Construction Law Update

August 2021

Contents

In the Australian Courts

COMMONWEALTH

Playing one off against another… ensure your insurance policy terms are clear

***Liberty Mutual Insurance Company Australian Branch t/as Liberty Speciality Markets v Icon Co (NSW) Pty Ltd* [2021] FCAFC 126**

Andrew Hales | Emily Miers | Paige Freeman

Key point and significance

This case reiterates the importance of providing due consideration to terminology used in construction insurance policies to ensure that the cover sought is captured. When interpreting the terms of market specific insurance policies they are to be interpreted as a whole and to bring about a reasonable and commercial result.

Participants in the construction industry should check their existing third party liability insurance policy wording before renewal to see whether it actually covers them for the risks they intend to be covered, especially in respect of the definition of *'Product'* where the absence of words such as *'built'* or *'constructed'* may be significant.

Facts

The first instance decision was covered in our *November 2020 to January 2021* edition of Construction Law Update. In summary, Icon Co (NSW) Pty Ltd (**builder**) was the contractor for the residential and commercial development known as the Opal Tower at Sydney Olympic Park (**Opal Tower**). The builder commenced building on 16 November 2015 and achieved practical completion on 8 August 2018, at which point the project entered a 12-month defects liability period.

On 24 December 2018, within the defects liability period, cracks were observed at the Opal Tower, forcing residents to evacuate (**the incident**). Following the incident, the builder re-entered the site and undertook all necessary rectification works. In July 2019, a class action by the residents of Opal Tower was commenced against the Sydney Olympic Park Authority who in turn, and amongst others, filed a cross-claim against the builder.

In the first instance proceedings in the Federal Court of Australia, the builder sought declarations against two insurers, the first respondent (**Liberty**) and the second respondent (**QBE**), with which it placed third party liability insurance policies through its broker in September 2015 and September 2018 respectively.

The relevant period covered by the policies differed, with the 2015/16 Liberty policy (**Liberty Policy**) being current at the time of the commencement of the Opal Tower contract while the QBE policy covered the period from 20 September 2018 to 31 December 2018 (**QBE Policy**).

Both Liberty and QBE denied the builder indemnity for the incident and, as a result, the builder sought declarations designed to progress its claims for indemnity against both insurers.

First Instance Decision

The Federal Court of Australia found in favour of the builder under each of the policies of insurance but on different grounds.

Claims against Liberty

The court held that the Liberty Policy was to be rectified to reflect the intention of the parties by including an endorsement extending the period of coverage of the Liberty Policy in turn covering a period that would entitle the builder to coverage for the incident.

The court found that the parties' dealings disclosed a common intention by each of the agents that the Liberty Policy operate as a 'contracts commencing' rather than a 'turnover' policy, thereby extending coverage for the defects liability period for projects commencing in the relevant insurance period.

The court dismissed the builder's claim that, without rectification, on a proper interpretation of the Liberty Policy, it was a 'contracts commencing' rather than a 'turnover' policy.

Claims against QBE

The court held that the QBE policy extended to the incident at Opal Tower, because the building was a 'Product' within the meaning of that term in the QBE Policy. The court made the finding on the following basis:

- as a construction company, the builder erected buildings which it supplied to its clients, which was covered by the definition of *'Product'* in the QBE Policy;
- the Opal Tower fell within the ordinary meaning of *'product'*, being a thing produced by any action or operation, or by labour; and
- QBE's construction of the policy would produce an odd result, contrary to the parties' intention, that there would be no cover for projects that had been completed and handed over to the principal, but for which the maintenance / defects liability periods had not expired.

Appellate Decision

Claims against Liberty

Liberty appealed the first instance decision, that the Liberty Policy required rectification, to the Full Court of the Federal Court of Australia. The builder cross-appealed on its claim based on the proper construction of the Liberty Policy.

The builder's cross-appeal

The builder argued that the proper interpretation of the terms of the Liberty Policy as a *'contracts commencing'* policy could be determined by reference to the policy itself, and that the trial judge did not need to find that the Liberty Policy required rectification.

The court ultimately held that the policy was sufficiently worded to permit the insured to give instructions for each contract commencing in the policy year to be covered, upon the payment of an agreed additional premium. In reaching this conclusion the court held:

- a businesslike construction of the Liberty Policy was to be preferred (to produce a reasonable and commercial result as required in determining the operation of insurance policy requirements), to allow contracts that are expected to be incomplete by the end of the policy year but commencing prior to the expiry, to be insured; and
- the Liberty Policy could be construed harmoniously and without commercial inconvenience to provide:
  - annual turnover cover with run off cover that can be used in such manner as the insured may choose;
  - run off cover to a program; or
  - a form of contracts commencing cover upon giving instructions and paying a premium.

Liberty's appeal

Although the court didn't consider it necessary as a result of the decision in relation to the cross-appeal, the court still addressed Liberty's appeal and ultimately dismissed the grounds of appeal. The court made determinations that:

- on the evidence the parties came to know of each other's intentions, and the finding that the contracts commencing intention was commonly held was available; and
- although there was some merit to the grounds relating to whom the insurer's agent's intentions were to be attributed to, it was not determinative of the appeal and on balance should be rejected.

Claims against QBE

The dispute subject to the QBE Policy appeal was whether the Opal Tower (and its component parts) was a *'Product'* for the purpose of the scope of cover provided under the QBE Policy.

In determining that the Opal Tower (and its component parts) was not a *'Product'* as that term was defined under the QBE Policy the court:

- considered that the words *'built'* or *'constructed'* seemed the most apt descriptors of what a construction company does in relation to a building and the absence of those words in the definition of *'Product'* was significant, though not determinative; and
- held that it was contrary to the operation of the QBE Policy as a whole to find that the Opal Tower (and its component parts) could be a *'Product'*. This was as a result of:
  - the use of the terminology *'Products Liability and/or Completed Operations'*, that conveyed an intention to distinguish between a *'Completed Operation'* and a *'Product'*. The court considered that were a completed building to be a *'Product'* for the purposes of the QBE Policy, then the definition and use of *'Completed Operation'* would be made redundant which would be an error; and
  - some exclusions applying specifically in relation to *'Products'* and none applying in relation to *'Completion Operations'*, demonstrating that that the parties did not intend the definition of *'Product'* to extend to *'Completed Operations'*.

| back to *Contents*

NEW SOUTH WALES

Say my name, say my name: pleading apportionable claims with specificity

Bingo Holdings Pty Ltd v GC Group Company Pty Ltd [2021] NSWCA 184

Andrew Hales | *Amy Ryan* | *Will Ryan*

Key point and significance

A defendant cannot simply identify third parties who may be concurrent wrongdoers, nor point to a class of persons one or more of whom may be concurrent wrongdoers, in order for a claim to be apportionable. Rather, a defendant's pleadings must identify the concurrent wrongdoers (including disclosing the relevant cause of action and damage) with the same specificity required of an initiating process in order for the claim to be apportionable.

If a defendant is unable to identify concurrent wrongdoers with the requisite specificity, and cannot conduct further fact finding activities against those purported concurrent wrongdoers, it should not plead that the plaintiff's claim is apportionable.

Facts

Claim against the applicant

GC Group Company Pty Ltd (**GC Group**) was a subcontractor in a large residential development project at Albion Park. GC Group purchased recycled aggregate (a building material used in concrete and the construction of roads and retaining walls) from (at least one of) the applicants, Bingo Holdings Pty Ltd, Bingo Recycling Pty Ltd, Bingo Waste Services Pty Ltd and Wollongong Recycling (NSW) Pty Ltd (collectively, **the applicant**).

GC Group alleges that the recycled aggregate supplied by the applicant was contaminated and that by using the contaminated aggregate in construction GC Group suffered loss and damage because it was obliged to effect substantial reconstruction work at its own cost.

GC Group alleged that the applicant was liable for breach of contract, breach of the consumer guarantees provide by sections 53, 55 and 56 of the Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**ACL**) and for engaging in misleading or deceptive conduct contrary to section 18 of the ACL.

Apportionable claim?

The applicant sought to establish that GC Group's claim against the applicant was an *'apportionable claim'* for the purpose of section 34 of the *Civil Liability Act 2002* (NSW) (**CLA**) in its Technology and Construction List Response (**List Response**) (which was subsequently struck out), and then by way of two separate notices of motion (in respect of both instances, the court refused to grant leave to amend the applicant's List

Response). In respect of the latter refusal, the applicant sought leave to appeal this interlocutory decision at the NSW Court of Appeal.

When seeking leave to appeal, the applicant asserted that the claim was apportionable because the contaminated aggregate the applicant delivered to GC Group was initially supplied by one or more of 710 customers of the applicant, or alternatively, because it was sourced from a stockpile the applicant had acquired when purchasing the businesses. Relevantly, the applicant submitted that each of those entities *'may'* be a concurrent wrongdoer *'to the extent'* that the contamination came from the recycled aggregate supplied to the applicant by any of them (although did not, and submitted it was not required to, plead that any one or more of those people *'was'* a concurrent wrongdoer).

The parties agreed that the contract claim and the consumer guarantee claim were not apportionable, and accordingly that the apportionment claim could only succeed in respect of the misleading and deceptive conduct claim.

Decision

The Court of Appeal dismissed the summons seeking leave to appeal and ordered the applicant to pay the costs of the summons.

The matter was dismissed on the basis that the misleading and deceptive conduct claim was brought under federal law (the ACL). However, in its proposed amendment to the List Response, the applicant incorrectly asserted that the claim was apportionable using NSW legislation (the CLA).

However, the court observed that, even if pleaded using federal law, the applicant's claim would have been dismissed because it was pleaded with a lack of specificity. The court commented that it was insufficient for a defendant to simply identify that a party *'might'* have caused the loss, or was in a class of individuals one or more of whom may be concurrent wrongdoers. Rather, the court observed that *'a defendant seeking to rely on a proportionate liability defence must plead that claim with the same degree of particularity as if bringing a cross-claim against the alleged concurrent wrongdoer, setting out the relevant material facts.'*

Referring to the case of *Ucak v Avante Developments Pty Ltd* [2007] NSWSC 367, the court reminded the parties that a defendant asserting that a claim is apportionable must plead the following elements:

- the existence of a particular person;
- the occurrence of an act or omission by that particular person; and
- a causal connection between that occurrence and the loss that is the subject of the claim.

Accordingly, the court held that a defendant pleading a proportionate liability defence must plead in a manner that discloses the cause of action and damage in at least as detailed a manner as would be required for any initiating process for a cause of action.

As the applicant had failed to identify the concurrent wrongdoers with the requisite specificity, the claim was not apportionable.

| back to *Contents*

NCAT has jurisdiction over misleading and deceptive conduct cases under the ACL

Gaskell and Bourke v Northshore Homes Pty Ltd and Nazha [2021] NSWCATCD 33

Andrew Hales | Tom Lawler

Key point and significance

Once the NSW Civil and Administrative Tribunal (**NCAT**) has jurisdiction under section 74(3) of the *Fair Trading Act 1987* (NSW) (**FTA**) to award damages for contravention of section 18 of the *Australian Consumer Law* (NSW) (**ACL**), it may award such sum, and make such ancillary orders, as it thinks fit. The plain meaning of these words is not restricted. This jurisdiction is conferred on NCAT if the matter concerning section 18 of the ACL arises in connection with another matter within NCAT's jurisdiction which is the subject of proceedings in NCAT.

Facts

Aaron Gaskell and Serena Bourke (**owners**) brought proceedings in NCAT against Northshore Homes Pty Ltd (**builder**) and Sami Nazha, a director of the builder (**director**). The builder was put into liquidation before proceedings finalised. The builder had performed defective building work at the owners' property.

The owners sought damages for two misleading and deceptive representations they claimed the director had made contrary to section 18 of the ACL. The representations were as follows:

- the builder's website stated it had won awards, which it had not (**website representation**); and
- the director stated to the owners that, under regulation 35 of the *Work Health and Safety Regulation 2017* (NSW), which requires WHS risks to be eliminated or minimised, *'as a principal contractor I have the right to hire or fire any subcontractor, engineer, certifier etc'* (**engineering representation**).

After the owners' engineer was terminated, the builder's engineer certified defective work carried out by the builder that should not have been certified. Rectification is likely to cost $221,344.

The director raised jurisdictional limit and overcompensation issues.

Decision

The tribunal found that:

- the director did not make the website representation;
- the director had engaged in misleading and deceptive conduct by making the engineering representation;
- the tribunal could award damages for contravention of section 18 of the ACL as the tribunal sees fit; and
- an order that the director pay the owners $221,344 would not overcompensate the owners despite an award of $481,445 in related proceedings and a $340,000 insurance payment.

Website representation

The director was not engaged in the conduct relating to the representation, as required by section 18 of the ACL. Although the director caused the website to be created and maintained, the tribunal accepted the director's evidence that a co-director was responsible for the website and the director had seen the website but had not gone through it word for word, though he understood that members of the public would read it.

In addition, the tribunal rejected the owners' further submission that the director's omission to change the website constituted misleading and deceptive conduct, because the owners did not plead this point nor put the point to the director in order for him to respond to it.

Engineering representation

The tribunal found the director's engineering representation was misleading and deceptive because it led the owners into error by causing them to form the view they had no choice other than to allow the director to terminate the engagement of the owners' engineer.

The tribunal rejected the director's submission that the engineering representation did not cause the owners to suffer loss or damage because the engineer's plans remained in place and were not altered.

But for the engineering representation, the tribunal found the owners would have continued to engage their engineer to inspect the work in progress on an ongoing basis, at least in connection with engineering issues, because:

- the contract allowed for an engineer engaged by the owners to inspect the work in progress;
- the owners had engaged an engineer to do that;
- the engineer had carried out a site inspection and informed the builder of what was required to be done about footing excavations and reinforcement issues;
- had the engineer continued to inspect the works the defective building work would have been inspected and addressed at the relevant time; and
- the high cost of rectification of the improperly certified work required would have been avoided.

Jurisdiction

The tribunal found it had jurisdiction to decide the claims for misleading and deceptive conduct under the ACL and matters of loss or damage, award such sums, and make ancillary orders, as it thinks fit because:

- related proceedings were brought in the NCAT to determine a building claim under the *Home Building Act 1989* (NSW) which enlivened section 73(4) of the FTA;
- section 79S of the FTA, which restricts NCAT's awards for consumer claims to sums not exceeding $40,000, did not apply because, although the owners' claim could be defined as a consumer claim, section 74(3) of the FTA, which expands not contracts NCAT's jurisdiction, would be rendered purposeless if section 79S applied;
- section 30(5) of the FTA, which applies jurisdictional limits set by other legislation to claims under Parts 2 and 3 of the ACL in NCAT, did not apply because section 18 of the ACL is not within those Parts; and
- there has been no binding decision as to the meaning and scope of the words *'may award such sum, and make such ancillary orders, as it thinks fit'* in section 74(3) of the FTA.

Therefore, the tribunal found nothing restricted the plain meaning of the words in section 74(3) of the FTA.

Damages awarded and overcompensation

The tribunal rejected the director's submission that an order for $221,344 would over compensate the owners by exceeding the costs of rectification.

The tribunal found the insurance payout of $340,000 from the home owner warranty insurer included a cost element to compensate the owners for legal costs in the previous related proceedings against the builder that could no longer be recovered because of the builder's liquidation.

The tribunal found $221,344 to be the proper award, despite the $481,445 awarded in the previous related proceedings also including provision for rectification costs.

| back to *Contents*

QUEENSLAND

A failure to act in good faith may prevent recovery under the statutory insurance scheme

Queensland Building Services Authority v Samimi & another [2021] QDC 112

David Pearce | James Knell | Tia Shadford

Key point and significance

The Queensland Building Services Authority (**QBSA**) (now the Queensland Building and Construction Commission - QBCC) was prevented from recovering a payment under the Queensland Home Warranty Scheme, in circumstances where it was found that the claimant failed to act in accordance with an implied duty of good faith when dealing with a builder and had unlawfully repudiated a contract.

The significance of this decision is that:

- a court has demonstrated that it is prepared to read into a domestic building contract an implied duty of good faith and fair dealing; and
- the QBSA / QBCC will be prevented from recovering payments made under the statutory insurance scheme provided by the *Queensland Building and Construction Commission Act 1991* (Qld) (**Act**) where the builder in question has a genuine defence to the claim made against it.

Facts

In 2006, Mehran Pty Ltd (**Mehran**) engaged Spectrum Pty Ltd (**Spectrum**) to undertake domestic building works for the construction of two residential dwellings (**contract**). Spectrum carried out building works between May 2006 and March 2007. Mehran alleged that the works undertaken by Spectrum were defective and that Spectrum had suspended the works and left them incomplete.

In July 2007, Mehran lodged a claim with the QBSA, seeking payment under the Queensland Home Warranty Scheme regarding the defective and incomplete works. Following this, in August 2007, Mehran issued a notice of termination to Spectrum for its failure to remedy alleged breaches and suspended the

works under the contract. The first defendant, Spectrum's director Karen Samimi (**Samimi**), considered that Mehran's notice of termination was invalid and amounted to a repudiation of the contract. Samimi caused Spectrum to issue its own termination notice to Mehran.

Under the Queensland Home Warranty Scheme, the QBSA paid $400,000 to Mehran in satisfaction of its claim. Having paid this amount, the QBSA issued a letter of demand to Samimi and the second defendant, Mojgan Samimi (also a director of Spectrum), seeking re-payment.

The QBSA then initiated proceedings against the Samimis to recover the $400,000, as a debt, under sections 71 and 111C of the Act. These provisions allow the QBSA to recover any payment made under the statutory insurance scheme from the building contractor who carried out the relevant residential construction work.

The court was required to consider a number of matters as part of this proceeding, including whether:

- Spectrum's suspension of works was unlawful, in circumstances where Mehran had breached an implied term of the contract by not giving proper instructions for building works to proceed;
- the works carried out by Spectrum were defective and incomplete; and
- Mehran was entitled to terminate the contract as a result of Spectrum's suspension of the works, or for carrying out defective and incomplete works.

Decision

The District Court dismissed the QBSA's claims, finding that:

- the Samimis were not at 'fault' as they had a defence to the claims brought against them;
- Spectrum had lawfully suspended the works under the contract; and
- Mehran was not entitled to terminate the contract.

Suspension of the Works

The Samimis argued that Mehran was subject to an implied term, which required it to cooperate with Spectrum by providing instructions that would permit the building works to proceed, which could be described as a duty of good faith and fair dealing. They asserted that Mehran breached that implied term by failing to provide instructions. In reply, the QBSA contended that there were clauses in the contract that prevented a duty of good faith from being implied into the contract.

Jones DCJ rejected the QBSA's argument. The court found that Mehran was contractually bound to provide the instructions sought by Spectrum in respect of the electrics and hydraulics works under the contract. The court rejected the QBSA's contention that enough information had been given to allow Spectrum to continue its work. Mehran was required to provide instructions to address ambiguities in relation to the electrical and hydraulics works, and its failure to do so put it in breach of important terms of the contract which required it to consult in a genuine way to resolve ambiguity and to not hinder Spectrum's ability to carry the works. The necessary information in relation to those works was found to *'simply not be there'*, in circumstances where the instructions were critical to the continuation of the project and were required before the project could proceed in a meaningful way. On this basis, Spectrum was entitled to suspend the works, pursuant to the suspension clause in the contract.

Mehran's termination of the contract

The court held that the grounds on which Mehran based its termination of the contract were insufficient and did not provide it with an entitlement to terminate.

The first ground on which Mehran terminated the contract was Spectrum's suspension of the works. However, as discussed above, the court found that Spectrum was entitled to suspend the works under the contract. As such, this did not provide Merhan with a lawful basis for terminating the contract.

The second ground for termination was Mehran's allegation that Spectrum had failed to carry out the works in accordance with the architect's plans. Mehran identified ten alleged defects. The court held that only one of those defects provided a basis for the lawful termination of the contract, and that was a failure to construct a firewall. Despite this defect, the court held termination to be invalid by operation of a clause in the contract that prevented the parties from terminating the contract if they were, themselves, in substantial breach of the

contract at the time. Mehran's failure to provide instructions put it in substantial breach of the contract and therefore prevented it from exercising its right to terminate.

The notice of termination issued by Mehran was held to indicate its intent to no longer be bound by the contract. The court found this to be a repudiation of the contract, which subsequently put Mehran in breach of the terms of the contract. The court held that the notice of termination issued by Spectrum amounted to an acceptance of that repudiation, thereby providing the Samimis with a defence to QBSA's claims against them.

| back to *Contents*

Sweet & Spiky! The Big Pineapple Joint Venture goes pear shaped…

Rankin Investments (Qld) Pty Ltd & Anor v CMC Property Pty Ltd & Ors [2021] QCA 156

Andrew Orford | Sam Rafter | Mikayla Colak

Key point

Where a 'joint venturer' is defined as the composite of an individual and their corporate entity, the joint venturer breaches its obligations under a joint venture agreement when those obligations are breached by one of its constituent parts.

Facts

This case concerns a joint venture agreement (**JV Agreement**) between Rankin Investments (Qld) Pty Ltd (**Rankin Investments**), a company owned by Bradley John Rankin (together, **the Rankin interests**) and CMC Property Pty Ltd, a company owned by Peter Thomas Kendall and David Spencer Ahern (**CMC**), in a project to redevelop the Big Pineapple on the Sunshine Coast.

The corporate vehicle for the joint venture was Big Pineapple Corporation Pty Ltd (**Big Pineapple Co**) as trustee for the Big Pineapple Unit Trust (**Big Pineapple Trust**). The Rankin interests and CMC each held 50% of the units in the Big Pineapple Trust. Under the JV Agreement:

- clause 5.1 provided that Big Pineapple Co's Board was responsible for the project's overall policies and implementation on behalf of the joint venture; and
- clause 6.1(a) provided an undertaking by each of the parties that they would take all necessary steps to give full effect to the provisions of the JV Agreement.

Despite this, on 19 December 2019, Mr Rankin sent various emails to consultants engaged to undertake the project requesting that they stop work. This was done without the authority of the Big Pineapple Co, without the knowledge or consent of CMC and without the approval of Big Pineapple Co's Board.

On 16 January 2020, CMC sent a default notice to Mr Rankin and Rankin Investments, asserting that the sending of the emails to the consultants placed the Rankin interests in default of the JV Agreement. Subsequently, on 26 February 2020 CMC gave a notice of event of default which, if valid, triggered provisions of the JV Agreement by which the parties' joint venture interest could be purchased by CMC as a result of the event of default. The notice required the default to be remedied within 28 days.

In the Supreme Court

The Rankin interests filed an application seeking declarations that the notices sent by CMC were not valid nor enforceable. The primary judge found that Mr Rankin's emails constituted a breach of obligations under the JV Agreement. As the Rankin interests had failed to remedy the breaches, the relevant clauses of the JV Agreement were triggered and the notices issued by CMC were valid.

Grounds of appeal

The Rankin interests appealed the primary judge's decision to the Court of Appeal. One of the arguments advanced by the Rankin interests was that clause 6.1(a) of the JV Agreement could not be used to prevent a party from engaging in conduct which is neither expressly prohibited nor prohibited as a matter of a clear implication from that express term.

The Rankin Interests also sought leave to raise a ground of appeal that had not been raised before the primary judge. The new argument was that the evidence did not establish that Mr Rankin's emails of 19 December 2019 were sent by, or on behalf of, Rankin Investments, and therefore the emails were not sent by a 'Joint Venturer' as defined in the JV Agreement. They argued that:

- a breach of an obligation imposed upon a *'party'* did not entitle a joint venturer to issue a notice to remedy breach, since a breach must be by a *'Joint Venturer'* as defined (ie the collective of the individual and their company); and
- on this basis, a breach by one part of the joint venturer was insufficient to find a breach by the joint venturer.

Decision

The Court of Appeal declined to grant the Rankin interests leave to argue the additional ground. The Court of Appeal noted the fact that the primary judge had proceeded on the *'understandable assumption'* that the emails were sent on behalf of Rankin Investments as no submission had been made to the contrary and, as the sole director and sole shareholder of Rankin Investments, Mr Rankin controlled the company.

Considering the issue in more detail, Applegarth J held that:

- where each *'joint venturer'* is defined to be the composite of an individual like Mr Rankin and his corporate entity, Rankin Investments, the *'joint venturer'* breaches its obligations under the JV Agreement when those obligations are breached by one of its constituent parts (ie Mr Rankin or Rankin Investments); and
- a finding otherwise would produce an *'odd commercial result'* where one member of the *'joint venturer'* could commit a substantial breach of the joint venturer's obligations but be insulated from the notice of default provisions in the JV Agreement.

In relation to the other grounds of appeal, the Court of Appeal concluded that the primary judge had been correct in finding that the Rankin interests had breached the JV Agreement. In doing so, the Court of Appeal held that the obligation to *'take all necessary steps to give full effect to the provisions of this Agreement'* is capable of giving rise to an implied negative stipulation that the party will not do things that are inconsistent with the obligation to take necessary steps (for example, by sending the stop work emails).

| back to *Contents*

Prepayments reduce amounts payable under QBCC statutory insurance scheme

Schneider v Queensland Building and Construction Commission [2021] QCA 155

David Pearce | Hazal Gacka | Charlotte Lane

Key points

A claim made under the statutory insurance scheme, established under the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**), will be reduced by the amount of any *'prepayments'* made to a contractor. Under the scheme, there is a clear distinction between *'prepayments'*, which are monies paid before work is undertaken, and monies which are *'due'*, which is payment for work that has actually been carried out.

Facts

The applicants (**the Schneiders**) entered into a building contract (**contract**) with Contract Build Pty Ltd (**Contract Build**) to erect a house on a block of land they owned in Roma. The agreed price for the construction was $284,900, to be completed and paid over six stages. The first three payments were made between January and July 2014 (for the deposit and completion of two construction stages). In October 2014, the contract was novated (ie transferred) to Line Constructions Pty Ltd (**Line Constructions**).

Two certificates of insurance under the statutory insurance scheme under the QBCC Act were issued in relation to the contract, the first when Contract Build was the contractor and the second when Line Constructions became the contractor. Section 67X of the QBCC Act provides that the purpose of the statutory insurance scheme is to provide assistance to consumers of residential construction work for loss associated with work that is defective or incomplete.

In 2015, Line Constructions sent the Schneiders invoices accompanied by photographs that purported to show completion of the third and fourth stages of construction. Unbeknown to the Schneiders, the photographs were of a different property and Line Constructions had done no work at all under the contract. Line Constructions made two fraudulent claims for the next two progress payments owing under the contract, totalling $128,205. In 2016, the Schneiders became aware that Line Constructions had made fraudulent claims and made a complaint to the Queensland Building and Construction Commission (**QBCC**). That complaint initiated a claim under the statutory insurance policy (**Policy**). Following this, the Schneiders terminated the contract with Line Constructions.

The QBCC's decision on the claim

Under the statutory insurance scheme, the QBCC will pay an insured's loss for, among other things, non-completion of insured work referred to in a certificate of insurance. Clause 1.6(b) of the Policy provides, where in the opinion of the QBCC, the insured pays to or on behalf of the contractor any monies for the contracted works before they become due (ie a 'prepayment'), the QBCC will reduce the amount payable under the Policy by the value of the prepayment. The value of the prepayment is the QBCC's assessment of the value of the incomplete work in the stage of the contract for which the prepayment was made.

The QBCC considered that the Schneiders had made prepayments to Line Constructions before the work had actually been undertaken and the monies had become due. Consequently, the QBCC denied the claim under the Policy.

The Queensland Civil and Administrative Tribunal

The Schneiders commenced proceedings in the Queensland Civil and Administrative Tribunal (**QCAT**) to review the decision of the QBCC. QCAT decided to permit the claim by the Schneiders.

The QBCC appealed this decision to the Appeal Tribunal of QCAT (**Appeal Tribunal**). The Appeal Tribunal held that the payments were prepayments under the Policy and the QBCC was entitled to reduce the amount payable to the Schneiders under the Policy by $128,205 reflecting the prepayments made by the Schneiders.

The Schneiders sought leave to appeal against the Appeal Tribunal's decision to the Supreme Court of Queensland.

Decision

The Court of Appeal rejected the Schneiders' application for leave to appeal. The question to be answered was whether the payments by the Schneider to Line Constructions had been paid before they had become due and were therefore a *'prepayment'* for the purposes of clause 1.6(b) of the Policy. The court held the correct construction of clause 1.6(b) was that money cannot become *'due'* for works which are not done.

The court considered that clause 1.6(b) is not dependent upon the particular conditions of a contract or the reason why the works had not been done. It did not depend on the knowledge of the owner or the state of mind of the contractor. Clause 1.6(b) operated solely upon the question of whether work had been done and therefore the money for that work had become due. If payment is made before that point, it should be construed as a payment of money for the contracted works before they become due – in other words, prepayment for work that has not been done and is therefore *'incomplete work'* within the meaning of clause 1.6(b).

The court noted that it could not be the intention of the statutory insurance scheme to embroil the QBCC in an adjudication of the merits of claims. Therefore, the obligation of the QBCC under clause 1.6(b) on the court's construction is the simple assessment of whether work has been done or not and whether a prepayment has been made or not.

Consequently, the QBCC was entitled to reduce the amount payable to the Schneiders by $128,205, being the payment made by the Schneiders to Line Constructions which was payment of money for the contracted works before they became due. This was simply due to the fact the work had not yet been done by Line Constructions.

| back to *Contents*

VICTORIA

No apportionment of claims for breaching the warranty to carry works out in a 'proper and workmanlike manner' in domestic building contracts

Bellini v Meldan (Vic) Pty Ltd (Building and Property) [2021] VCAT 833

Jeanette Barbaro | Tom Kearney | Michelle Yu

Key point

Claims for breach of the implied warranty under section 8(a) of the *Domestic Building Contracts Act 1995* (Vic) (**Act**) to carry works out in a *'proper and workmanlike manner and in accordance with the plans and specifications set out in the contract'* are not apportionable.

Where previous case law appeared to suggest that claims for breach of the warranty under section 8(a) may be apportionable, this decision clarifies that only claims arising from the breach of subsection 8(d) (a warranty that *'the work will be carried out with reasonable care and skill'*) of the Act may be apportionable.

Facts

In 2013, the applicants (**owners**) purchased a property in Newport. As subsequent owners of the property, they were entitled to the benefit of the implied warranties under section 8 of the Act.

The owners alleged a number of building defects (such as defective construction of a fence, leaky showers and inadequate painting) and issued proceedings alleging breach of the implied warranties under the Act. The owners sought damages from the first respondent (**builder**) and second respondent (**building surveyor**) for the cost of defect rectification and the cost of alternative accommodation.

The builder sought to limit its liability by relying upon the apportionment provisions of Part IVAA of the *Wrongs Act 1958* (Vic).

The question before the Tribunal was:

- whether the claims for each defect were apportionable between the builder and building surveyor; and
- the amount of damages awarded for each alleged defect, on the basis of expert evidence provided.

Decision

Senior Member Walker held that:

- breaches of the warranties under subsections 8(a) to (c) and (e) to (f) of the Act are not apportionable as they do not arise from a failure to take reasonable care; and
- breach of the warranty under subsection 8(d) (that *'the work will be carried out with reasonable care and skill'*) of the Act may be apportionable.

The Senior Member noted that the terms in which the claim is framed are an essential determinant of whether a claim can be said to arise from a failure to take reasonable care. Therefore, a claim for breach of the warranty under subsection 8(d) of the Act may not be apportionable, even if the respondents fail to use reasonable care if the claim is not framed correctly.

| back to *Contents*

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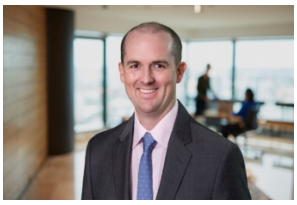

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