiers in the NSW building and construction industry.

The main purpose of the proposed Regulation is to support and implement the *Building and Development Certifiers Act 2018* (NSW) (**Act**) which was passed on 24 October 2018. The Act and the (draft) Regulation provides administrative detail and will (when enacted) bring the Act into force. The Act forms part of the Government's response to the Independent Review of the *Building Professionals Act 2005* (**BP Act**), also known as the Lambert Review. The Act will replace the BP Act and aims to improve the administration of certifiers in NSW with a simplified, modern and updated structure.

The proposed *Building and Development Certifiers Regulation 2019* is still in draft form.

The Regulation prescribe the qualifications, skills and experience required to be granted and maintain registration and will clarify the roles and responsibilities of certifiers. It also seeks to:

- detail and streamline the different classes of registration for certification work;
- prescribe the qualifications, skills and experience required to grant and maintain registration;
- improve the independence of certifiers and provide certainty around when a conflict of interest arises;
- clarify the roles and responsibilities of certifiers;
- provide greater protections for consumers by strengthening contract requirements for certification work;
- establish a new accreditation authority framework to formalise the regulation of regulated work, including the work of competent fire safety practitioners; and
- strengthen compliance and enforcement through penalty notice offences to more effectively target misconduct.

A public consultation period is open until **28 October 2019**. Stakeholders can make submissions through the NSW Fair Trading website.

Builder and designer reforms (almost) ready

The Design and Building Practitioners Bill 2019

Jenny Cohen

Significance

The Design and Building Practitioners Bill 2019 (**Draft Bill**) has been released by the NSW Government for public consultation. The Draft Bill proposes mechanisms to strengthen regulation and compliance of designers and builders in the industry, requiring registration under a newly established scheme and requirements for declarations to be made confirming compliance with the Building Code of Australia. This is supported by an extended duty of care, as well as various disciplinary, investigation and enforcement mechanisms.

Background

In February 2019 the NSW Government released its response to the Building Confidence report prepared by Peter Shergold and Bronwyn Weir, which proposed reforms to introduce a registration scheme for "building designers", require building designers to declare compliance with the Building Code of Australia, ensure an industry wide duty of care is owed to building owners, and appoint a Building Commissioner in NSW.

David Chandler commenced his position as the new Building Commissioner on 14 August 2019, and now this Draft Bill appears to deliver on the balance of the promised reforms.

Key proposals

1. **Regulated designs –** The proposed reforms are intended to apply to "regulated designs", which are to be prescribed by regulations. The Draft Bill indicates that it may include a design for a building element, or performance solution for building work or a building element, where the building element is specified to be fire safety systems, waterproofing, internal or external load bearing component essential to the stability, or part of the building enclosure.

2. **Compliance declarations –** Design compliance declarations and building compliance declarations are required to be made by design practitioners and building practitioners. Design practitioners are required to declare that "regulated designs" comply with the Building Code of Australia. Further, building practitioners are required to provide a building compliance declaration, before an application is made for an occupation certificate, which declares whether a design compliance declaration was obtained and whether building work relied on a design prepared by a registered design practitioner. Declarations of this kind are also required to be made for variations to any regulated design.

3. **Registration scheme –** Practitioners who make compliance declarations are required to be registered under a new registrations scheme introduced by the Draft Bill. There will be a broad discretion to refuse to register a practitioner, and to impose conditions on registration, including the power to specify standards or methodologies for the design or building work to follow.

4. **Duty of care –** The Draft Bill provides that a person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects to each owner, including each subsequent owner of the land.

5. **Enforcement –** Various powers to enforce compliance are introduced by the Draft Bill, which includes taking disciplinary action. This will include suspending or cancelling registration, or requiring payment of a penalty not exceeding $220,000 in the case of a body corporate, conducting an investigation into registered practitioners, or issuing a stop work order if work contravenes the legislation and which could result in significant harm or loss to the public, occupiers or potential occupiers of the building.

Next steps – have your say

It is anticipated that a final version of the legislation will be introduced into Parliament before the end of 2019, and the regulations will be developed in 2020.

The NSW Government is currently accepting submissions on the Draft Bill until **Wednesday 16 October 2019** which can be submitted by mail or electronically through the *Fair Trading website*. If you are interested in providing feedback, and if you would like assistance to prepare a submission, please don't hesitate to contact us.

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In the Australian courts

AUSTRALIAN CAPITAL TERRITORY

No jurisdictional error where work is merely 'claimed' to have been done under a construction contract

Empire Global Pty Ltd v SA Expert Designs Pty Ltd [2019] ACTSC 244

Ben Fuller | Lauren Polis | Andrew Black

Key point and significance

It is sufficient for the application of the *Building and Construction Industry (Security of Payment) Act 2009* (ACT) (**ACT Act**) to establish that a construction contract exists between the parties and that one party claims work was performed under it. Whether or not the work was actually performed under the construction contract does not affect a party's entitlement to serve a payment claim (and therefore does not affect an adjudicator's jurisdiction to determine the matter). The decision of *Canberra Drilling Rigs Pty Ltd v Haides Pty Ltd* [2019] ACTCA 15 (***Canberra Drilling* Appeal**) was affirmed, consistent with the underlying 'pay now argue later' policy approach of the Act.

Facts

SA Expert Designs Pty Ltd (**SA Expert**) tendered to carry out painting works for Empire Global Pty Ltd (**Empire Global)**. The parties entered into a written subcontract for the works on or about 25 July 2017 (**subcontract**). At the request of Empire Global's site representative, SA Expert performed additional works in the course of the project which were outside the original scope of works in the subcontract. For each item of additional work, SA Expert generated a docket which was signed by Empire Global's site representative. Empire Global then issued a purchase order corresponding to the docket.

SA Expert made a payment claim under section 15 of the ACT Act, claiming payment for the additional work to the value of $83,788.95 (**payment claim**). Empire Global rejected the payment claim on the basis that SA Expert did not follow the agreed administrative process for seeking the prior written approval of the additional work.

SA Expert applied for adjudication of the payment claim, relying on the dockets and associated purchase orders for the additional work. In its adjudication response, Empire Global asserted that, for any additional work to be a variation under the subcontract, the work must have been the subject of prior written approval of Empire Global. Empire Global asserted the requirement for written approval had been agreed by the parties in a 'post tender meeting' on 14 July 2017. Accordingly, Empire Global asserted that the adjudicator had no jurisdiction to make a determination in the matter.

The adjudicator ultimately found that it had jurisdiction to determine the application and found for SA Expert. The adjudicator preferred SA Expert's submission that it had entered into an arrangement with Empire Global's site personnel under which SA Expert would carry out the works, get its 'docket' signed, and Empire Global's site representative would issue a purchase order for that work. The adjudicator noted that if Empire Global disagreed that SA Expert had carried out the additional work, then it would not have issued the purchase orders.

Empire Global made an application to the ACT Supreme Court to set aside the adjudicator's decision by reason of jurisdictional error, submitting that:

- the adjudicator had erred in finding that the additional work had been done 'under' the subcontract because, under that subcontract, variation works required the prior written approval of Empire Global (consequently, any claim for payment for the additional work should have been made on a quantum meruit basis rather than under the Act); and
- alternatively, each item of additional work was the subject of a separate construction contract and therefore should have been the subject of a separate payment claim and adjudication.

Decision

The court dismissed the application and found that the adjudicator's decision was not infected by jurisdictional error as the additional items of work had been done under the subcontract.

The core issues before the court were:

- whether the adjudicator's finding that the additional works were carried out under a construction contract was a finding of jurisdictional fact; and
- if so, whether the precondition (that the works were completed under the contract) was satisfied.

Empire Global contended that its case ought to be distinguished from the *Canberra Drilling* Appeal on the basis that the issue was not whether the works were in fact carried out under a relevant construction contract but whether the relevant contract even existed. The court rejected this argument, stating that this was simply an attempt to characterise the issue as something other than *'whether the relevant work was done under the relevant construction contract'*.

The court affirmed the decision in *Canberra Drilling* that it is sufficient for a claimant under the SOP Act to claim that works were done under the construction contract (as opposed to this being the objective fact).

Other issues

In considering the preliminary issue of whether Empire Global served a valid payment schedule, the court also noted an important difference between section 16 of the ACT Act and section 14 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**NSW Act**). Section 16(2)(b) of the ACT Act provides that a respondent to a payment claim must 'state' the amount of payment to be made to a claimant (if any), whereas the NSW Act provides that the respondent must 'indicate' the amount of payment.

The court noted that using the word 'state' rather than 'indicate' showed a difference in legislative intent. The court expressed a view that there may be a question in the ACT as to whether a payment schedule which does not state but only indicates the proposed amount to be paid is a valid payment schedule, and therefore that the test for a valid payment schedule may be slightly higher in the ACT. Given that this issue was not raised or argued by SA Expert in its submissions, it was merely noted by the court.

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NEW SOUTH WALES

Denial of natural justice and procedural unfairness by adjudicators – when would the courts intervene and what would be the consequences?

CC Builders (Aust) Pty Ltd v Milestone Civil Pty Ltd [2019] NSWSC 1251

Andrew Hales | Neetika Nagpal

Key point

In making a determination under section 22 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**), if the adjudicator applies section 20(2B) to exclude a submission of the respondent on the ground that it has reasons that were not advanced in the payment schedule but there is clear evidence that they were, then the courts can intervene on grounds of denial of natural justice and procedural unfairness. The nature of the order that may be passed will depend upon the court's approach and discretion. It is unlikely that the whole determination would be set aside.

Significance

The case indicates the relevant considerations that may be undertaken by the courts before intervening in the determinations made by adjudicators under the Act. The courts are usually reluctant to intervene, unless the determination is grossly unreasonable and irrational. The decision also signifies courts' approach of not setting aside the entire determination and pass orders that aim to balance the interests of both parties.

Facts

The adjudicator Robert Sundercombe (**adjudicator**) determined that CC Builders (Aust) Pty Ltd (**CCB**) owed an amount of $113,767.87 to Milestone Civil Pty Ltd (**Milestone**) under various claims. CCB brought proceedings challenging the determination and seeking to set it aside on the following grounds:

- denial of natural justice and procedural unfairness;
- jurisdictional error in relation to a claim for carry over work; and
- adjudicator's fees.

Denial of natural justice and procedural unfairness

Milestone made two extension of time claims under the contract: one from 21 November 2018 to 22 February 2019 (**First EOT Claim**); and the second from 23 February 2019 to 24 April 2019 (**Second EOT Claim**). In the payment schedule, CCB stated that since Milestone abandoned the work on 23 February 2019, 47 business days were lost. Consequently, Milestone delayed the completion of the contract and CCB calculated the delay costs of $70,500.

Section 20(2B) of the SOP Act bars a respondent (in this case, CCB) to include reasons in the adjudication response for withholding payment, which were not included in the payment schedule. Referring to the Second EOT Claim and relying on section 20(2B) of the SOP Act, the adjudicator reasoned that CCB was prevented from including this claim in its adjudication response as it did not advance this reason in its payment schedule.

CCB contended that the adjudicator's view is erroneous as CCB had referred to the Second EOT Claim in its payment schedule. On this basis, CCB stated that the adjudicator's failure to consider CCB's submission vis-à-vis the Second EOT Claim amounted to a failure of procedural fairness, resulting in denial of natural justice. Milestone acknowledged that error but argued that failure to take into account CCB's submission is not a violation of natural justice contemplated under the SOP Act.

Jurisdictional error in relation to a claim for carry over work

CCB alleged jurisdictional error in relation to the claims raised by Milestone for carry over work, which was allowed by the adjudicator. Before the adjudicator, both parties disagreed on the assessment of the amount under the claim. Milestone's claim was that CCB had not paid to it all of the monies that had been assessed as due to Milestone under the contract. The parties drew attention to progress claims and assessment progress claims.

Adjudicator's fees

CCB challenged the adjudicator's decision to direct CCB to pay its fees in entirety, even though Milestone did not recover all the money it claimed from CCB.

Decision

Denial of natural justice and procedural unfairness

The court allowed CCB's claim in relation to denial of natural justice and procedural unfairness. Drawing from *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 19 and *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) NSWLR, the court noted that decisions on whether a submission is duly made is a matter for the adjudicator, not the courts, to determine. However, a decision that a submission was not duly made which is not reasonable or is without any foundation will not be immune from correction by the court. Justice Rein at [32] explained that the case involved the intersection of two important principles: first, the clear restriction of intervention by the court in adjudication under the SOP Act; and second, the need for the measure of natural justice that the SOP Act requires to be given and adherence to the requirements of section 22.

When the adjudicator finds a submission to be not duly made for reasons that are reasonable (albeit erroneous), it is not for the court to determine whether or not the adjudicator was correct to conclude and the adjudicator's decision would not constitute a denial of procedural fairness. However, if the adjudicator does not explain how he had arrived to exclude the submission, when evidence shows that such submission was raised in the payment schedule, then there is lack of reasonableness and rationality. The decision to exclude

the submission amounts to procedural unfairness establishing jurisdictional error. In this case, the failure to consider the submissions, duly made, constituted jurisdictional error on the issue of the Second EOT Claim.

Jurisdictional error in relation to a claim for carry over work

The court rejected CCB's claim that there was a jurisdictional error in relation to the claim for carry over work. It relied on an assessment progress claim produced by CCB, which constituted an admission identified by the adjudicator. The adjudicator relied on this document to resolve the dispute on the carry over claim. There was no jurisdictional error.

Adjudicator's fees

The court noted that the question of fees is a matter of discretion. While there have been no cases on the question of award of an adjudicator's fees under the SOP Act, there have been cases where the successful party has recovered all of its costs, even on matters on which it was unsuccessful[1]. Given that CCB was successful in its claim for procedural unfairness and Milestone was successful in the claim relating to carry over work, the court directed CCB to accept liability for 50% of the adjudicator's fees, in accordance with section 29 of the SOP Act.

Consequences

While the court agreed with CCB on this claim, it did not set aside the entire determination. The court relied on Justice McDougall's approach in *Emergency Services* where *Emergency Services Superannuation Board v Davenport* [2004] NSWSC 697 succeeded on two of its challenges but failed on the third. Justice McDougall said at [71] that *'the grant of relief in the nature of the prerogative relief is discretionary'*. Given that the challenge in that case was to individual items within the determination and not the determination overall, there was but one determination.

Using this approach, the court granted CCB the relief it sought but on condition that it will not re-agitate the carry over work claim at any further adjudication or seek to recover the carry over amount from Milestone other than at a final hearing pursuant to section 32 of the SOP Act.

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Don't stop – The statutory entitlement to suspend works for unpaid interest

Galileo Miranda Nominee Pty Ltd v Duffy Kennedy Pty Ltd [2019] NSWSC 1157

Richard Crawford | Adriaan van der Merwe | Patrick Raccanello

Key point and significance

Not all amounts due to a contractor are considered to be progress claims, and contractors should carefully consider the nature of claim amounts before issuing suspension notices.

Under section 27(1) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**), a claimant is able to suspend the works it is undertaking if it has not been paid the scheduled amount under section 16 of the Act, being the amount of a progress payment as set out in a payment schedule. The court found that non-payment of the interest portion of a payment claim does not entitle a contractor to suspend work under the Act.

Facts

Galileo Miranda Nominee Pty Ltd (**principal**) engaged Duffy Kennedy Pty Ltd (**contractor**), under a design and construct contract (**contract**), as the builder for two residential tower blocks containing 197 units.
A critical remaining step to achieving practical completion was for the contractor to obtain an occupation certificate. The principal certifier however required the contractor to attend to the following before it would issue the occupation certificate:

[1] See *Waters v P C Henderson (Aust) Pty Ltd* (unreported CA (NSW), *Kirby P, Mahoney and Priestley JJA*, 6 July 1994) cited in *James v Surf Road Nominees Pty Ltd [No 2]* [2005] NSWCA 296.

- provide a penetration schedule, indicating where pipes, wires or other services penetrated through structural walls; and
- increase the height of balcony balustrades to comply with Building Code of Australia (**BCA**).

The contractor argued that it had provided the relevant information regarding the penetration tests to the principal certifier and that the balustrades were compliant with BCA regulation.

As date for practical completion was not reached, the principal exercised its right to impose liquidated damages on the contractor.

The contractor proceeded to issue the principal with a notice suspending the works on the grounds that a progress payment had not been made pursuant to the Act. This occurred as the principal made a late progress claim payment to the contractor, which accrued interest. When making the progress claim payment, the principal failed to pay the amount of accrued interest. The amount of interest was not large, being a few hundred dollars.

The principal subsequently issued the contractor with a default notice on the grounds that, amongst other alleged breaches, it had failed to complete the works in a competent manner and that the principal therefore suspended the works (**default notice**) and sought to take the works out of the contractor's hands (**take out notice**).

The main issues for determination by the court were:

- whether the contractor had:
  - a statutory entitlement to suspend the works at any time when there was unpaid interest; or
  - the right to rely on the provisions of the contract in suspending performance for a 'reasonable cause';
- whether the interest payable on the late progress claim was considered to form part of the progress claim payment; and
- whether the principal validly issued the default and take out notices to the contractor.

Decision

The NSW Supreme Court found in favour of the principal.

The contractor was in breach of its obligation to proceed with the works in a diligent manner, as it was refusing to comply with the requirements of the principal certifier for the issue of the occupation certificate.

The court also found that the non-payment of the interest portion, however frustrating to the contractor, did not leave the contractor without a remedy. On a proper construction of section 27(2) (which entitles the contractor to suspend in the case of non-payment), the 'amount that is payable' under the Act is the amount specified in the payment schedule. This does not include interest and does not include the interest entitled under section 11.

The court considered that the meaning of 'reasonable cause' should be construed in a commercial manner. Accordingly, the failure of the principal to pay the interest amount was disproportionate to suspending the works and did therefore not constitute 'reasonable cause'.

The principal validly issued the default and take out notices to the contractor.

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Bowled over: Independent valuers must pay attention to the terms of a lease

Strike Australia Pty Ltd v Data Base Corporate Pty Ltd [2019] NSWCA 205

Richard Crawford | Karen Hannigan | Olivia Borgese

Key point

If a valuer is appointed to determine market rent, the valuer must only take into account the conditions expressly stated in the lease agreement. In this case the valuer was required to have regard to market rents

for comparable premises in the vicinity of the subject property. This meant that comparable properties in areas further afield, such as Bondi and Macquarie Park, were not valid and outside what would be acting reasonably in construing a contract.

Facts

This case was an appeal against a decision of the Supreme Court of NSW. The applicant, Strike Australia Pty Ltd (**Strike**) was the defendant in proceedings brought by Data Base Corporate Pty Ltd (**Data Base**).

At first instance, a declaration was granted to Data Base that the determination of market rent by an independent valuer was not carried out in accordance with the terms of the sub-lease and therefore not binding on the parties.

Strike sub-leases from Data Base premises at King Street Wharf, Sydney (**Premises**) where it operates a ten-pin bowling alley and licensed entertainment venue. Prior to the end of a 10-year term in 2017, Strike gave notice to Data Base it was exercising the first option to renew for a further term of 5 years. A clause of the sub-lease provided for rent review at the commencement of the further term. In the absence of an agreement between the parties, Data Base was to appoint a valuer to determine the market rent in accordance with certain provisions in the sub-lease. This occurred and an independent valuer made a determination.

Data Base successfully established that the valuer's determination was not made in accordance with the provisions of the sub-lease. The court agreed that the valuer did not have regard to the rent *'for comparable premises in the vicinity of the Premises'* on the basis that in the valuer's report he stated he had regard to rents in King Street Wharf and other premises including properties in Macquarie Park and Bondi.

The Supreme Court held that the rental determination was not binding on the parties.

Strike appealed the decision on the grounds that the primary judge erred in finding that the valuer's determination was not made in accordance with the sub-lease. If this was not made out, that the judge erred in finding that the valuer's consideration of market rents for premises in Macquarie Park and Bondi was erroneous. If both grounds were made out, the rent determination was to be binding on the parties.

Decision

The Court of Appeal dismissed the appeal with costs and upheld the primary judge's decision that:

- the valuer had to take into account *'comparable premises in the vicinity to the Premises'* and not premises the valuer believed comparable elsewhere such as Macquarie Park and Bondi;
- determining the limits of *'in the vicinity of the Premises'* was not within the valuer's discretion and premises in Macquarie Park and Bondi are objectively outside the vicinity of the Premises;
- the rent determination was not binding on the parties.

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Leasehold strata schemes: Owners corporations to bear all responsibility for building defects

The Owners – Strata Plan No 91322 v Trustees of the Roman Catholic Church for the Archdiocese of Sydney [2019] NSWCA 89

Andrew Hales | Kate Morrison | Sarah Feyen

Key point and significance

An owners corporation acquiring a 99 year leasehold interest from the holder of the freehold interest in the common property of a leasehold strata scheme registered under the *Strata Schemes (Leasehold Development) Act 1986* (NSW) (now repealed) was not a successor in title and so was not entitled to enforce the statutory warranties under the *Home Building Act 1989* (NSW) to recover damages in respect of alleged defects in the strata development.

The owners corporation was left to bear the burden of the cost of repairs or remain the 'owner' of a defective building.

The repeal of the 1986 legislation could not effect a retrospective vesting of the common property in the owners corporation (unlike the position under the *Strata Schemes Development Act 2015* (NSW) which vests, upon registration, common property of a strata scheme in the owners corporation regardless of whether the strata scheme was leasehold or freehold).

Facts

The trustees of the Roman Catholic Church for the Archdiocese of Sydney (**trustees**), as owner of the freehold title to the land the subject of the development, granted development rights to Spring Cove Developments Pty Ltd (**developer**) who entered into a construction contract with SX Projects Pty Ltd (now in liquidation) to construct 16 luxury townhouses and apartments at Spring Cove in Manly. The proposed strata scheme was governed by the *Strata Schemes (Leasehold Development) Act 1986* (NSW) (now repealed). The prospective lots were sold 'off the plan' on terms contained in a tripartite agreement between the trustees, the developer and the prospective unit holder. The tripartite agreement contemplated that, upon completion of the development and registration of the strata plan, the trustees would sell the leasehold interest in the relevant lot to the purchaser. The trustees agreed to lease the common property directly to the owners corporation on a 99 year lease.

The owners corporation alleged that the apartments and areas of the common property had a number of defects. It initiated proceedings on the basis that it was the *'immediate successor in title'* to the trustees and thus entitled to the benefit of the statutory warranties implied into the construction contract pursuant to section 18B of the *Home Building Act 1989* (NSW).

At first instance it was held that the owners corporation was not entitled to enforce the warranties to recover damages as it only held a leasehold interest in the land and was therefore not an *'immediate successor in title'* as defined by section 18D of the *Home Building Act 1989* (NSW). The owners corporation appealed that decision.

Decision

The Court of Appeal dismissed the appeal and held that the owners corporation was not the successor in title to the trustees and so was not entitled to the benefit of the statutory warranties under the *Home Building Act 1989* (NSW).

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Defence against the Delay Arts – Expert opinion will not trump facts established by the evidence

White Constructions Pty Ltd v PBS Holdings Pty Ltd [2019] NSWSC 1166

Richard Crawford | Ashley Murtha

Key point and significance

This case demonstrates the importance of paying close attention to the actual facts rather than opinions about what the evidence establishes.

Facts

The developer, White Constructions Pty Ltd (**developer**) was developing a 100-lot subdivision known as Cedar Grove in Kiama NSW. The developer engaged a sewer designer, Illawarra Water & Sewer Design Pty Ltd, and a water servicing coordinator, PBS Holdings Pty Ltd (together, the **consultant**) to prepare and submit a satisfactory sewer design for approval by Sydney Water. The Developer also contracted with Cleary Bros (Bombo) Pty Ltd (**contractor**) to carry out the construction works.

The lot has an uneven topography and hard subsurface rock. This posed difficulties for the installation of the sewer infrastructure. The consultant originally prepared and submitted an installation design involving

pumping stations in order to keep costs down. This was not accepted by Sydney Water. After a lengthy and unsuccessful period pursuing this 'packaged pump' solution, the designer finally submitted a more costly gravity boring solution which was accepted by Sydney Water.

The contractor made a number of delay and disruption claims to the developer due to the delay in approval for the sewer design. The developer, in turn, claimed breach of contract and damages against the consultant. In response the consultant argued that:

- the delay was not a breach of its agreement with the developer as the developer had instructed it to pursue the unsuccessful packaged pump solution; and
- the delay to the approval of the sewer design did not delay or disrupt the project.

Both sides engaged experts to prepare delay analysis reports. The experts adopted differing but both well-established delay analysis methods. Both expert reports were highly complex and theoretical, and both experts were highly critical of the other's methodology.

Decision

The court found in favour of the consultant. The court agreed with the consultant that the developer had instructed it to pursue the unsuccessful packaged pump solution in order to keep costs down.

Despite this, the court went on to consider the impact of the delay on the project. The court obtained the assistance of its own delay expert to aid in the interpretation of the expert evidence.

The court's expert advised that neither method used by the parties' experts was appropriate to be adopted in the case. Rather, a close consideration and examination of the actual evidence of what was happening on the ground would reveal if the delay in approving sewerage design actually played a role in delaying the project and, if so, how and by how much.

In this respect, the court gave weight to the evidence of the contractor's *'comprehensive and well-kept'* site diary. The site diary entries were contrasted against the expert report tendered by the developer and its conclusions regarding the progress and sequencing of the works. Although the diary repeatedly referenced the wait for the sewer design, it did not identify the activities, if any, which were being affected by the wait. What the diary made clear is that excavating through hard rock was the major delaying factor for the project as a whole.

Given that the primary source of evidence contradicted the developer's expert opinion, the court did not agree with its conclusions that the sewer design delayed and disrupted the project.

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QUEENSLAND

Restrictive covenants remain despite sustainability provisions in the *Building Act 1975* (Qld)

Bettson Properties Pty Ltd & Anor v Tyler [2019] QCA 176

Julie Whitehead | Clare Turner | Jane Evelyn

Key point and significance

Restrictive covenants in building contracts for visual impact and aesthetic reasons will not be prohibited by the sustainable housing provisions in the *Building Act 1975* (Qld) (**Act**) unless they make the installation of solar panels on a roof or external surface of a building 'impossible, impracticable, or impractical'.

Facts

This case is an appeal from a decision of the Supreme Court of Queensland with the essential facts and decision at first instance previously discussed in our *July 2018 edition* of the Construction Law Update.

In summary, Bettson Properties Pty Ltd and Tobsta Pty Ltd (**Sellers**) were the developers of a staged residential and commercial development in the northern suburbs of Brisbane called 'Griffin Crest'.

In the sale of a proposed lot within the estate to Pauline Taylor (**Buyer**), the relevant contract required the Buyer to submit plans for the approval of the installation of solar panels, and to not proceed with affixing solar panels to any roof or structure until it received consent in writing from the Sellers. If the Sellers were of the opinion that the panels caused a negative visual impact or were aesthetically unpleasing, the installation would not be approved.

Without consulting the Sellers, the Buyer installed solar panels on the north-eastern quadrant of the Buyer's roof after receiving advice that that particular position would maximise efficiency. The Sellers formed the view that the panels had an adverse visual impact and demanded the Buyer relocate the solar panels to the lower southern side of the roof where the they would only have an 80% efficiency.

The Buyer refused to move the solar panels and the Sellers applied to the Supreme Court of Queensland for a declaration that the installation constituted a breach of contract, and sought a mandatory injunction to require the solar panels to be relocated.

The key consideration in the case was the effect of certain provisions in the Act that are designed to promote sustainable housing by prohibiting a contract from:

- prohibiting the installation of solar panels (section 246O);
- preventing the installation of solar panels on a roof or other external surface of the building (section 246Q); and
- withholding consent for an approval if it prevents a person from installing solar panels on a roof or other external surface of a building (section 246S).

The trial judge agreed with the arguments lead by the Buyer and dismissed the application, ordering the Sellers to pay the Buyer's costs on the ground that the relevant contractual provisions were deprived of contractual force and effect by sections 246O, 246Q and 246S of the Act.

Decision

The Queensland Court of Appeal allowed the appeal and set aside the trial judge's decision.

Critical to the court's decision was whether *'prevents a person from installing'* in sections 246Q and 248S of the Act connotes not only *'makes it impossible, impracticable or impractical for the person to install'* but also less significant adverse effects, such as *'less energy efficient for the person to install'*.

The court found that the word *'prevents'* in sections 246Q and 246S bears its common primary meaning of *'stops from happening'*, which comprehends cases where the result of the relevant restriction or withholding of consent is that it is impossible, impracticable, or impractical to install solar panels.

As the Buyer was able to position the solar panels in accordance with the contract where they would have 80% efficiency, the contract did not make it impossible, or impractical to install the solar panels, rendering the prohibitions outlined in sections 246Q and 246S of the Act irrelevant.

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An 'expert' or an 'arbitrator', that was the question

Middlemount South Pty Ltd v Anglo American Metallurgical Coal Assets Pty Ltd & Anor [2019] QSC 211

David Pearce | Luke Trimarchi | Jane Evelyn

Key point and significance

In considering whether an expert determination crosses the line into an arbitration (or quasi judicial proceedings):

- requesting submissions or information on particular points is not a matter that distinguishes an arbitrator from an expert; and
- receiving documents from the parties does not equate to hearing evidence in the sense of a judicial or quasi judicial proceeding.

Facts

This proceeding dealt with a challenge by Middlemount South Pty Ltd (**Middlemount**) to the validity of an expert determination, which forms part of a wider dispute as to the parties' respective rights under a Sale and Purchase Agreement (**Agreement**).

The Agreement contained a dispute resolution procedure that provided that a disputed matter as to the completion accounts or the final completion amount was to be referred to an independent accountant for a binding determination.

The Agreement expressly stated at clause 8.5(h) that the independent accountant *'must act as an expert and not as an arbitrator and its written determination will be final and binding on the parties in the absence of manifest error…'*.

Clause 8.5(f) of the Agreement provided that a disputed matter must be referred to the independent accountant by written submission which must include:

- the completion accounts or the final completion amount as applicable;
- the dispute notice;
- the response; and
- an extract of the relevant provisions of the Agreement.

The Agreement also provided that the parties must promptly supply the independent accountant with any information, assistance and cooperation requested in writing by the independent accountant in connection with its determination.

The dispute resolution procedure was activated and an independent accountant was engaged to make a determination. In the process of doing so, the independent accountant requested additional information from the parties after receiving their written submissions, which included calling for and receiving further submissions and evidence before it made its determination.

One of the grounds for the invalidity of the determination Middlemount asserted was that, in requesting further information, the independent accountant had crossed the line from an independent expert into an arbitrator in breach of clause 8.5(h).

Decision

In declaring that the expert determination was final and binding, Jackson J dismissed Middlemount's argument that the independent accountant acted as arbitrator. Jackson J held that requesting submissions or information on particular points is not a matter that distinguishes an arbitrator from an expert and that receiving documents from the parties is not *'hearing evidence in the sense of a judicial or quasi-judicial proceeding'*. In his Honour's view, the actions of the independent accountant fell within the powers conferred to it by clause 8.5(f) of the Agreement.

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Win some, lose some … the risky game of not observing correct adjudication procedures

National Management Group Pty Ltd v Biriel Industries Pty Ltd trading as Master Steel & Ors [2019] QSC 219

Julie Whitehead | Matt Hammond | Chris Nliam

Key point

It is important that claimants diligently observe security of payment and adjudication procedures as a failure to do so might be fatal to their claim. At the same time, the court will not allow respondents to be unreasonably opportunistic.

Significance

The court is unlikely to simply accept that a repeat payment claim, in respect of the same reference date, was made to fix up a minor error. Once a payment claim is submitted, it might be safer for the claimant to leave in minor errors than submit a new payment claim.

Respondents should be aware that the court will not always find on a technicality that a claimant's service of an adjudication application is invalid in circumstances where it is reasonable to find that the service contained all the information needed.

Facts

The applicant National Management Group Pty Ltd (**NM**) and the respondent Biriel Industries Pty Ltd (**Biriel**) were parties to an agreement for Biriel to fabricate, supply and install structural steel for two separate projects. In December 2018, Biriel issued two payment claims in respect of the first project. Two weeks later, Biriel issued two payment claims: one, a replacement for the previous payment claims, and a fresh one in relation to the second project.

When NM did not provide Biriel with payment schedules, Biriel applied for adjudication of each of the payment claims.

More than one payment claim made for first project

The *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act)** prohibits a claimant from making more than one payment claim for each *'reference date'* under the construction contract.

In regard to its first project, Biriel argued that it issued more than one payment claim in the applicable *'reference date'* because the previous payment claims had incorrectly stated the enabling legislation as the now repealed *Building and Construction Industry Payments Act 2004* (Qld) (**BCIPA**) rather than the BIF Act. NM argued that the latest payment claim was void because it was in contravention of the BIF Act.

Validity of service of adjudication application

The BIF Act provides that *'a copy of the adjudication must be given to the respondent'* and also that a copy of an adjudication application *'must identify the payment claim to which it relates'*.

The Queensland Building and Construction Commission (**QBCC**) wrote two letters to NM informing it that Biriel had lodged two adjudication applications. The next day, NM received two envelopes from Biriel containing some documents from Biriel which NM claimed it did not know were supposed to be adjudication applications as a result of some issues like missing pages and the absence of a cover letter. NM also pointed out that Biriel had not identified correct invoices for its claims.

NM later wrote to the adjudicator stating that he lacked jurisdiction to decide the applications because Biriel had failed to serve it with a copy of each of the adjudication applications.

The adjudicator decided that it could not consider the response from NM because it was given outside the timeframe for providing an adjudication response. In any case, NM was prohibited under the BIF Act from giving an adjudication response because it did not provide payment schedules after it received the payment claims. NM applied in the Supreme Court for the adjudicator's decision to be set aside.

Decision

The court declared that the adjudicator's decision in relation to the first application was void. The court found that Biriel issued two payment claims in contravention of the BIF Act and that, as a result, the adjudicator lacked jurisdiction to decide that application. Biriel was permanently restrained from seeking to enforce the adjudicator's decision with regard to the application. It was not relevant that the first payment claim was issued under the BCIPA because this was allowed under the BIF Act.

With regard to the second application, the court dismissed NM's application, having found that Biriel had substantially complied with its obligation to effect service on NM. The court found that it was not plausible for NM to insist that it was not aware that the documents it received contained an adjudication application given some factual evidence to the contrary including the presence of an application form with a sufficient number of pages and the prior notification by the QBCC. The court also found that any errors with the invoices did not prevent the second application from identifying the payment claim to which it related given some evidence that NM had enough information to draw the correct conclusions.

The court accepted that NM's preclusion from making an adjudication response did not extend to its entitlement to make submissions about jurisdictional issues. However, the court found that even if the adjudicator had considered the question of jurisdiction, it would not have arrived at a different conclusion given evidence that Biriel had, in fact, validly effected service of the adjudication application on NM.

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Late service of an adjudication application is, in fact, a very big deal!

Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor [2019] QCA 177

Andrew Orford | Sarah Ferrett | Chris Nliam

Key Point

It is crucial that a claimant in an adjudication proceeding ensures that it serves the respondent with the adjudication application as soon as possible. Failure to do this is likely to result in the arbitrator having no jurisdiction to determine the application.

Significance

The absence of a particular timeframe in the now repealed *Building and Construction Industry Payments Act 2004* (Qld) (**Act**), (and now in its successor the *Building Industry Fairness (Security of Payment) Act 2017* (Qld)) for serving adjudication applications to respondents does not have the effect that a claimant is allowed to take as long as they like to effect service. Rather, the *Acts Interpretation Act 1954* (Qld) (**AIA**) imposes an obligation for such service to be effected *'as soon as possible'*.

When serving the respondent with adjudication documents, it is crucial that the claimant take steps to ensure that a copy of the adjudication application is included in the materials it delivers to the respondent.

Facts

The essential facts of this case were previously reported in the *May 2019 edition* of the Construction Law Update.

In summary, Niclin Constructions Pty Ltd (**Niclin**) entered into four contracts with SHA Premier Constructions Pty Ltd (**SHA**) to design and construct four petrol stations. After Niclin and SHA exchanged payment claims and payment schedules, Niclin lodged four separate adjudication applications with the Queensland Building and Construction Commission (**QBCC**).

Under the Act, a copy of an adjudication application must be served on the respondent (in the approved form). Note however that the legislation prescribed no timeframe for this service to be made. However, under the AIA, if no time is specified for doing a thing under an Act, the thing is to be done *'as soon as possible'*. Due to a mistake, Niclin served on SHA documents in support of its applications but did not include the actual adjudication applications.

In its adjudication responses, SHA stated that the adjudication applications were invalid because Niclin had not served SHA with a copy of each. Niclin realising its mistake, served SHA with a copy of each of the applications – 12 business days after the applications were made. The adjudicator subsequently concluded that he did not have jurisdiction to decide the applications because they were not served on the respondent *'as soon as possible'* in accordance with the AIA.

Decision

The court at first instance affirmed the adjudicator's decision. Niclin appealed to the Court of Appeal.

The Court of Appeal unanimously dismissed Niclin's appeal, concluding that the primary judge did not err in concluding that Niclin was required to serve the adjudication applications *'as soon as possible'* and that Niclin did not comply with it. As a result, the court held that the adjudicator did not have jurisdiction to determine the adjudication claims.

The Court of Appeal held that given that the Act provided builders with a statutory right to progress payment in a particularly expeditious adjudication process, parliament could not have intended to allow a situation where a claimant would take as long as it liked to serve an application.

The court stated that parliament did not specify any timeframes for the service of adjudication applications because it intended to accommodate the different circumstances that might lead to service not being able to be effected soon after being lodged. Therefore, in accordance with the AIA, parliament intended that service of adjudication applications be made on respondents *'as soon as possible'*.

The court noted that, in this particular case, SHA was legally represented and had given instructions to accept service. It was therefore possible for Niclin to serve the adjudication applications on SHA the same day they were lodged. In these circumstances, the court found that Niclin's service of the adjudication applications on SHA 12 business days after the applications were made was not *'as soon as possible'*.

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Three's company – conferences, witnesses and valid payment claims

J.R. & L.M. Trackson Pty Ltd v NCP Contracting Pty Ltd & Ors [2019] QSC 201

Andrew Orford | Sarah Ferrett | Nicholas Davison

Key point

This decision makes a number of key points:

- An email containing three attached invoices referring to the same date and work under one contract could be reasonably understood as a single payment claim and valid under the *Building and Construction Industry Payment Act 2004* (**BCIP Act**).
- If a claimant lodges two adjudication applications in relation to one payment claim, the second adjudication application will be invalid; however, the first adjudication application lodged will not be invalidated.
- An adjudicator may call a conference during which he or she permits the involvement of witnesses who are not parties to the application.
- An adjudicator may accept oral submissions made at a conference. The definition of 'submission' is to be considered broadly encompassing written and oral statement on both issues of law and fact.

Facts

NCP Contacting Pty Ltd (**NCP**) entered into a construction contract with JR & LM Trackson Pty Ltd (**Trackson**) for sewage works. NCP submitted monthly progress payment claims which Trackson ceased paying.

NCP served a payment claim in the form of a single cover email attaching three invoices each bearing the same date and comprising the total outstanding costs of work done. Trackson proposed a payment of $NIL. NCP lodged two simultaneous adjudication applications for two of the three invoices attached to the email.

The adjudicator proceeded to determine the first adjudication application lodged and in doing so called a conference of the parties. The conference was attended by witnesses who were not parties to the application but nonetheless proceeded to give oral submissions. The adjudicator subsequently determined the matter in favour of NCP.

Trackson commenced proceedings alleging jurisdictional error on a number of grounds.

Decision

One or three payment claims?

Trackson argued that NCP submitted three separate payment claims. The court found, however, that the invoices were sent together in one email bearing the same date and referring to work under one contract. As such, they should have been reasonably understood to constitute a single payment claim for the total of the invoice amounts. As such, the court found that the payment claim was valid, stating that in assessing a claim one must focus on substance over form as the wording of the BCIP Act does not demand a high level of particularisation.

A second adjudication application will not invalidate the first

The court also considered whether the fact that NCP lodged two adjudication applications for separate invoices, which were in fact part of the same payment claim, rendered the entire decision invalid.

NCP was only entitled to lodge one adjudication application and the adjudicator did not make a determination on the second application. In the absence of any contrary authority, the court accepted that the lodgement of the second application did not invalidate the first adjudication application or the decision made in relation to it.

An adjudicator may receive 'witnesses' at a conference

The court held that the attendance of witnesses at a conference will not result in jurisdictional error.

The court accepted the purpose of the BCIP Act is to provide speedy resolution of payment disputes. Adjudicators may require further submissions, inspections or conferences to establish questions of fact in service of that purpose. Those in attendance must be able to quickly provide information in response to an adjudicator. The understanding of an individual, such as a director, will frequently be informed by other professionals such as surveyors or supervisors. To interpret the meaning of section 25(3)(d) to limit a conference of the parties only to the parties to the contract would deprive the conference of its utility and thus be contrary to the nature of the BCIP Act. For a conference to have utility, witnesses with relevant expertise or factual knowledge necessary to provide the adjudicator with quick access to relevant information are to be permitted to attend.

An adjudicator can consider 'submissions' made during the conference

The court went on to clarify what constitutes a submission capable of being made at conference. The wording of section 26(2) of the BCIP Act allows the adjudicator to consider all properly made submissions in support of the claim or schedule. The court noted that it would be nonsensible to permit an adjudicator to seek further information and also prohibit them from considering that information.

Further, the inconsistency of language present in the Act suggests submissions are not restricted to legal arguments. Section 24 of the BCIP Act permits the respondent to an adjudication application to include relevant submissions in its response. Conversely, section 24B relating to the claimant's reply omits the term submission. It would be similarly nonsensible to imply that submissions of legal character are only available to one party.

It flows that a general definition of submissions should be preferred over a more narrowly construed legal definition. A logical and appropriately broad definition would therefore include oral responses by witnesses to the adjudicator's questions of fact or law.

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An arbitration clause may render clauses allowing court proceedings unenforceable

The Trustee For Hardev Property (Dev 10) Unit Trust v Palmgrove Holdings Pty Ltd & Ors [2019] QSC 208

Michael Creedon | Clare Turner | Ray Zhai

Key point

The *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**) does not require a contract for commercial building work with an unlicensed contractor to include an acknowledgement that the work must be carried out by a licensed subcontractor on behalf of the unlicensed contractor.

Significance

A head contractor without a QBCC licence does not lose its entitlement to payment under the QBCC Act merely because the head contract does not include a provision which stipulates that the commercial building work will be carried out by a licensed subcontractor.

Facts

Section 42 of the QBCC Act prescribes that a person who carries out building work or provides building work services must hold an appropriate contractor's licence (**Licencing Requirement**), or otherwise the person will not be entitled to any monetary or other consideration for the work. Carrying out work includes entering into a contract to carry out the work in accordance with Schedule 2 of the QBCC Act.

However, a person does not contravene the Licencing Requirement if the person merely enters into a contract to carry out building work that is not residential or domestic building work and the work is to be carried out by an appropriately licensed contractor pursuant to section 8, Schedule 1A of the QBCC Act (**Exemption Provision**). The Exemption Provision further provides that there is no breach if a person enters into a contract with an appropriate licensed contractor to carry out the building work or causes a licensed contractor to carry out the work.

The Trustee For Hardev Property (Dev 10) Unit Trust (**Principal**) and Palmgrove Holdings Pty Ltd (**Contractor**) entered into a contract for the construction of a retaining wall and fencing works (**Work**) for a number of proposed lots that were subject to subdivision (**Contract**). The Contractor did not hold an appropriate QBCC licence at the time of entering the Contract. The Principal failed to pay the Contractor's payment claim and the Contractor obtained a favourable adjudication decision against the Principal.

The Principal applied to the Queensland Supreme Court for an order to declare that the adjudication decision was void.

Decision

The court found for the Contractor and dismissed the application for declaratory relief.

The court agreed that the Work involving proposed lots subject to subdivision was not residential or domestic building work and consequently stated that the Contractor would not have contravened the Licencing Requirement if the Contractor merely entered into the Contract for the Work to be carried out by an appropriately licensed contractor.

The court rejected the Principal's submission that the Exemption Provision was only applicable where there was an agreement or acknowledgement in the Contract that the Work would be carried out by a licensed person. This was on the basis that the legislation did not require any provision in the contract to stipulate the work to be carried out by a licensed person to achieve its legislative intention, which is to ensure that the work which required a licence must be carried out by an appropriately licensed person. The court found that the evidence of the Contractor's general intention to engage a licensed person to carry out the Work at the time of entering into the Contract was sufficient for the Exemption Provision.

The court also considered the evidence of the Contractor's coordinating, scheduling, directing and inspecting the performance of the Work and held that those matters were part of the engagement by a contractor to a

subcontract to carry out works required by the head contract and were incidental to the Contractor entering into a contract with an appropriate licensed subcontractor. Therefore, the court rejected the Principal's claim that the Contractor provided building work services.

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