Construction Law Update

September 2020

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Legislative update

NEW SOUTH WALES

Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020

The *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (**RAB Act**) commenced on 1 September 2020 and will regulate many projects in NSW.

The RAB Act applies to Class 2 buildings within the meaning of the Building Code of Australia (**BCA**). Class 2 includes residential apartment buildings and the RAB Act also applies to mixed use residential and commercial buildings.

Developers must provide advance notice of the expected completion date at least six months and not over 12 months before an application for an occupation certificate is made.

The definition of 'developer' under the RAB Act is broader than the definition under the *Home Building Act 1989* and includes:

(a) those who contract, arrange, facilitate or cause the building work to be carried out;

(b) the owner of the land on which the building work is being carried out;

(c) the principal contractor as defined under the *Environmental Planning and Assessment Act 1979;* and

(d) the developer of the strata scheme (within the meaning of the *Strata Schemes Management Act 2015*).

The RAB Act gives the Department of Customer Services unprecedented powers to:

(a) prohibit the issue of an occupation certificate or the registration of a strata plan for a residential apartment building;

(b) issue stop work orders; and

(c) issue building rectification orders to cause building work to be carried out.

The Department of Customer Services also has various enforcement powers to ensure compliance with and establish penalties for non-compliance with the RAB Act. The Act applies retrospectively with a 10 year limit.

Building and Construction Industry Security of Payment Regulation 2020

The *Building and Construction Industry Security of Payment Regulation 2020* (**Regulation**) also commenced on 1 September 2020. The Regulation is not retroactive, and therefore will not apply to contracts entered into before its commencement date.

The Regulation is made under the *Building and Construction Industry Security of Payment Act 1999* (**Act**) to repeal and remake, with amendments, the *Building and Construction Industry Security of Payment Regulation 2008*.

The Regulation introduces a requirement for head contractors to keep a ledger for retention money held for each subcontractor and an obligation to provide trust account records to subcontractors if their money is held in trust. It also removes annual reporting requirements for trust accounts to NSW Fair Trading.

The Regulation changes the requirements for provision of supporting statements. It also introduces qualifications and eligibility requirements for adjudicators.

Schedule 2 of the Regulation commences on 1 March 2021. From that date, an 'owner occupier construction contract' will be:

- subject to the Act; and
- will also be an 'exempt residential construction contract', so that it will be subject to s 11(1C) of the Act concerning the due date for payment of a progress payment under such a contract.

In the Australian courts

NEW SOUTH WALES

Beware a counter offer! Make sure your contract includes the right price

***C & V Engineering Pty Ltd v Hamilton & Marino Builders Pty Ltd* [2020] NSWCA 103**

Andrew Hales | Jessica Nesbit | Jonin Ngo

Key point and significance

A contract formed under email correspondence and subsequent conduct required the supply of building materials and services at a price per unit as required, not at a fixed sum for a fixed quantity where the quantity of units required was unknown at the time of contracting.

This case demonstrates the importance of clarifying the parties' commercial intentions and the terms upon which a contract is formed before proceeding to performance. Where there is doubt, a court will consider the context in which the contract was formed and is likely to prefer a businesslike construction.

Facts

This case was an appeal from a decision of the District Court of NSW about a supply contract entered into between C & V Engineering Pty Ltd (**supplier**) and Hamilton & Marino Buildings Pty Ltd (**builder**) under which the supplier was engaged to provide and install metal plates and angles as joiners for pre-cast concrete panels (**subcontract**) to be used for constructing 55 units in Mascot (**project**).

The subcontract was formed by way of email correspondence between the parties with no formal contract being executed. The supplier asserted that the subcontract was for a fixed lump sum based on the supply and installation of 1,000 plates. The builder argued that the price was to be calculated by multiplying the supplier's unit price with the required number of plates.

The following email correspondence between the builder and the supplier related to determining the commercial intention of the parties and the terms of the subcontract:

- On 9 April 2015, the builder requested the supplier to provide a quote for the metal plates and angles. It was not in dispute that at this time the final engineering design for the project was not finalised.
- At 8:00am on 10 April 2015, a meeting was held between the builder and the supplier at which they had tried to arrive at an estimate only of the plates and angles required based on the workshop drawings and engineering design.
- At 9:58am on 10 April 2015, the supplier emailed the builder noting that the approximate quantities from the meeting were between 881 to 1020.
- At 4:28pm on 10 April 2015, the supplier emailed the builder enclosing a proposal for 1000 angles and plates at $44 each and attaching the supplier's standard terms. Relevantly, while the terms contemplated a *'contract sum'*, an amount had not been included.
- On 11 April 2015, the builder wrote to the supplier stating: *'We're happy to lock in a price per plate as per your quote. Please note though that it may be 800 plates or more. I notice you allowed for 1,000, I don't want the quantity to affect the price.'.*
- On 13 April 2015, the builder sent a further email to the supplier stating: '*As discussed, please consider this email as your instruction to proceed with the supply and installation…of the angles/plates* ***as required*** *… as per the rates noted in your quotation attached.'* (emphasis added).

On 15 May 2015, when the engineering design had been completed for the project, the builder emailed the supplier stating that only 150 units were required. The supplier refused to perform further work arguing that the builder had an obligation to purchase a fixed number of plates and angles regardless of the volume required for the project.

The District Court held that the subcontract was not for a fixed number of plates and angles and there was an implied term that each party had to negotiate a variation of price in good faith should the number of plates

and angles required be fewer than originally estimated. The issue on appeal was whether the primary judge's construction of the contract as being one for a price per unit (as opposed to a fixed quantity) was correct.

Decision

The NSW Court of Appeal dismissed the appeal and held that:

- the effect of email correspondence between parties must be determined objectively by reference to what the correspondence would demonstrate to a reasonable business person;
- the builder's email of 13 April 2015 did not constitute an acceptance of the supplier's offer to supply and install 1,000 angles and plates nor was a fixed price agreed. Objectively, neither party knew how many units would be required. The builder's email was rather a counter-offer accepting the rates noted in the supplier's quotation with those rates to be applied *'as required'*;
- the context of the correspondence between the parties clarified that *'required'* referred to a need of the builder for a number of units that had not yet been finalised and communicated and was consistent with the absence of a *'contract sum'* in the supplier's proposal document;
- the supplier accepted the counter-offer the following day by performance; and
- based on the above construction of the subcontract, there was no need for the District Court to imply a term to negotiate a variation in price.

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I fought the law and the law won: draft payment claims

East End Projects Pty Ltd v GJ Building and Contracting Pty Ltd [2020] NSWSC 819

Andrew Hales | Kate Morrison | Lauren Topper

Key point and significance

A clause that made the right to make a payment claim contingent on the provision of a draft payment claim on a certain date was void as it unduly restricted the operation of the *Building & Construction Industry Security of Payment Act 1999* (NSW) (**Act**).

However, the Supreme Court noted that a requirement to submit a draft payment claim will not always be void if it does not prevent a reference date arising and does not have the effect of excluding, modifying or restricting the operation of the Act. The same would apply under the new NSW regime where the definition of the term *'reference date'* has been deleted from the Act and replaced with an express right to serve a payment claim each named month.

Facts

East End Projects Pty Ltd (**developer**) and GJ Building & Contracting Pty Ltd (**builder**) contracted for construction works on a project at East End, Newcastle (**contract**). The developer sought a declaration that a payment claim was void for the purposes of the Act and an order restraining the builder from seeking a determination under the Act regarding that claim because a reference date had not arisen when the claim was served.

The mechanism for making a claim for payment under the contract required the builder to provide a draft claim before its actual progress claim was:

- by clause 37.1, the builder had to provide a draft progress claim to the superintendent by the 25th day of each month for work done to the last day of that month (**Draft Progress Claim**);
- by clause 37.1(e), the builder had to strictly comply with the clause 37.1 requirements, and, if it did not, the Draft Progress Claim was deemed not to be a Draft Progress Claim for the contract;
- by clause 37.2, the superintendent had to issue a preliminary assessment of the amount which the superintendent considered due in relation to the Draft Progress Claim within 5 business days of receiving the Draft Progress Claim;

- by clause 37.3(a), no earlier than 7 business days after the date the Draft Progress Claim was provided, the builder had to provide the superintendent with a progress claim in final form (**Final Progress Claim**); and
- by clause 37.3(b), the date referred to in subclause 37.3(a) was the *'reference date'* for the Act.

The builder did not follow the draft progress claim procedure and instead served a progress claim on 28 May 2020 without having served a Draft Progress Claim. The builder claimed that the mechanism for fixing a reference date was void under section 34(2) of the Act, and therefore the reference date arose on the last day of each month under section 8(2)(b) of the Act. The claim was said to have been served regarding the 30 April 2020 reference date. The developer claimed that the reference date was to be determined by the contract under section 8(2)(a) of the Act, and therefore no relevant reference date arose because no Draft Progress Claim had been served.

Decision

The court found in favour of the builder by holding that the contract did not identify a date on which a claim for a progress payment may be made. A reference date arose under the contract under section 8(2)(b) of the Act (being the last day of the month in which the work was carried out).

The court did not accept the developer's argument that the requirement to submit a Draft Progress Claim before the Final Progress Claim was a mechanism designed to facilitate the prompt payment of progress claims rather than a mechanism which impeded a reference date from arising and restricting the operation of the Act.

The fatal flaw in the payment mechanism was the requirement that a Draft Progress Claim had to be served by the 25th day of the month, the result being that if the builder failed to serve the Draft Progress Claim by that date, no reference date would arise and the builder would lose its entitlement to serve a progress claim regarding that month. That requirement restricted the operation of the Act.

Although ultimately the court agreed with the builder's submission that the reference date mechanism restricted the operation of the Act, it is interesting to note the court disagreed with the builder's suggestion that the regime was contrary to the Act because it gave the developer notice of the issues likely to be raised within the progress claim and therefore afforded the developer more than the 10 business days allowed under the Act to prepare its payment schedule. The advance notice would not exclude, modifying or restricting the operation of the Act. In that regard, the court noted that *'The purpose of the time limit is to ensure that once the processes of the Act commence with the service of a payment claim, they occur promptly. It is not the purpose of the Act to prevent the parties from introducing other mechanisms in their contract to ensure that they are not caught by surprise.'*

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Final and binding expert determination? There may be a catch

Lahey Constructions Pty Ltd v Department of Education [2020] NSWSC 1158

Andrew Hales | Adriaan van der Merwe | David Bell

Key point and significance

If a contract clause provides for an expert's determination to be final and binding up to a certain amount, be aware of the difference in treatment of the amount awarded by the expert and the amount actually required to be paid by one party to another. In a GC21 contract, a set-off resulted in an expert's determination being final and binding as the amount actually required to be paid by one party to the other was under the contractual threshold.

Facts

During 2017, Lahey Constructions Pty Ltd (**builder**) and the Department of Education (**principal**) entered into two separate contracts for upgrade works to Manly Vale Public School (**MV contract**) and Bardia Public School (**Bardia contract**). The general conditions of the MV and Bardia contracts were identical New South Wales Government GC21 (Edition 2) conditions.

Disputes arose in relation to claims made about variations carried out by the builder. Disputes had to be dealt with under the issue resolution process set out in the contracts, which included expert determination. Relevantly, clauses 71.7 and 71.8 of the contracts provided that an expert's determination was final and binding unless the determination required one party to pay the other an amount over $500,000 calculated without having regard to any amount paid under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**).

The parties appointed an expert to determine the issues. During the expert determination process, the builder served payment claims under the MV and Bardia contracts which were then the subject of various adjudications under the SOP Act. The adjudications dealt with several builder's claims for payment for variations, including those that had been referred as issues to the expert for determination. Because of the adjudications, the principal had to pay the builder amounts in relation to each variation referred to the expert.

In the expert determination process, the principal defended the builder's claims for payment for the variations by arguing it had paid amounts under the adjudications in excess of the builder's entitlements under the contracts and that it could have restitution of amounts paid to the builder over its contractual entitlements. The principal also raised its own set-offs and cross-claims in relation to the other variations the subject of the adjudications.

The expert assessed the parties' contractual rights to payment under the contracts for the variations. In assessing the variation claims, the expert determined in most cases that the amounts paid to the builder because of the adjudications were over the builder's actual contractual entitlements. In these cases, the principal could be repaid the difference. After having determined the builder's original contractual entitlement, the net result of the expert's determination was that the builder had to repay the principal $1.6 million under the MV contract and $2.2 million under the Bardia contract.

The builder initiated proceedings to dispute the amounts determined by the expert, contending that, as the amount the determination required the builder to pay exceeded the $500,000 threshold, the determination was not final and binding. The principal disagreed, noting that after excluding any amounts paid under the SOP Act, the threshold amount had not been reached and the builder could not litigate.

The builder's case was that the *'determinations'* that were relevant for the purposes of clauses 71.7 and 71.8 were those made by the expert under each of the MV and Bardia contracts as to the amounts the principal was originally contractually required to pay to the builder for the relevant variations. On this basis, the builder contended that the relevant *'determinations'* were the expert's determinations that the builder's contractual entitlements for the variations were $3.7 million in respect of the MV contract and $5.1 million in respect of the Bardia contract.

The builder claimed these original contractual entitlements, which were determined by the expert without regard to amounts paid under the SOP Act, were the amounts that should be compared with the threshold.

Decision

The court agreed with the principal's argument that the expert determination was final and binding, dismissed the builder's case and ordered the builder to make the payment determined by the expert.

In rejecting the builder's argument, the court held that the relevant *'determination'* was the *'aggregate liability'* that one party was actually required to pay to the other, rather than the determination of any individual issue or assessment by the expert of any amount originally required to be paid or to which one party was originally contractually entitled. The focus of the clause was not on the value of claims per se, but on the value of the outcome of the determination of the claims (including any defences, cross-claims and set-offs).

Rather, as the principal had submitted, to determine whether the $500,000 final and binding threshold had been exceeded, a calculation must be undertaken by deducting from the total amount payable under the expert's determination the amounts paid under the SOP Act (because regard is not to be had to that amount).

Applying this approach, the principal argued, and the court agreed, that what was relevant was the expert's determination of the final amount(s) that were payable by the builder to principal. Under the MV contract, the expert determined that $1.6 million had to be paid by the builder to the principal, most of which resulted from restitution for overpayments made by the principal under the adjudications. The end result was that $119,042 was the only amount not paid by the principal under the SOP Act.

Under the Bardia contract, the expert determined that $2.2 million had to be paid by the builder to the principal. This resulted from a setting off of $2.3 million for restitution for overpayments made by the principal under the adjudications against $65,224 owed to the builder for a single variation. The end result was that $65,224 was the only amount not paid by the principal to the builder under the SOP Act.

The determinations under each contract were therefore final and binding.

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Proving loss of opportunity damages for an engineer's misleading and deceptive conduct

Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd [2020] NSWCA 223

Andrew Hales | Karen Hanigan | Naomi Graham

Key point

Lost opportunity to complete a development and make a profit due to a wrongly issued structural engineering compliance certification was a foreseeable result in a claim for damages for misleading and deceptive conduct.

Facts

Mistrina Pty Ltd (**developer**) contracted with Jabbcorp Construction Management Pty Limited (**builder**) to build a mixed use residential/commercial development. The development was funded by a loan facility entered into with Bankwest (**financier**). The developer gave security to the financier over the development land and a separate property it owned.

The loan facility allowed the financier to demand immediate payment where a change in circumstances could materially affect the developer's ability to meet loan obligations.

The developer, financier and builder entered into a deed which gave the financier the right to assume the developer's obligations under the building contract after an event of default under any security interest held by the financier.

The design of the building incorporated a raft slab. The builder required a structural engineering certificate to state the design was compliant. Australian Consulting Engineers Pty Ltd (**engineer**) provided a design and structural engineering certificate incorrectly certifying that the structural design of a raft slab complied with the Building Code of Australia and relevant Australian standards. The builder relied on this certificate in commencing construction.

When construction was well advanced, an order was issued to stop works after discovering the raft slab was non-compliant and posed a risk to the integrity of the neighbouring property.

The financier demanded immediate repayment of the loan facility and, when this was not met, exercised its rights under the security documents, selling the partially complete development and the additional property given as security.

In the Supreme Court

The developers argued the misleading and deceptive conduct of the engineer in providing the certificate caused the loss of a commercial opportunity, being the chance to complete the development on time and with a profit.

The issue was whether the defective design played a material role in the financier's decision to exercise its rights under the security documents and call in the loan. The developer had to establish a sufficient causal connection between the conduct (defective design) and the damage claimed (loss of commercial opportunity).

The trial judge held that the developer did not establish a causal connection between the loss and the erroneous certification. The judge considered it a matter of conjecture that the structural defects causally contributed to the financier's decision.

On appeal

The developer appealed on two grounds asserting that the engineer's misleading and deceptive conduct caused it to suffer loss and damage.

The engineer filed a notice of contention seeking to confirm the trial decision because the loss was not a foreseeable consequence of the misleading and deceptive conduct.

The engineer also filed a cross-appeal in relation to the trial judge's finding that the discount to be applied to the loss of opportunity would be 15% had the developer succeeded.

Decision

The court allowed the appeal, dismissed the cross-appeal and set aside the trial judge's decision. This meant that the developer recovered for loss of opportunity against the engineer for the defective design, which caused the financier to step in and exercise its rights under security documents. The court held that:

- there was overwhelming inference that the defective design was a material cause of the financier taking over the development and that was enough to establish causation;
- the loss of opportunity was at least foreseeable in a general way; and
- the assessment of damages for loss of opportunity exhibited many characteristics of a discretionary judgment, and the evidence supported the conclusion reached in relation to the 15% discount.

Causation – a 'material cause'

On appeal, Ward JA agreed with the trial judge that it would be sufficient for the developer to establish that the conduct complained of played a material part in the financier's decision to establish a causal connection. However, Ward JA considered the trial judge erred in determining that the structural design defect was not a material cause of the financier taking over the development.

Her Honour held there was an overwhelming inference to be drawn that the cessation of the building works due to the design defect was a material cause for the financier to step in and exercise its rights under the security documents. In addition, this was more than conjecture – it was the most obvious and probable inference to draw on the facts. This was based on three factors:

- the evidence demonstrated that the financier was concerned about the suspension of works and the effect on time and cost;
- no other relevant material change was identified at or around the time the financier issued the demand; and
- the discovery of the structural defect and likely delay were matters which fell within the event of default clause under the security documents.

Loss of opportunity was foreseeable in a general way

Her Honour held that the loss suffered by the developer was a reasonably foreseeable consequence of the misleading and deceptive conduct, even in a general way, if not more so. The financier calling up its loan was the very event that could naturally arise from delays, additional costs and the discovery of significant structural defects.

Assessment of damages

Ward JA rejected the engineer's position that, if the misleading and deceptive conduct was held to be a cause of the lost opportunity of the developer, damages should be assessed and discounted by 80-90%. Her Honour agreed with the trial judge's assessment in obiter that a 15% discount should apply.

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Stay of enforcement of an adjudication determination

MTR Corporation (Sydney) NRT Pty Ltd v Thales Australia Ltd [2020] NSWCA 226

Andrew Hales | Nicholas Grewal | Julia Prieston

Significance

This decision is important for those considering an application for a stay of the enforcement of an adjudication determination, particularly where proceedings for judicial review, based on jurisdictional error, have been dismissed.

These factors were all considered relevant in this case:

- the policy of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**), which allows a speedy adjudication of a payment claim to ensure that subcontractors and contractors are not deprived of cash-flow whilst building disputes are resolved;
- whether the applicants have a reasonably arguable case on appeal (although it was noted that on applications for leave to appeal generally, merely establishing a reasonably arguable case would not usually warrant a grant of leave);
- whether there is prejudice to either party turning on the outcome of the application; and
- whether there is a risk of reputational harm if payment is required (although on the facts there was no such risk, and so reputational harm was not relevant to the actual decision).

It was noted that a court should be reluctant to grant a stay in proceedings under the SOP Act unless the applicants can establish clear grounds by way of prejudice or other considerations which warrant depriving the respondent of its statutory entitlements, upheld by a judge in judicial review proceedings.

Finally, even though the stay was granted, the Court of Appeal described it as an indulgence to the applicants, and that therefore the respondent should not have to pay the costs of the applicants' success.

Facts

The first instance decision was covered in our *August 2020* edition of Construction Law Update. In summary, Thales made an adjudication application against MTR under the SOP Act. On 5 June 2020, the adjudicator allowed a claim in an amount of ~$25.5 million in favour of Thales. MTR then commenced proceedings seeking judicial review of the adjudicator's determination but was unsuccessful. MTR also introduced claims of misleading or deceptive conduct under section 18 of the Australian Consumer Law.

On 31 August 2020, subject to certain conditions regarding the commencement of proceedings seeking leave to appeal, the primary judge granted an interlocutory injunction restraining the respondent from enforcing the adjudication determination, and the stay was extended by agreement until the day on which the application for a further stay was listed before the Court of Appeal .

Decision

The extended stay was granted, noting the absence of any real prejudice against either party from the stay being granted, and that there was an expectation of an early hearing and determination of the application for leave to appeal and the appeal.

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The writing's on the wall – what amounts to reasonable rectification costs?

Murphy v Zubkrycki & Anor [2020] NSWDC 538

Andrew Hales | Lachlan Williams | Jenny Cohen

Key points and significance

A retaining wall was classified as residential building work even though it was constructed unlawfully and before the related construction of a dwelling commenced.

Rectification works must be reasonable and necessary to bring the works in conformity with the original contract.

An owner may be entitled to damages for distress and inconvenience because of a breach of the home building warranties.

Facts

The defendants, Mr and Mrs Zubkrycki, were partners in a construction business (**builders**) and purchased land from a developer in December 2014, with the transaction settling in March 2015. During January 2015, before settlement, Mr Zubkrycki constructed a retaining wall on the land. Then the builders constructed a house on the land. The builders sold that property to Ms Murphy (**owner**) in April 2016. In March 2017, the side retaining wall collapsed. The owner commenced proceedings on the basis that the builders had breached the implied warranties under section 18B of the *Home Building Act 1989* (NSW) (**HBA**) that the owner had the benefit of as successor in title.

The owner claimed damages for the cost of rectification and damages for distress and inconvenience. The builders denied liability for the claim because they did not build the wall. In the alternative, the builders claimed that the wall was not *'residential building work'* for the HBA (which argument was ultimately abandoned by the builders). The builders also claimed that the rectification works carried out by the owner exceeded what was reasonable and necessary to achieve conformity with the original contract.

Decision

Residential building work

The court made a factual finding that Mr Zubkrycki constructed the wall. Following this, the court held that the wall was *'residential building work'* under the HBA, given that the wall would not have been built but for construction of the residential dwelling. This finding was reached notwithstanding that evidence indicated the wall was built unlawfully at a point in time where Council approval had not yet been obtained. The court found that the HBA does not require the work to be lawful, and also does not involve a temporal requirement for construction of the dwelling to follow in sequence after construction of the wall.

Reasonableness of rectification works

The rectification work was arranged and pursued by the owner in February 2019 under a quote obtained by the owner (**Owner's Quote**) rather than under an alternative design for rectification provided by the builder in July 2017 (**Builders' Design**). The owner argued it was reasonable to reject the Builders' Design if the builders had disclaimed responsibility for building the wall.

The court found that the rectification work under the Owner's Quote was unnecessary or reasonable to bring the works in conformity with the original contract as it included some betterment to the original wall. The court accepted the builders' expert evidence of such betterment and the owner did not adduce evidence that the Owner's Quote was reasonable and necessary to bring the works in conformity with the original contract. The court referred the quantum of damages back to the parties for agreement or, failing agreement, referred to a referee.

Distress and inconvenience

The court awarded $5,000 in damages to the owner for distress and inconvenience because a physical inconvenience had been suffered. On the owner's evidence, she indicated agitation and injured feelings arising from concern about damage to her property and damage to her neighbour's property due to the collapsed wall and any prospective liability she may face.

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Ambiguous conditions precedent clause causes a 'circularity'

One Pro Baulkham Hills Pty Ltd v Ming Tian Real Property Pty Ltd [2020] NSWSC 1043

Andrew Hales | Claire Laverick | Nick Meyer

Key point

An ambiguous conditions precedent clause prevented a building contract becoming effective, foiling a developer's claim for damages against a contractor for breach of obligations under that contract. The contract included four key conditions precedent, one of which was the satisfaction of all conditions precedent to the developer drawing on its financing. Those conditions precedent could only be satisfied once all conditions precedent to the building contract were satisfied. The drafting presented a contradiction between the conditions, allowing a *'circularity'* to occur. While not drafted as such, the court found that the conditions precedent were to be read sequentially and that the contract had not become effective before its termination.

Significance

The decision shows the importance of properly and clearly drafting the parties' intentions, and considering how the contract interfaces with other project documents. When drafting a conditions precedent clause, each party should:

- consider the order in which conditions must be satisfied (if any); and
- ensure the conditions precedent can be satisfied (including by considering other related agreements to which it is, or will be, a party (such as financing agreements)).

Facts

On 22 December 2017, One Pro Baulkham Hills (**developer**) and Ming Tian Real Property (**builder**) contracted to design and construct 40 townhouses at Baulkham Hills for $20.7 million (**contract**).

Clause 7(a)(i) of the contract provided that:

> *'[the builder] must not commence the [Work Under Contract] unless and until [the developer]… issues a notice to proceed.'*

Further, clause 9(a)(ii) of the contract included four key conditions precedent, whereby the builder was under no obligation to perform the works until:

> *(A) [the developer] has secured financing for the cost of the [Work Under Contract] on terms and conditions acceptable to [the developer] acting reasonably;*
>
> *(B) all conditions precedent to [the developer] making first draw on that financing have been satisfied;*
>
> *(C) [the developer], [the builder] and [the developer's] Financier have entered into any tripartite agreements required by [the developer's] Financier on terms acceptable to all parties;*
>
> *(D) [the developer] has provided a Notice to Proceed to [the builder] in accordance with clause 7;*

Relevantly:

- one condition precedent in the financing agreement to the developer making first draw was that the contract was unconditional, including *'the issuance of a notice to proceed'*; and
- the builder had to provide security and evidence of home warranty insurance within a certain period after receipt of the notice to proceed.

On 31 October 2018, the developer served the builder with what was purported to be a notice to proceed (**Notice to Proceed**). The builder did not construct the townhouses, nor did it provide valid security and evidence of home warranty insurance. On 22 January 2019, the sole director of the builder, Mr Meng Dai, provided what appeared to be a bank guarantee (which the parties accepted in these proceedings was not genuine). On 1 May 2019, the parties signed a 'Deed of Termination' where they agreed to *'mutually terminate'* the contract, while reserving their rights in relation to a breach arising before termination.

The parties agreed that conditions (A) and (C) were satisfied, but the builder argued that condition (B) was not satisfied when the Notice to Proceed was issued, the Notice to Proceed was not valid, and condition (D) was not satisfied.

As the builder did not provide valid security or evidence of insurance, the developer could not draw down any additional funds from the financier as it could not meet the financing conditions precedent. The developer argued that it suffered loss.

The parties disputed:

1. whether the conditions precedent in clause 9 were to the formation of the contract or to the obligation of the parties to perform under that contract;
2. whether the builder was in breach of the contract by failing to provide security and evidence of home warranty insurance; and
3. whether Mr Dai misled and deceived the developer by providing the purported bank guarantee.

The developer sought damages from the builder regarding item 2, and damages or compensation from Mr Dai regarding 3 above.

Decision

Stevenson J found in favour of the builder on all three issues and concluded that the Notice to Proceed was not effective, and therefore the builder's obligations to provide security and evidence of insurance had never arisen. The developer did not suffer damage because of the builder's failure to provide these things.

His Honour concluded that the parties intended that the conditions precedent were only to performance of, and not to existence of, the contract as, although clause 9(a)(i) stated that *'the Contract is subject to, and conditional upon'* the conditions precedent, clause 9(a)(ii) stated that the builder *'is under no obligation to perform'* any works until the conditions precedent were satisfied. This conclusion was also supported by the parties' conduct, particularly the language of the Deed of Termination, a notice to show cause issued by the developer and the builder's response (which proceeded on the basis that there was a contract between them).

The court concluded that the developer could only serve a Notice to Proceed once conditions (A), (B) and (C) were satisfied. If clause 9 was to be construed so the requirements of the conditions precedent were not sequential, it would be open for the developer to serve a Notice to Proceed on any date, for example, the day after the contract was made, committing both it and the builder to construction, notwithstanding that finance had not been and might never be secured.

Whilst his Honour agreed with the developer's submission that this sequential interpretation would *'create a circularity'* with the condition precedent in the financing agreement referred to above (which meant that condition (B) could not be satisfied until condition (D) was satisfied), his Honour did not accept this affected the construction of the contract. It had to be construed in the light of matters known to the parties when it was made, and not in light of matters arising from a financing contract made later between only one party to the contract and a third party.

The court was not satisfied that condition (B) had been satisfied before the contract was terminated, let alone when the Notice to Proceed was issued. The Notice to Proceed was not effective, and the builder was under no obligation to perform any works or provide any evidence of insurance.

Separately, the misleading and deceptive conduct claim raised by the developer was also dismissed, as a valid claim would have required that the developer relied on the purported bank guarantee and suffered damage. However, when the builder issued the bank guarantee in January 2019, the developer correctly identified it as a fake and requested a valid guarantee to be provided. The court found that the developer did not rely on the bank guarantee and suffered no loss or damage *'because of'* Mr Dai's conduct.

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Valid settlement agreement or contracting out of the Security of Payment Act?

Reward Interiors Pty Ltd v Master Fabrication (NSW AU) Pty Ltd [2020] NSWSC 1251

Andrew Hales | Amy Ryan | Tom Lawler

Key point and significance

Settlement agreements regarding amounts payable under payment claims will be permitted by the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**) and will cause the relinquishment of a party's ability to otherwise enforce its right to payment under the SOP Act.

Such an agreement will in effect be held to acknowledge the operation of the SOP Act but record the parties' agreement that, in the particular circumstances, their rights will instead be governed by their agreement. This will not be an *'attempt to deter a person from taking action under'* the SOP Act under section 34(2)(b).

Facts

In March 2020, Master Fabrication (NSW) (AU) Pty Ltd (**subcontractor**) served a payment claim under the SOP Act on Reward Interiors Pty Ltd (**contractor**). The contractor did not submit a payment schedule in response to the payment claim. Under the SOP Act, the subcontractor could have sought judgment for the amount claimed under the payment claim because the contractor had failed to issue a payment schedule within the required time. However, in April 2020, the parties agreed at a meeting that the contractor would pay a lesser sum in full satisfaction of the payment claim (**settlement sum**). The contractor paid the subcontractor the settlement sum.

The contractor sued the subcontractor for damages arising from the construction work. In its cross-claim in the proceedings, the subcontractor sought summary judgment for the difference between the settlement sum and the amount claimed under the payment claim. The subcontractor argued that it was entitled to summary judgment because the agreement for the settlement sum amounted to the parties contracting out of the SOP Act, and was void.

Decision

In deciding the summary judgment application, the court found that the contractor had an arguable case that the agreement (assuming it had been made, but not determining that issue) was not void under the SOP Act and dismissed the summary judgment application on that basis. In making this decision, the court found that, due to the agreement, the subcontractor had relinquished its right to seek judgment for the amount claimed under the payment claim due to the contractor's failure to issue a payment schedule.

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WESTERN AUSTRALIA

Arbitrate or litigate: applying to court for payment despite an arbitration clause

MSP Engineering Pty Ltd v Tianqi Lithium Kwinana Pty Ltd [2020] WASC 251

Tom French | Penny Bond | Laura Hamblin

Significance

The case confirms the importance of keeping money flowing in construction contracts. Under the standard form AS4902-2000, contractors can apply to a court for the payment of unpaid certified amounts, even where the parties are proceeding through the contractual dispute resolution process (including arbitration).

Facts

MSP Engineering Pty Ltd (**MSP**) and Tianqi Lithium Kwinana Pty Ltd (**Tianqi**) were party to two separate but identical contracts for a lithium hydroxide processing plant (**contracts**).

The contracts contained a typical payment regime (a modified AS4902-2000) under which MSP could make a progress claim which would be assessed by the superintendent in a progress certificate. Following assessment, Tianqi would pay MSP the certified amount (**Payment Clause**).

The dispute resolution clauses provided for:

- one party to notify the other of a dispute;
- following notice of a dispute, the parties would confer on the dispute;
- If the dispute remained unresolved, the dispute would be referred to arbitration,

(**DR Clause**).

Importantly, the DR Clause also provided that nothing in the clause would prejudice a party from instituting proceedings to enforce payment or to seek injunctive or urgent declaratory relief (**Carve Out**).

The Proceeding

A DR Clause dispute arose regarding the outstanding payment of a certified progress certificate in the amount of around $35 million (**Payment Dispute**).

MSP commenced proceedings to enforce payment of the certified amount. Tianqi applied for a stay of the proceedings because the Payment Dispute had been referred to arbitration under the DR Clause. MSP argued that, because the Payment Dispute concerned a certified amount, it was subject to the Carve Out.

Decision

Master Sanderson rejected Tianqi's application for a stay of proceedings. In deciding the issue, Master Sanderson applied *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd [No 3]* [2013] VSC 435 and held that the starting point was the Payment Clause. Under the Payment Clause, certified amounts are not contractually in dispute, they are payable by the principal to the contractor.

In interpreting the Payment Clause, Master Sanderson commented that the clause reflected the importance of providing a flow of funds to the contractor and confirmed the line of authority in *Algons Engineering Pty Limited v Abigroup Contractors Pty Limited* (1998) 14 BCL 215. Master Sanderson noted that the Carve Out also supported the flow of funds.

Master Sanderson concluded there was no reason for the court to exercise its discretion to grant a stay of proceedings because the amount was due and payable under the contract.

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Who's who when you sue: identifying which entity carried out a building service

The Owners of Richmond Quarter Strata Plan 66227 and Pindan Contracting Pty Ltd [2020] WASAT 103

Tom French | Penny Bond | Laura Hamblin

Key point

To avoid any uncertainty, construction companies that cease to be the entity undertaking the building works should promptly notify the Permit Authority and apply to have any permits transferred.

Significance

The case confirms that complaints under the *Building Services (Complaint Resolution and Administration) Act 2011* (WA) (**Act**) can only be made about the person or entity that carried out the regulated building service. Where a construction company no longer exists, or is otherwise unavailable, a remedy cannot be sought from a related entity (within the meaning of the *Corporations Act 2001* (Cth)).

Facts

The Owners of Richmond Quarter Strata Plan 66227 (**owners**) lodged a complaint against Pindan Contracting Pty Ltd (**Pindan Contracting**) relating to constructing a seven-storey residential and commercial building in East Fremantle (**Project**).

Pindan Contracting disputed the complaint because the entity did not carry out the building service. Pindan Contracting alleged Pindan Pty Ltd as The Trustee for Chamois Unit Trust trading as Pindan Constructions (**Pindan Constructions**) carried out the building service.

Pindan Contracting and Pindan Constructions were related entities with common directors. While Pindan Contracting was initially named as the builder on the original building permit issued by the Town of East Fremantle (**Town**), during contract negotiations, it was agreed that Pindan Constructions would be the builder, not Pindan Contracting. Despite this, Pindan Contracting did not notify the Town it had ceased to act and, as a consequence, it was never removed from the original building permit.

Pindan Constructions began preparatory work and the developer and Pindan Constructions contracted for the construction works. Subsequent building permits named Pindan Constructions as the building contractor.

Pindan Constructions ceased to operate after August 2019, and the complaint was lodged in November 2019.

Decision

The Tribunal held that Pindan Constructions, and not Pindan Contracting, was the responsible entity.

The Tribunal considered the wording of the Act, in particular the phrase *'carried out'* the building service. The Tribunal confirmed the line of authority that the relevant company is the entity responsible for bringing the whole project to completion.

The construction works were undertaken by Pindan Constructions, including all invoicing and subcontracting. Pindan Construction was paid by the developer for the works. It had also lodged a separate application for a building permit with the Town and lodged the notice of completion.

Based on this information, the Tribunal was satisfied the responsible entity was Pindan Constructions and dismissed the owners' application.

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