Construction Law Update

September 2021

Contents

In the Australian courts

NEW SOUTH WALES

Measuring damages for defective building work

B & W Windows (Residential) Pty Ltd v Sibilia [2021] NSWCATAP 271

Andrew Hales | Maciej Getta | Jonathan Molina

Key points and significance

An owner of a defective building (assuming liability is established) is generally entitled to recover as damages the cost of rectifying the defective work. The onus of proving the measure of damages lies upon the party seeking to recover damages. Proof requires more than submitting an invoice from a third party builder. Proof is required to demonstrate that all of the rectification work performed was required to *'bring the work into conformity with the contract'*.

Facts

B & W Windows (Residential) Pty Ltd (**contractor**) entered into a contract with Sibilia (**owner**) on 29 January 2018. The contractor agreed to manufacture, supply and install windows, doors and screens at the owner's principal place of residence at Marrickville.

A dispute arose in respect of an allegation by the owner that three windows leaked through the frames and sills. In accordance with clause 2(a) of a Deed of Settlement and Release the contractor agreed *'without admission of liability'* to perform and complete rectification work which included the removal of three windows from site, identified as the pool window, the ensuite window and the master bedroom window and the re-fabrication and re-installation of those windows.

When the re-installed windows were tested with a hose the owner asserted that all three still leaked. The contractor conceded that, at the time of the test, the kitchen pool window and the master bedroom window leaked.

By a decision delivered on 2 October 2020, the Tribunal concluded that all three windows were leaking and defective because the contractor had not utilised small joint sealer in the re-fabrication. The Tribunal found the contractor liable for the reasonable cost of rectification of the leaking windows and awarded:

- the amount of an invoice for the supply and installation of the replacement windows from a different manufacturer (the Tribunal having concluded that the appropriate method of rectification was the replacement of the windows and that the use of silicone to stop leaks was not appropriate);
- $29,601.69 in respect of *'loss and damage in connection with the removal and replacement of the windows'* reflecting three invoices issued by Mr Bannister (**builder**); and
- $9,420 for the supply of scaffolding.

The contractor filed a notice of appeal on a number of grounds, one of which was that the Tribunal erred in law by awarding $29,601.69 in respect of loss and damage in connection with the removal and replacement of the windows reflecting three invoices issued by the builder.

Regarding this amount the Tribunal had found:

> *'[*the owner's expert*] provided a breakdown of costs, and I have received no breakdown of costs to the contrary and he was not cross-examined in a way that causes me to reject his evidence. In the absence of any expert building evidence to the contrary, I make orders in accordance with the total contained therein.'*

The contractor asserted that this did not establish that the work the subject of those invoices was required in consequence of any breach of warranty on the part of the contractor.

Appeal Tribunal decision

The Appeal Tribunal allowed the appeal as the invoices relied on by the owner were not clear enough to establish that the work referred to in the invoices was work required in order to bring the work into conformity with the contract or to establish the value of the work.

The Appeal Tribunal considered the leading case of *Bellgrove v Eldridge* (1954) 90 CLR 613 (***Bellgrove***) regarding the principles of assessment of damages for defective building work. In *Bellgrove*, the High Court of Australia found that damages for breach of the obligation to construct in accordance with the contract and specifications are measured by the cost of rectification, where it is necessary to undertake that rectification to produce conformity and where it is reasonable to adopt that course.

The Tribunal made an error of law in finding the contractor liable for the amount of the builder's invoices because they did not acknowledge that the onus of proving that the invoices reflected costs incurred by reason of the contractor's breach of statutory warranties was the responsibility of the owner.

The Appeal Tribunal noted that there was no requirement on the contractor to undertake cross-examination on the builder in order to clarify the extent to which the invoices reflected work that was necessary to bring the work into conformity with the contract. This obligation lay on the owner. By not directly clarifying the contents of the invoices that related to the removal and replacement of the windows, this led the Appeal Tribunal to infer that the evidence on that topic (from the owner's builder) would not have assisted the owner.

| back to *Contents*

Statutory warranties: when does the time limit start?

Howell v Talevski [2021] NSWSC 1133

Andrew Hales | Laura-Rose Lynch | Tom Dearden

Key point

Correspondence between a builder and home owner had the effect of varying the building contract between the parties and extending the completion date of the work. If the work had been completed by the original completion date specified in the building contract, the action would have been outside the seven-year limitation period for breach of statutory warranty. However, due to the correspondence that had passed, the completion date had been extended such that the proceedings were in fact brought within the limitation period.

Significance

Builders should be mindful that promises they make to continue working on a project after the date for completion specified in the building contract has passed could have the effect of varying the building contract and extending the date for completion. This could in turn extend the time period in which a claim can be brought against them.

Facts

In 2007, Mrs Jenny Howell (and her late husband) (**owner**) decided to demolish their existing residence in Mosman and construct a duplex, with plans of living in one half and renting out the other. They entered into a home building contract with Mr Peter Talevski (**builder**) on 26 May 2007. The building contract comprised a series of documents including general conditions 'FT241' entitled 'Home building contract' issued by the Office of Fair Trading.

Relevantly, the building contract specified that the *'date for completion of the work'* was *'32 calendar weeks from the date the work is due to commence'*. It also specified that the parties could vary the contract by written agreement.

The builder commenced work in August 2007 and, due to numerous delays (the causes of which were disputed between the parties, with each party blaming the other), continued working on the project until August 2012. During this time, there were numerous communications between the owner and the builder and numerous requests for extensions of time, with the builder promising that he would complete the project.

Eventually, on 9 November 2012, the owner terminated the building contract with the works remaining incomplete.

On 17 July 2018, the owner commenced proceedings against the builder for breach of the statutory warranties implied into the building contract under section 18B of the *Home Building Act 1989* (NSW) (**HBA**) and expressly incorporated into the general conditions. While the HBA has since been amended, at the time of the building contract (26 May 2007) section 18E of the HBA required such claims be commenced within seven years after:

> *'(a) the completion of the work to which it relates, or*
>
> *(b) if the work is not completed:*
>
> *(i) the date for completion of the work specified or determined in accordance with the contract, or*
>
> *(ii) if there is no such date, the date of the contract.'*

Decision

The Supreme Court of New South Wales decided in favour of the owner by holding that the proceedings had been commenced within the limitation period.

The court determined that at the time the contract was terminated the work was not complete based on the requirements for completion under the building contract. Therefore, paragraph (b)(i) of section 18E of the HBA was the applicable provision for determining whether the proceedings had been brought within the seven-year limitation period. The court needed to determine the relevant *'date for completion of the work specified or determined in accordance with the contract'*.

The building contract had originally specified that the completion date would be 32 calendar weeks after the work was due to commence. However, the court ultimately held that the communications between the parties, where the builder promised to complete the works, had the effect of varying the contract and extending the completion date well beyond the date originally agreed between the parties.

Although the court could not determine a precise completion date, by looking at these communications it held that the parties had effectively agreed to extend the completion date until sometime in mid-2012. Since the proceedings had been commenced within seven years of this general period, the court ultimately held that they had been brought within time.

| back to *Contents*

Another decision on commencement of statutory warranty limitation periods…

Jandson Pty Ltd v James [2021] NSWCATAP 274

Andrew Hales | Adriaan van der Merwe | Jack McFadden

Key point and significance

Statutory limitation periods do not commence on the issue of an occupation certificate under the terms of the standard form Housing Industry Association (**HIA**) contract; they commence upon practical completion which may be earlier depending on whether the scope of work includes all work required for an occupation certificate.

Facts

James (**owner**) entered into a contract with Jandson Pty Ltd (**builder**) under the standard form HIA conditions to construct a residential building in March 2009. Practical completion was reached on 8 July 2010, and a final occupation certificate was issued on 20 October 2010. The owner subsequently complained about alleged breaches of the statutory warranties under the HBA, due to water penetration in various locations. The builder attended on a number of occasions to rectify this issue; however, the water penetration continued.

In July 2017, the owner's solicitor wrote to the builder alleging breaches of statutory warranties and proposing that the builder undertake the scope of works outlined in the owner's expert's draft report (**owner's letter**). At an on-site meeting, the builder rejected this solution, and in an email of August 2017 sent from the builder to the owner's solicitor the builder proposed an alternative scope to rectify the water penetration (**builder's letter**). The builder commenced the works outlined in its letter but did not complete them.

In June 2019, the owners commenced proceedings in the NSW Civil and Administrative Tribunal claiming that the works were defective. The owner claimed that the proceedings were brought within the seven-year statutory limitation period as the builder's letter constituted a separate contract. The Tribunal found in favour of the owner and ordered the builder to carry out the works specified in the owner's expert report. The builder appealed the decision on grounds which included that the Tribunal made errors of law in relation to contract formation, consideration and the completion date.

Decision

The Appeal Panel upheld the appeal finding that the owner's application to the Tribunal was out of time as the parties did not enter into a new contract or vary their original contract and the relevant building works were completed under the contract before the final occupation certificate was issued.

Contract formation

The Appeal Panel found that it was not open to the Tribunal to find that the builder's letter satisfied the requirements of a new contract. While accepting that the owner's letter did constitute an offer, this was expressly rejected in the builder's letter, which the Appeal Panel found to constitute a counter offer. Additionally, there was no evidence that the owner was aware of the builder's counter offer, as this was sent to the owner's solicitor and the evidence did not support a conclusion that the owner's solicitor had accepted the offer or that he was authorised to do so.

Consideration

The Appeal Panel noted that, based on its conclusions relating to contract formation, it was not strictly necessary to determine the adequacy of consideration but nevertheless did so. The Appeal Panel considered various authorities noting that a promise not to sue was valid consideration, as distinct from a promise to forbear temporarily, which is only good consideration where it is a promise to defer bringing a claim which is honestly made. The Appeal Panel found that the consideration was good, amounting to more than a temporary forbearance to sue, as it was sufficiently clear that had the builder agreed to undertake the scope of works proposed by the owner, the owner would not have sued.

Completion Date

The Appeal Panel concluded that the date in the final occupation certificate was not the date on which the building works were completed and from which the statutory period ran. Based on section 3B(1) of the HBA, the statutory period commenced on completion of the building works within the meaning of the HIA contract, meaning when practical completion was achieved. Based on the interpretation of the HIA contract, the Appeal Panel concluded that the statutory period should have commenced when the works reached practical completion, being 8 July 2010.

| back to *Contents*

QUEENSLAND

How much is 50% of a pineapple worth? The Big Pineapple Joint Venture goes back to Court

CMC Property Pty Ltd & Ors v Rankin Investments (Qld) Pty Ltd & Anor [2021] QCA 173

Andrew Orford | Sam Rafter | Mikayla Colak

Key point

An opinion about the monetary value of something depends upon many factors, such as the method of valuation and the point in time in respect of which the value is said to hold. Where the value of a joint venturer's interest is to be determined and the contract is silent as to the valuation date, the date which will produce the most relevant and current value should be preferred.

Facts

This case is another appeal (further to our *August Construction Law Update*) concerning the joint venture agreement (**JV Agreement**) between Rankin Investments (Qld) Pty Ltd, 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.

In early 2020, CMC triggered the default buy-out rights in the JV Agreement and thereby began a process by which the Rankin interests would sell their interest in and withdraw from the joint venture. One of the steps in this process is the determination of the value of the departing joint venturer's interest.

The JV Agreement provided that:

- where the parties failed to agree upon the value of the interest (as was the case here), a chartered accountant would be appointed (as an expert) to determine the value of the interest being sold;
- the chartered accountant was also entitled to appoint two valuers to assist with the valuation.

The JV Agreement did not expressly provide for the point in time on which the value was to be determined. The issue in dispute was the contractually implied date at which the value of the interests was to be determined. The parties agreed that it must be one of two points of time:

- the date on which the notice of sale is deemed to have been given (i.e. the date on which the buy-out rights were triggered); or,
- the date on which the chartered accountant actually determines the value of the interest (i.e. the current value as at the date of the valuation).

At first instance, Davis J concluded that the relevant point in time for the valuation was the latter of the two options. CMC appealed against this decision. CMC argued that it was a matter of *'commercial common sense'* that the value of an offer should be its value when it is made. Further, it contended that because the chartered accountant is entitled to appoint two valuers to assist in reaching a valuation, there might be conflicting valuations and valuation dates, which would lead to uncertainty or absurdity.

Decision

The Court of Appeal dismissed the appeal, finding that Davis J had been correct in concluding that the correct point in time for the valuation was the date on which the chartered accountant expressed to the parties his or her opinion.

The court found no commercial reasoning to support CMC's submission that the valuation had to be based on the date on which the buy-out rights in the JV Agreement were triggered. Further, the court held that the role of the additional valuers was to assist the chartered accountant, and any conflict in their valuations would be resolved by the chartered accountant before a determination was made.

The court highlighted the fact that the sale process may not be quick, and the value of the withdrawing party's interest may vary greatly over time. While the exit process is underway, the project must continue and its continuation might require Big Pineapple Co to take up capital, to accept loans, to incur liabilities and to discharge them. As such, the liabilities of each joint venturer may change as the project proceeds. To construe the contract as stipulating a purchase price that may not be relevant at the time of the actual sale could lead to unfairness. Instead, the court held that the Rankin interests should have available for consideration an offer at a price which represents the most relevant value of the interest – their current value.

| back to *Contents*

CFMMEU representatives permitted to enter construction site

Enco Precast Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union & Ors [2021] ICQ 15

Samantha Betzien | Allie Flack | Daniel Szabo

Key point and significance

This case is a reminder that union officials with work health and safety (**WHS**) entry permits are entitled to enter workplaces, including construction sites, where the official holds a reasonable suspicion of a safety issue and the union's membership rules cover workers at the site (whether or not workers are actually members).

Facts

The Construction, Forestry, Maritime, Mining, and Energy Union (**CFMMEU**) received a tip-off on its *'safety hotline'* about safety issues at Enco Precast Pty Ltd (**Enco**), including the poor condition of plant and equipment and issues with access and egress.

Under the *Work Health and Safety Act 2011* (Qld) (**WHS Act**), union officials who hold work health and safety entry permits (**WHS Entry Permits**) issued by the Industrial Registrar are entitled to enter a workplace if they reasonably suspect a safety contravention has occurred to inquire into the suspected contravention, and must issue a notice of entry when entering. The union officials may only enter if there are *'relevant workers'* present, being workers who are, or are eligible to be, members of the union.

Following the tip-off, the CFMMEU officials holding WHS Entry Permits attended Enco's site to investigate the safety complaint. Enco barred the CFMMEU officials' access to the site, arguing the CFMMEU officials did not have a right of entry under the WHS Act because there were no *'relevant workers'* present, being workers who were members of or eligible for membership of the CFMMEU. The CFMMEU officials returned the next day and were again refused entry. On the third day, and after WHS inspectors attended the site, Enco allowed the CFMMEU officials to enter. On each attempted entry to the site, the CFMMEU officials served Enco with notices of entry.

Enco commenced an application against the CFMMEU and its officials requesting the Industrial Commissioner declare that the notices of entry were invalid, that the CFMMEU officials were not entitled to enter Enco's site, and that for the purposes of the WHS Act the CFMMEU is not entitled to represent any worker at the Enco site. Under the WHS Act, the Industrial Commissioner hears disputes about the exercise of an entry right.

The Industrial Commissioner found there was no *'dispute about'* the reasonable suspicion as Enco had allowed the CFMMEU officials to enter on the third occasion. She further determined that the CFMMEU may have some coverage, but that there was insufficient evidence to finally determine the issue and therefore Enco had failed to discharge its onus of proving no relevant workers were present on site. In case she was wrong, the Industrial Commissioner interpreted the CFMMEU's coverage rules to find that there were workers that fell within the coverage rules. For one of the eligibility rules, the Industrial Commissioner found there was insufficient evidence as to whether the relevant work forms the *'primary function'* of the relevant workers.

Enco appealed the decision to the Industrial Court of Queensland, arguing that the Industrial Commissioner was wrong in finding that there was no dispute about the reasonable suspicion, that the onus for the *'relevant workers'* issues was on Enco, and that there may have been coverage by the CFMMEU at the Enco site.

Decision

The court rejected Enco's appeal. The court accepted there was no dispute as to the reasonable suspicion issue. The court further accepted that Enco bore the onus of proof in claiming the CFMMEU did not have coverage at the Enco site, and that Enco had not discharged that onus.

The court considered the interpretation of the CFMMEU's coverage rules in more detail and in particular under two different rules which the CFMMEU claimed justified coverage: the *'FEDFA Rule'* and the *'Terrazzo Rule'*. Although the Industrial Commissioner's decision on the FEDFA Rule turned on the onus issue, the Terrazzo Rule finding did not. The court accepted the factual findings on the terrazzo rule, meaning the CFMMEU did have coverage and therefore the CFMMEU officials had a right to enter under the WHS Act.

FEDFA Rule

The FEDFA Rule is a part of the CFMMEU's coverage rules originating in the former Federated Engine Drivers' and Firemans' Association. There were four categories of workers that potentially fell within this rule: the bobcat skid-steer operator; the boiler attendants; the gantry crane operators; and the hydraulic pump attendants. The Industrial Commissioner had found that each of the four categories of workers were performing work that fell within the description of the FEDFA rule, being respectively operating the bobcat skid-steer, operating the boiler, operating the gantry crane, and attending the hydraulic pump, but that in each case the Industrial Commissioner could not make a finding as to whether those duties were the workers' primary functions. Given the onus was on Enco to prove they were not, this finding meant that Enco had not proven that the CFMMEU did not have coverage.

The court found the Industrial Commissioner had made no error in making factual findings as to the duties performed by each worker, construing the FEDFA rule to ascertain whether the workers fell within the rule, and considering whether she was satisfied that the relevant functions were the primary functions of the workers. The court accepted each finding was made on a proper basis and that there had been no appellable error.

Terrazzo Rule

The Terrazzo Rule in the CFMMEU's coverage rules includes workers *'engaged in the preparation and/or erection of terrazzo or similar compositions'*. The Industrial Commissioner had accepted that the product made by Enco was a similar composition to terrazzo, and therefore workers engaged in preparing the Enco product were captured by the Terrazzo Rule.

Enco argued that the Terrazzo Rule, in the context and history of that rule, did not apply to products made by unskilled workers except those assisting a skilled person, and that the uncontested evidence before the Industrial Commissioner was that Enco's workers were unskilled and not assisting a skilled labourer. The court found that the broader rule in which the Terrazzo Rule was contained referred to particular skilled trades, but there were no such references made to *'those engaged in'* preparing terrazzo and similar products. All persons, whether tradespeople or otherwise, who prepared the Enco product were captured by the Terrazzo Rule, and therefore the CFMMEU had coverage at the Enco site and had the right to enter under the WHS Act.

The court found no errors with the Industrial Commissioner's findings and dismissed the appeal.

| back to *Contents*

BIF Act requirement to 'give' a copy of an adjudication application is strictly enforced

Equinox Construction Pty Ltd v Henning & Anor [2021] QSC 223

Andrew Orford | Matt Hammond | Charlotte Lane

Key points

Courts will strictly construe the requirement for a claimant to 'give' a copy of an adjudication application to a respondent under section 79(3) of the *Building and Construction Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**). While an adjudication application may be validly served by post under the Act, any claimant wishing to do so needs to be alive to the importance of proving service.

Facts

The applicant, Equinox Construction Pty Ltd (**Equinox**), a building company, and the first respondent (Mr Henning), a landscaper, entered into a construction contract. Mr Henning made a $29,255 payment claim to Equinox (**payment claim**). Equinox did not respond to the payment claim. As a result, it became liable to pay the amount claimed. Mr Henning applied for an adjudication of the payment claim and subsequently received an adjudication decision in his favour, which he filed as a judgment debt in court.

Several months later, Equinox applied to the Queensland Supreme Court for a declaration that the adjudication decision was void on the basis of jurisdictional error, because Mr Henning did not *'give'* Equinox a copy of the adjudication application, and the first time Equinox became aware of it was after it had been determined by the Adjudicator.

Issues

The primary issue for determination was accordingly whether Mr Henning *'gave'* Equinox a copy of his adjudication application as required by the BIF Act. Ryan J explained that the critical issue for her consideration was whether she could overlook deficiencies in Mr Henning's evidence and infer that Mr Henning *'gave'* Equinox a copy of his adjudication application by posting it in accordance with the provisions of section 39A of the *Acts Interpretation Act 1954* (Qld) (**Acts Interpretation Act**).

Decision

Ultimately, Ryan J declared that service was not effective and the adjudication determination was void.

Section 79(3) of the BIF Act provides that where a party to a construction contract applies for adjudication of a payment claim, that party must *'give'* a copy of their application for adjudication to the respondent. If this step is not taken, the adjudicator has no jurisdiction to adjudicate the payment claim.

Section 39 of the Acts Interpretation Act provides that if an Act requires or permits a document to be served on a person, the document may by served on an individual by sending it by post. Section 39A further provides that service may be effected by properly addressing, prepaying and posting the document as a letter and is taken to have been effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved.

Ryan J explained that in order to resist the application, Mr Henning had to be able to prove that he had *'given'* (or in other words, brought to the notice of Equinox) a copy of his adjudication application. Importantly, Mr Henning did not send the adjudication application by registered post. Nor was his evidence sufficient to conclude that he had, in fact, actually posted it or that it had been sent to the correct address. In those circumstances, Ryan J concluded that deficiencies in the evidence could not be overlooked and that as a result Mr Henning was unable to rely upon sections 39 and 39A of the Acts Interpretation Act to prove service.

Ryan J was therefore not satisfied that the adjudicator had jurisdiction to make a decision regarding Mr Henning's payment claim. As a result, Mr Henning was unable to rely upon the adjudication procedures of the BIF Act to recover the money he claimed to be owed by Equinox.

| back to *Contents*

Sophisticated parties denied the benefit of a force majeure clause and an implied term of good faith

North Queensland Pipeline No 1 Pty Ltd v QNI Resources Pty Ltd [2021] QSC 190

Julie Whitehead | Sarah Cahill | Tia Shadford

Key point and Significance

A force majeure event must be outside a party's control and not the direct result of a party's fault or negligence. In addition, all notice requirements specified in a force majeure clause must be complied with.

There is no binding authority obliging a court to imply a duty of good faith into a commercial contract. A court will not imply a duty of good faith in circumstances where the contract is between commercially sophisticated

parties, the contract is capable of sensible operation without the implication of that term, and the contract contains terms which contradict the implication of a duty of good faith.

Facts

In 2005, the plaintiffs, North Queensland Pipeline No 1 Pty Ltd and North Queensland Pipeline No 2 Pty Ltd (**NQ Pipelines**) entered into a gas transportation agreement (**GT Agreement**) with Queensland Nickel for the transportation of gas along a high-pressure natural gas pipeline from the gas fields near Moranbah to Yabula. Queensland Nickel entered into the GT Agreement as manager of the Queensland Nickel joint venture and agent for the joint venture participants, QNI Resources Pty Ltd and QNI Metals Pty Ltd (**QNI Resources & Metals**).

Between January and April 2016, Queensland Nickel entered voluntary administration and was ultimately placed into liquidation. NQ Pipelines looked to QNI Resources & Metals to recover the outstanding amounts owed under invoices issued between January 2017 to May 2021. Of the significant amount owned, QNI Resources & Metals reluctantly paid only $9,134,187. NQ Pipelines instituted proceedings against QNI Resources & Metals to recover the outstanding amount, following which QNI Resources & Metals issued a counterclaim to recover the $9,134,187 paid to NQ Pipelines on the basis that the outstanding amount was not recoverable due to:

- a force majeure event having occurred under the GT Agreement, specifically Queensland Nickel's failure to obtain the licences required to operate its refinery; and
- the implication of an obligation of good faith into the GT Agreement.

A portion of the outstanding amounts included imbalance charges payable under the GT Agreement, as well as ongoing charges which the contract required continued payment of during a force majeure event. QNI Resources & Metals argued that both of these were a 'penalty' and therefore unenforceable.

Decision

Freeburn J found in favour of NQ Pipelines and dismissed QNI Resources & Metals' counterclaims.

Force Majeure Event

The court held that QNI Resources & Metals' failure to secure the necessary licences did not constitute a force majeure event under the GT Agreement. To be a force majeure event, the event must have occurred without the QNI Resources & Metals' fault or negligence. Freeburn J was not satisfied that this was the case given that there was no evidence to indicate that there had been a reasonable attempt by QNI Resources & Metals to secure the necessary licences.

QNI Resources & Metals were also prevented from relying on the force majeure clause as the relevant notice requirements under that clause had not been followed. Freeburn J found that the force majeure clause expressed the notice period in mandatory terms. As a result, lawful suspension under the force majeure clause could only occur where there was a force majeure event and notice, with the particulars as required under the GT Agreement, had been given. Neither of the notices put forward by QNI Resources & Metals were held to be sufficient for the purpose of force majeure under the GT Agreement, as neither specified the *'Affected Obligation'* as required. In coming to this decision, his Honour rejected the contention that the notices were sufficient because the circumstances which may have given rise to a force majeure event could be inferred from the other notices provided.

Was there a penalty?

Freeburn J concluded that the requirement to pay ongoing service charges was not a penalty, as the sole or predominant purpose of the force majeure clause was not to punish. This was because:

- the arrangement was an agreement between two commercially sophisticated parties;
- the charges were reasonable as the apparent intention of the payment structure under the GT Agreement was to recover the significant costs that would be incurred irrespective of the occurrence of a force majeure event; and
- the GT Agreement made allowances for the reserved capacity in the pipeline which continued for Queensland Nickel.

The imbalance charges were also held not to have a predominantly punitive purpose and therefore were not a penalty. The charges (and the relative responsibility allocations) were held to be commercially sensible and effectively provided for the effects of positive and negative imbalances.

Duty of good faith

Freeburn J rejected QNI Resources & Metals' contentions that a duty of good faith could be implied into the GT Agreement and adopted the cautious approach previously taken by other courts with respect to implying good faith obligations into commercial contracts.

His Honour confirmed that the law is unsettled when it comes to implying a term of good faith, however, reiterated the high threshold that must be met for a term to be implied into a contract. Freeburn J was not prepared to take the *'large step'* of implying an obligation of good faith, given the parties and the GT Agreement were relatively sophisticated and the GT Agreement contained terms which contradicted the implication of a general or more specific implied term of good faith. The court also confirmed that implying a term of good faith as a matter of fact is a difficult hurdle to overcome and was not warranted in this case as it would require Queensland Nickel to subordinate its interests (in contradiction with accepted authority that the obligation of good faith should not require a party to subordinate its interest to those of the contract's counterparty). The GT Agreement was capable of sensible operation without implication of the term, and implication of the term was inconsistent with the GT Agreement's express terms or its tenor.

| back to *Contents*

Fraud, deceit, conspiracy: conduct not justified by QBCC licensing concerns

Sentinel Springwood Retail Pty Ltd & Ors v Tomlinson & Ors [2021] QDC 159

Michael Creedon | Luke Trimarchi | Daniel Szabo

Key point and significance

Significant wrongful conduct could not be explained away by claiming that certain actions, including falsifying tenders and quotes, were carried out to prevent the employer's breach of its obligation not to carry out building project management work without the appropriate licence under section 42(1) of the *Queensland Building and Construction Commission Act* (1991) (**QBCC Act**).

Facts

Mr Tomlinson was employed by Shield Property Services Pty Ltd (**Shield**), which provided services to companies in the Sentinel Group (**Sentinel plaintiffs**). The Sentinel plaintiffs owned and operated commercial properties, and Shield organised building management and maintenance services on their behalf. Mr Tomlinson's role was to liaise with contractors in order to obtain quotes for building work on various properties and projects. He was required to submit to the Sentinel plaintiffs three quotes from contractors and recommend which contractor they should retain.

For eight different projects, instead of obtaining three quotes, Mr Tomlinson had sought only one quote and had then fabricated or amended quotes so that the genuine quote appeared to be the cheapest quote. He also increased the genuine quotes so that the Sentinel plaintiffs paid significantly more for building works than the contractors had originally quoted. Two contractors, Bodel Projects Pty Ltd (**Bodel**) and Verus Construction Pty Ltd (**Verus**) gave Mr Tomlinson a financial reward after Sentinel accepted their inflated quotes.

Shield and the Sentinel plaintiffs discovered Mr Tomlinson's conduct and terminated his employment. They sued Mr Tomlinson for the tort of deceit, breach of fiduciary duty, the tort of conspiracy, and breach of his employment contract. They also claimed against three contractors, Bodel, Growth Australia Pty Ltd (**Growth Australia**) and Verus for accessory to the breach of fiduciary duties and the tort of conspiracy.

The Sentinel plaintiffs claimed that, but for the conduct of Mr Tomlinson, they would have engaged contractors for a much lower price, and that they suffered loss of at least the difference between the original genuine quotes received from contractors and the inflated quotes which they accepted on Mr Tomlinson's recommendation.

The Sentinel plaintiffs reached a settlement with Bodel and Growth Australia before trial and did not press those claims. They maintained their claims against Mr Tomlinson and Verus.

Decision

The court found:

- Mr Tomlinson had committed the torts of deceit and conspiracy and breached his fiduciary duties to the Sentinel plaintiffs;
- the Sentinel plaintiffs had not suffered loss with respect to the Bodel and Growth Australia projects, because of the settlement amounts received, and could not recover damages for those particular claims in deceit and conspiracy;
- Verus was an accessory to Mr Tomlinson's breach of fiduciary duty for that project and had also committed the tort of conspiracy; and
- Mr Tomlinson was liable to account for the secret profit he received from contractors.

The Sentinel plaintiffs were therefore awarded damages against Mr Tomlinson and Verus for the difference between the original Verus quote and the altered Verus quote, and to recover the secret profits Mr Tomlinson received from contractors in breach of his fiduciary duty not to profit from his position as a fiduciary.

The court rejected Mr Tomlinson's defences including that he carried out his conduct in order to prevent Shield from committing breaches of section 42(1) of the QBCC Act.

Section 42(1) argument

Section 42(1) of the QBCC Act provides that a person must not carry out, or undertake building work unless the person holds a contractor's licence of the appropriate class under the QBCC Act. A person who contravenes this section commits a crime and is liable to receive a penalty or, in extreme cases, imprisonment.

Mr Tomlinson argued he did not fraudulently create quotes in order to enrich himself or the successful contractors but instead to prevent his employer, Shield, from committing an offence under section 42(1) of the QBCC Act. Mr Tomlinson claimed that he formed the view that Shield required a QBCC licence in order for it to provide project management services to the Sentinel plaintiffs as these works were *'building works'* under the QBCC Act. Therefore, by seeking multiple quotes, Shield would be acting unlawfully.
Mr Tomlinson claimed that, by fabricating quotes, he was merely trying to carry out his role in a lawful way. He claimed the fabricated quotes were based off of calculations using software to estimate a real market price.

The court considered this argument as relevant to whether Mr Tomlinson had breached his fiduciary duty or conspired with contractors, and whether the Sentinel plaintiffs did not suffer loss because the price approved was the true market price.

The court found Mr Tomlinson was not a credible or reliable witness. The court found that, even if Mr Tomlinson's purpose was to avoid breaching the QBCC Act, he admitted to concealing his deception and dishonest conduct from Shield and the Sentinel plaintiffs which satisfied those elements of the tort of deceit. Further, Mr Tomlinson still enriched himself using his position, in breach of his fiduciary duties, which could not be justified by attempts to prevent Shield from breaching the QBCC Act.

| back to *Contents*

Not all evidence is created equal

Tower Cranes International Pty Ltd v Boland Cranes Pty Ltd [2021] QDC 183

Michael Creedon | Alexandria Hammerton | Mikayla Colak

Key point

A judge is entitled to accept and prefer evidence adduced by one party and doing so does not necessarily mean that other evidence has been ignored. Decision makers must make an assessment as to the need to provide sufficient reasons for making a determination and a balance has to be struck between a basic

explanation to be afforded to the parties and an extensive, detailed recitation as to how a decision has been reached.

Facts

Tower Cranes International Pty Ltd (**Tower Cranes**) supplied a crane part, being a second hand inverter, to Boland Cranes Pty Ltd (**Boland**) who was in the business of hiring cranes for construction sites.

The inverter was supplied, received and installed on 23 March 2016. During and after installation, Boland alleged that the inverter displayed a number of defects, including shuddering, brake release failures and rusting.

Attempts to fix these defects were unsuccessful, and by 9 June 2016 the inverter, and therefore the crane, stopped working altogether.

In the Magistrates Court

Boland sought recovery for damages for breach of contract or, alternatively, negligent misrepresentation or breach of the Australian Consumer Law (**ACL**) contained within the *Competition and Consumer Act 2010* (Cth).

The primary judge found that Tower Cranes had breached the contract between the parties by supplying Boland a second-hand inverter that was not fit for purpose and awarded damages in Boland's favour.

Grounds of appeal

Tower Cranes appealed this decision on the grounds that the primary judge had erred by:

- imposing an onus on Tower Cranes to prove on the balance of probabilities that the inverter was of acceptable quality and fit for the disclosed purpose of use which had the effect of reversing the onus of proof;
- relying on evidence from after the time of the supply, as the time at which goods are to be of acceptable quality or fit for the disclosed purpose or use is the time at which the goods are supplied to the consumer (and not after that time);
- finding that the inverter was not of acceptable quality or fit for the disclosed purpose of use where the evidence adduced by Tower Cranes was that the inverter was functional prior to its supply;
- failing to draw an inference from Tower Cranes' expert evidence that the installation of the inverter contributed to the alleged defects or adverse performance; and
- failing to draw an adverse inference from Boland's unexplained failure to call a relevant witness in accordance with established legal principles.

Tower Cranes' consistently raised arguments against the primary judge's decision in relation to jurisdictional error and a failure to give full and adequate reasons.

Decision

The District Court dismissed the appeal, having not identified any error or mistake in law in the primary judge's decision.

Jarro J held that the primary judge had merely preferred Boland's evidence over Tower Cranes' evidence. His Honour considered that the primary judge had found the evidence adduced by Boland to be credible and reliable and had referred to this evidence in his reasons. On the other hand, the primary judge had doubts as to the credibility and reliability of the evidence adduced by Tower Cranes.

His Honour held that the primary judge had properly considered the evidence led by both parties, given sufficient reasons for granting judgment in favour of Boland and did not fall into any error in making the decision. As such, the decision should be affirmed. However, his Honour held that the ground for affirming the decision was that a consumer guarantee of acceptable quality and fitness for purpose applied to the supply of the inverter by virtue of the ACL. The evidence enabled the primary judge to form the view that there were defects and such defects rendered the inverter not fit for purpose. As such, Tower Cranes had breached the consumer guarantee and Boland was entitled to recover its losses by way of damages pursuant to section 236(1) of the ACL.

| back to *Contents*

WESTERN AUSTRALIA

Adjudication determination debt secured by contractual charge

Russell Consolidated Pty Ltd v Russell Noble Constructions Pty Ltd [2021] WASC 155

Tom French | *Candice Lamb* | *Ljubica Petrovic*

Significance

A construction contract under which the developer charges its interest in the property with due payment to the builder of all moneys that may become payable to the builder arising out of the subject matter of the contract is broad enough to encompass a debt created by an adjudication determination under the *Construction Contracts Act 2004* (WA) (**CCA**) which, if successful, can be enforced as a security interest.

Facts

Trupalm Pty Ltd (**developer**) owed money to Russell Noble Constructions Pty Ltd (**builder**) and Russell Consolidated Pty Ltd (**lender**).

The developer's debt to the builder arose from a contract for the construction of residential units in South Hedland, Western Australia. Under the contract, the developer charged its interest in the units with due payment to the builder of all moneys that may become payable to the builder arising out of the subject matter of the contract.

The developer's debt to the lender arose from a loan agreement which granted the lender a first registered mortgage over the residential units as security for the loan.

The builder obtained an adjudication determination against the developer under the CCA with respect to the debt. It sought to enforce it against the residential units which were already mortgaged to the lender.

The issue in dispute in the enforcement proceedings was whether the amount of the adjudication determination in the builder's favour was secured by the charge given by the developer under the construction contract.

Decision

Curthoys J concluded that the amount of the adjudication determination was secured by the charge.

In reaching this conclusion, Curthoys J considered two matters: first, the nature of an adjudication determination under the CCA and, second, whether the charge under the contract encompasses the debt created by the adjudication determination.

The builder argued that section 40 of the CCA provides that the adjudication determination is an advance towards the total amount payable under the construction contract. As such, it ensures that payment is part of the total contract sum and is not a separate payment in addition to or independent from contractual rights.

The lender disputed the builder's position and argued that the adjudication determination gave rise to a specific statutory debt independent of the construction contract and that the determination itself creates the debt.

Curthoys J agreed with the builder and found that the debt owed by the developer to the builder resulting from the unpaid adjudication determination arises from the builder's rights under the construction contract. Curthoys J stated that the CCA provides no separate statutory payment system but rather gives primacy to the parties' agreed contractual payment regime. It does not override the parties' contractual rights but preserves them. Curthoys J cited the Second Reading Speech of the *Construction Contracts Bill 2004* (**Bill**) which states that, *'[the Bill] is based on enforcing the contract between the parties and does not introduce a separate, and possibly conflicting, statutory right to payment'*. Therefore, it is the contract, not the determination itself, that gives rise to the entitlement to the debt.

The builder argued that the contract was clearly broad enough to encompass the debt arising from the adjudication determination.

The lender disputed that interpretation and argued that the construction of a similar clause was determined against the builder by the District Court in *Russell Noble Constructions Pty Ltd v Sewell* [2019] WADC 148 (***Sewell***) and that relitigating that issue in the present proceedings would be an abuse of process.

Curthoys J agreed with the builder and was not persuaded that there was any abuse of process.

Curthoys J stated that contractual interpretation involves ascertaining what a reasonable general person would have understood the parties to the contract to mean. He accordingly found that the expression:

- *'all moneys that may become payable'* refers to an amount that may become liable to be paid, including the debt presently due and payable to the builder;
- *'arising out of'* must be construed broadly; and
- *'the subject matter of the contract'* includes the adjudication determination because it was created as a result of a payment dispute arising from the works carried out by the builder under the contract.

In conclusion, the builder was allowed a charge by reason of its debt under the contract. As a result, enforcement under the *Civil Judgments Enforcement Act 2004* (WA) proceeded in respect of the residential units and the proceeds of sale were to be applied to the relevant creditors, including the builder.

| back to *Contents*

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