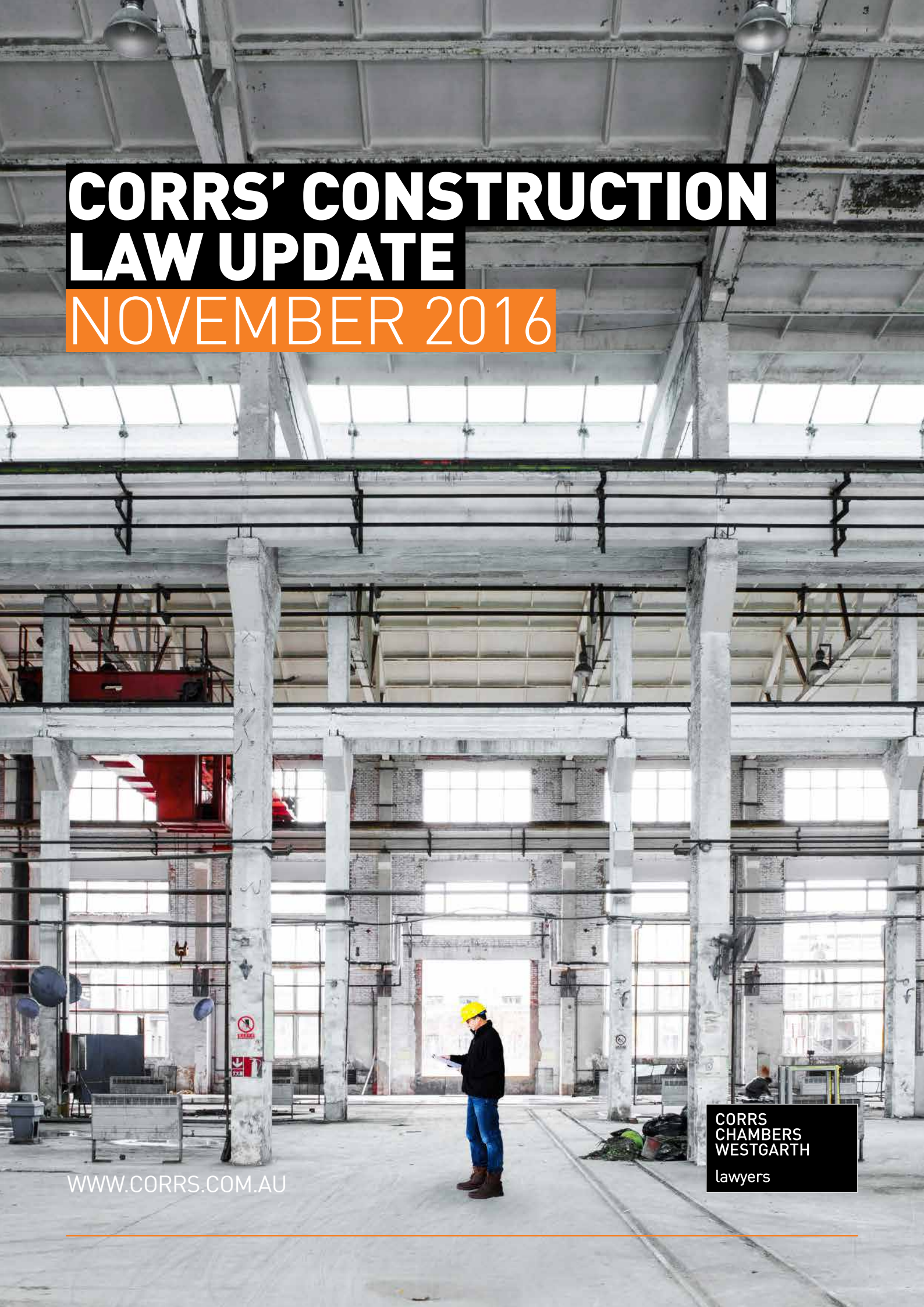
CORRS' CONSTRUCTION LAW UPDATE

NOVEMBER 2016



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WELCOME TO THE LATEST EDITION OF **CORRS' CONSTRUCTION LAW UPDATE** NOVEMBER 2016

This publication provides a concise review of, and commercially focussed commentary on, the major judicial and legislative developments affecting the construction and infrastructure industry in recent months.

It is a useful resource to help in-house practitioners and commercial managers keep up-to-date with recent legal developments and current legal thinking.

We hope that you find it interesting and stimulating.

OUR THINKING

Corrs regularly publishes thinking pieces which consider issues affecting various sectors of the domestic and global economies. We have included at the end of this Construction Law Update links to some of our recent thinking on issues affecting the construction industry.

CROWN MELBOURNE LIMITED V COSMOPOLITAN HOTEL (VIC) PTY LTD [2016] HCA 26

KEYWORDS: COLLATERAL CONTRACT; ESTOPPEL

KEY TAKEAWAYS

Parties need to be careful when giving assurances during contract negotiations.

While oral assurances or representations may sometimes be enforceable, more often they will not be. Reducing matters of importance to writing is always preferable.

In *Crown*, the High Court rejected the proposition that the statement that "you will be looked after" gave rise to an enforceable collateral contract or claim for promissory estoppel. The Court did so in five judgments, however, with two dissentients and divergent reasoning amongst the majority.

Facts

The Respondents were tenants under separate leases of two restaurant premises owned by Crown. In 2005, Crown offered the Respondents new leases for the restaurants for a 5 year term (**Lease**). It was a condition of the grant of each Lease that the Applicants carry out major refurbishments.

Each Lease also required Crown to notify the Respondents at least 6 months before the expiry of the Lease whether Crown would:

- renew the lease, and if so, on what terms (including a possible further refurbishment or relocation);
- permit the tenant to hold over the restaurant at the end of the lease; or
- require the tenant to vacate the restaurant at the end of the lease.

The Respondents undertook the major refurbishments in September 2005 and executed the Leases in October 2005. However, the executed Leases were not delivered to Crown until March 2006.

In December 2009, Crown gave each Respondent notice under the Leases requiring them to vacate the restaurant premises at the end of the Lease term.

The Respondents commenced proceedings in VCAT, alleging that between May 2005 and March 2006, Crown represented to Mr Zampelis (of the Respondent) that the Leases would be renewed for a further 5 year term on identical terms if the Respondents undertook the major refurbishments required under the Leases. The Respondents claimed that this representation:

- gave rise to a collateral contract requiring Crown to offer five-year renewals on identical terms at the end of the Lease; or
- meant that Crown was estopped from denying the existence of the obligation.

VCAT's Decision

VCAT relied on a contemporaneous note made by Crown's bank manager to find that in December 2005 Crown's agent made the following representation to Mr Zampelis:

> *"If Mr Zampelis spent the money that, under Crown's leases, the tenants were required to spent to achieve a major refurbishment to a high standard, he would be 'looked after at renewal time', and that the leases had been aligned with other tenant's leases [within the complex]"* **(Representation)**.

The collateral contract

The phrase "looked after at renewal time" by itself was found to be too vague to create an enforceable oral collateral contract. However, given the protracted negotiations during which the Respondents repeatedly requested (and Crown refused to grant) a 10 year lease term so that the Respondents could recoup the cost of the major refurbishments, VCAT found that a reasonable person in Mr Zampelis's position would have understood the Representation to be a promise that, at the end of the Lease term, Crown would give the Respondents a notice to renew each Lease for a further 5 year term on such terms as Crown thought fit. This promise was capable of forming an enforceable oral collateral contract.

It was critical to VCAT's finding that the Respondents by their actions evinced an intention not to be bound by the executed Lease (which was executed as a deed) until agreement was reached on the duration of the renewal arrangements and the Leases delivered to Crown in 2006.

Promissory estoppel

Crown unsuccessfully argued that the oral collateral contract was void because it purported to dispose of Crown's reversionary interest in the restaurant premises — that is, an interest in land — which needed to be recorded in writing under s 126(1) of the Instruments Act 1958 (Vic). The collateral contract VCAT recognised, though, was an obligation to give a written notice of a proposed renewal Lease, not to enter into a renewal of the Lease, so the requirements of the Act did not apply.

If the formality requirements of the Act did apply, VCAT would have ordered that the Representation estopped Crown from giving a notice other than an offer of renewal of Lease at the relevant time.

Damages

The only damages claimed by the Respondents were lost profits the Respondents claimed they would have earned but for Crown failing to renew the Leases. VCAT accepted this assessment and ordered that Crown pay damages equal to the lost profits claimed.

Appeals

On appeal to the Supreme Court of Victoria, Hargrave J held that:

- the Representation, being a promise to offer to enter into a contract on any terms Crown saw fit to offer, was too uncertain to be enforceable; and
- there was a fundamental inconsistency between the evidence led by the Respondents as to Mr Zampelis' subjective understanding of the Representation (that the Lease would be renewed on identical terms) and the meaning VCAT gave to the Representation (that a notice would be given to renew the Lease on terms Crown saw fit).

Mr Zampelis' understanding of the Representation was held to be "*wholly unreasonable*". Further, in light of the Respondents' failure to demonstrate any other detrimental reliance on the Representation, Hargrave J ordered that the VCAT proceeding be dismissed.

The Court of Appeal confirmed that there was no oral collateral contract but ordered that the estoppel issue be remitted to VCAT to determine what actual detrimental reliance (if any) the Respondents suffered by relying on the meaning of the Representation as found by VCAT, and to determine equitable relief accordingly.

The High Court's Decision

The collateral contract

French CJ, Kiefel and Bell JJ (in a joint judgment) and Keane and Nettle JJ (in separate judgments) confirmed that the terms of the oral collateral contract VCAT recognised were too vague and uncertain to be enforceable. The majority were critical of the assumption VCAT made that commercial realities would have required Crown not to offer entirely unreasonable conditions in the new lease.

Gordon J (with Gageler J agreeing) dissented and held that the oral collateral contract found by VCAT was capable of enforcement. Their Honours held that the relevant enquiry was whether a reasonable person would have understood the Representation as an enforceable promise, not whether the Representation was objectively sufficiently certain to be enforceable. Both Gordon and Gageler JJ also found that the oral collateral contract was not an agreement to agree, but rather an agreement to offer a lease renewal.

Estoppel

French CJ and Keifel, Bell and Keane JJ set aside the Court of Appeal's decision and reinstated Hargrave J's orders dismissing the VCAT proceedings because no evidence was put before VCAT from which VCAT could find that the Respondents had relied on the Representation other than on a wholly unreasonable and subjective basis. Further, the Representation was not sufficiently certain to give rise to a promissory estoppel.

Nettle J also reinstated Hargrave J's Orders but held that whilst the Representation was insufficiently certain to create an enforceable oral collateral contract, it was sufficiently certain to give rise to a promissory estoppel. His Honour agreed with the majority that there was no evidence put before VCAT from which it could be said that any detrimental reliance was placed on the Representation. Further (at [227]), having failed to demonstrate any loss on the case the Respondents chose to argue before VCAT, "*Crown should not now be vexed with what, in effect, would be a second proceeding. That would be wrong in principle and it would be unfair.*"

Gordon J (with Gageler J agreeing) held that because neither VCAT nor any appellate court made any findings on the assessment of damages, there was no appellable decision of law for the Court to consider. For this reason, their Honours agreed that it was not appropriate for the assessment of damages to be remitted to VCAT or another court where the Respondents had failed to demonstrate a relevant loss.

http://eresources.hcourt.gov.au/showCase/2016/HCA/26

SOUTHERN HAN BREAKFAST POINT PTY LTD (IN LIQ) V LEWENCE CONSTRUCTION PTY LTD [2016] HCATRANS 173

KEYWORDS: SECURITY OF PAYMENT; JURISDICTIONAL ERROR

The High Court has heard, and reserved its decision, in the first case before it about security of payment legislation.

The central issues concerned reference dates. It remains to be seen whether the High Court will make broader comments about the operation of security of payment legislation.

Background

Finally, after several unsuccessful previous attempts, the High Court has been persuaded to accept a case about security of payment legislation.

This is an appeal from *Lewence Construction Ply Ltd v Southern Han Breakfast Point Ply Ltd* [2015] NSWCA 288. In short, that decision held that the existence of a "reference date" was not a jurisdictional fact, with the consequence that an adjudicator's erroneous identification of a reference date is not judicially reviewable for jurisdictional error.

Three issues were presented on appeal:

1. Whether the existence of a reference date is a jurisdictional precondition for the service of a valid payment claim or the making of a valid determination.
2. Whether there was a valid reference date in this case. (Southern Han argued there was not because the contract had been terminated.)
3. Whether the claimant impermissibly served two payment claims in relation to the one reference date.

Befitting the High Court's recent practice, the appeal was speedily heard on Wednesday 12 October 2016 (only 11 weeks after the special leave hearing). It was heard by a bench of Kiefel, Bell, Gageler, Keane, and Gordon JJ, all of whom asked questions.

We now await the Court's decision, which may be this year. The High Court's website includes the transcript of hearing, an audio-visual recording (if you have a spare 4 hours and 22 minutes), and copies of the parties' written submissions.

http://www.hcourt.gov.au/cases/case_s199-2016

http://www.austlii.edu.au/au/cases/cth/HCATrans/2016/239.html

http://www.hcourt.gov.au/cases/cases-av/av-2016-10-12 (audio-visual recording, including the delivery of judgment in *Cunningham v Commonwealth [2016] HCA 39 and Ainsworth v Albrecht* [2016] HCA 40)

COLIN R PRICE & ASSOCIATES PTY LTD V FOUR OAKS PTY LTD [2016] FCA 764

KEYWORDS: CONTRACT; MISLEADING OR DECEPTIVE CONDUCT; UNCONSCIONABLE CONDUCT

KEY TAKEAWAY

In a lengthy and factually dense decision, Justice Moshinsky of the Federal Court found that:

- A building contract missing engineering and working drawings will not be rendered invalid if the agreement otherwise contains (or incorporates) enough detail about the works.
- Words such as "we will sort it out at the end" are sufficient to give rise to an estoppel claim (even where the contract requires waiver to be in writing).
- Whether an architect has been appointed depends on more than just whether architect is listed in the introduction section of a contract.

Facts

A syndicate of investors entered into a project that involved renovating, building, and ultimately selling apartments.[1] A dispute arose which, broadly, involved parties disagreeing on the validity of a simple works contract (**Contract**) that was signed in November 2006, as well as questioning subsequent conduct between the investors.[2]

Claims

The first applicant, CRP, sought payment for its work on a *quantum meruit* basis. This was put on three bases.[3] The primary basis was that the Contract was invalid, either because the Contract was only used to obtain finance and operated for no other reason; or because the Contract was void for uncertainty. CRP's alternative bases were misleading or deceptive conduct and unconscionable conduct.

The second applicant, Grovan, claimed that it was entitled to its share of the project's profits.[4] These entitlements had not been paid, and instead were distributed to other persons by the seventh respondent, Twentieth Green, which was the project trustee company. Grovan argued that because certain Payment Authorities were not validly executed, relying on them amounted to unconscionable conduct on the part of the respondents.

The respondents' cross-claim against CRP[5] suggested that CRP repudiated the Contract by ceasing to work on the project from August 2008. Alternatively, it was argued that CRP promised to complete the works by November 2007, and its failure to meet that commitment amounted to a breach of contract; or in the alternative, that the works did not meet the required standard outlined in the contract.

Each of the three claims involved many sub-issues, which Moshinsky J conveniently outlined early in the judgment.[6] His Honour refrained from considering certain questions due to the "incomplete state of the evidence".[7]

Decision

In respect of CRP's claims, Moshinsky J held that the Contract did in fact govern the relationship between the parties as the investors evinced an intention to be bound and no contrary evidence was presented.[8] Furthermore, the contract was of sufficient detail to render it valid. The two alternative claims for misleading or deceptive conduct and unconscionable conduct were not made out.[9]

The cross claim was dismissed as repudiation was not made out. His Honour also found as a matter of fact that Twentieth Green represented that it would not insist on the contractual deadline; and that it also failed to appoint an architect as its representative, which meant that it was unable to assume strict legal rights in relation to practical completion.[10] This served to defeat the argument that CRP breached the Contract by failing to complete the works by November 2007. Moshinsky J also held that CRP did not breach the contract by failing to complete works to the required standard as no instruction had been given to do so.[11]

With respect to Grovan's claim, his Honour held that:[12]

(i) $100,141 (2009 financial year) was wrongly withheld from Grovan; and

(ii) $15,000 (defect rectification) was wrongly deducted from Grovan.

http://www.austlii.edu.au/au/cases/cth/FCA/2016/764

1 At [1]–[6]
2 At [1]–[6]. See also [83]
3 At [3]
4 At [4]
5 At [325]–[334]. See also [5]
6 At [22]
7 At [336]
8 At [7]
9 At [271], [274]
10 At [328]
11 At [333]. Note that this was partly attributed to the failure to appoint an architect. Thus, clauses M10 and M11 were inoperable
12 At [335]. See also [325]–[334]

YE V ZENG (NO 6)
[2016] FCA 923

KEYWORDS: INTERNATIONAL ARBITRATION; ENFORCEMENT IN AUSTRALIA

KEY TAKEAWAY

This is the latest in a series of decisions by Allsop CJ facilitating robust enforcement of an international arbitral award (here, from China) in Australia.

In this decision, Allsop CJ appointed a receiver to the Australian property of the parties required to pay under the arbitral award, saying that the Court "*should strive to provide effective, swift and complete enforcement of judgments based on agreements to arbitrate, certainly those governed by the International Arbitration Act 1974 (Cth).*"

Facts

The applicant in the Federal Court proceedings had the benefit of an award from an arbitral commission in China (the Xiamen Arbitration Commission). The respondents had assets in Australia, so the applicant sought to enforce the order in Australia. The approximate value of the award was A$11,000,000.

The respondents sought to set aside the award.

In *Ye v Zeng* [2015] FCA 1192, Allsop CJ indicated a willingness to permit the applicant to have the benefit of the award even though an appeal was pending in China. He made orders to the effect that, as the price of the challenge, the respondents needed to provide security for the entire amount to which the applicant seemed to be entitled. Ultimately, Allsop CJ was persuaded this could be satisfactorily done by freezing orders: see *Ye v Zeng (No 3)* [2015] FCA 1279.

Allsop CJ subsequently made orders recognising and enforcing the arbitral award, following the unsuccessful appeal in China: *Ye v Zeng (No 4)* [2016] FCA 386. Allsop CJ ordered the respondents pay the applicant's costs on the indemnity basis because, as Allsop CJ subsequently summarised, he came to the view "that the respondents had delayed the applicant in enforcing a just commercial claim for over 8 months without any legitimate basis": *Ye v Zeng (No 5)* [2016] FCA 850, *Ye v Zeng (No 6)* [2016] FCA 923 at [3].

The applicant then sought to appoint a receiver to the respondents' property to obtain the benefit of the award.

Decision

The respondents argued that a receiver should not be appointed for two reasons (at [6]):

1 the applicant should first have recourse to property in China; and

2 the respondents should have time to arrange their affairs as some of the assets were family homes.

Allsop CJ rejected both arguments. He referred to the respondents' earlier lack of co-operation with court processes, and the "ample opportunity" that the respondents had to pay the arbitral award (at [7]–[9]).

Allsop CJ repeated the general approach he had taken in the litigation (at [9]):

> *"The Court should strive to provide effective, swift and complete enforcement of judgments based on agreements to arbitrate, certainly those governed by the International Arbitration Act 1974 (Cth). In circumstances where it can be inferred that the award creditor is being held out of its money by the use of the Court by the respondents for unreasonable delay, the clearest and most effective remedy is called for."*

http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2016/2016fca0923

SINO DRAGON TRADING LTD V NOBLE RESOURCES INTERNATIONAL PTE LTD [2016] FCA 1131

KEYWORDS: INTERNATIONAL ARBITRATION

KEY TAKEAWAY

The Federal Court has confirmed that a challenge to set aside a determination under international commercial arbitration must be brought strictly on the grounds which the rules prescribe that the challenge may be made. It is not an opportunity for the court to review the merits of the determination or evidence put before the arbitral tribunal.

Further, where a court is asked to set aside a determination for being contrary to public policy considerations of natural justice or procedural fairness, a party must prove that real prejudice or unfairness flows from the determination.

Facts

Noble Resources entered into a contract (**Supply Contract**) to supply and deliver 170,000 dry metric tonnes of iron ore (**Goods**) to Sino Dragon in WA. Sino Dragon failed to establish a letter of credit equal to the shipment value of the Goods before the time of shipment, as required under the Supply Contract.

The parties agreed to reduce the price of the Goods to enable a fully workable letter of credit to be provided. Later on the same day, a Sino Dragon representative informed Noble Resources that the letter of credit could not be provided and that it therefore could not perform the Supply Contract (**2014 Email**). The next day, Noble Resources informed Sino Dragon that it considered Sino Dragon's failure to provide a letter of credit together with the 2014 Email as repudiation of the Supply Contract. Noble Resources accepted that repudiation and terminated the Supply Contract.

Noble Resources subsequently obtained an award for damages (including interest) for Sino Dragon's repudiation of the Supply Contract (**Final Award**), following referral of this matter to arbitration in accordance with the Supply Contract. The arbitration was conducted in accordance with the UNCITRAL Arbitration Rules (**Rules**), in English, before three arbitrators and subject to the law of WA.

The Arbitration

A key matter before the arbitration was whether the parties had agreed to further reduce the price of the Goods after the 2014 Email to enable a letter of credit to be provided by Sino Dragon (**Sino Dragon Claim**).

Sino Dragon's employees involved in negotiations said to give rise to the Sino Dragon Claim gave evidence in chief by affidavit and were cross-examined via video link. The cross-examination was beset by technical difficulties, the witnesses were not provided with relevant materials and the Chinese interpreter arranged by Sino Dragon was not appropriately qualified and was ultimately replaced. These were all matters for which Sino Dragon was responsible.

In its reasons accompanying the Final Award, the arbitral tribunal stated that it considered and made due allowance for these matters when assessing the evidence given via video link.

The Appeal

Sino Dragon challenged the Final Award under Article 34 of the Rules for breaches of natural justice and procedural fairness, contrary to Australian public policy. In particular:

- the arbitral tribunal had no jurisdiction to determine a claim for damages for repudiation (**Ground 1**);
- evidence at the arbitration was contrary to public policy considerations of natural justice and procedural fairness (**Ground 2**); and
- two arbitrators were improperly appointed because of their current or past roles at KWM (Australia) (**Ground 3**).

Beech J refused these challenges. His Honour held that they really amounted to an impermissible vehicle for Sino Dragon to seek merits review of the Final Award or to correct deficiencies in its case.

In doing so, Beech J made the following observations about the ambit of an Australian court's power to set aside awards under Article 34 of the Rules:

- first, an award may only be set aside if a matter in Article 34(2) is proved (ie, jurisdictional error, incapacity, improper constitution of the arbitral tribunal, arbitration of the dispute is prohibited by law or the award is contrary to public policy). This furthers well-known policy objectives of the desirability of large commercial disputes being expeditiously and finally resolved by arbitration;
- second, the exercise of the power does **not** permit a court to conduct a merits review or otherwise attempt to find an error of law in the award; and
- third, where a 'procedural fairness' challenge is made, "real" unfairness or practical injustice must flow from the award. No unfairness or practical injustice arises where a party has had a reasonable opportunity to present its case: section 18C International Arbitration Act 1974 (Cth) (**Act**).

Ground 1

The Supply Contract required all documents in connection with the Supply Contract to be in English. The 2014 Email was in Chinese. Sino Dragon submitted the 2014 Email was not a "document" for the purposes of the Supply Contract. It therefore could not be the subject of a 'dispute' in connection the Supply Contract capable of referral to arbitration under the Supply Contract.

Beach J rejected this Ground. There was nothing in the express terms of the Supply Contract which prevented a document which failed to comply with the form requirements of the Supply Contract from being referred to arbitration under the Supply Contract.

Ground 2

Sino Dragon claimed that it was denied a reasonable opportunity to present its case or a breach of natural justice occurred due to the difficulties encountered in the cross-examination of its witnesses, contrary to the requirements of Articles 18 and 34, as modified by the Act.

In particular, Sino Dragon relied on comments from its witnesses that they did not feel that they understood the questions being asked or that their responses were properly understood. Sino Dragon did not raise these comments prior to challenging the Final Award and they were contradictory to its conduct in electing to proceed with the arbitration when these difficulties were encountered.

Beech J refused to set aside the Final Award on this ground and confirmed:

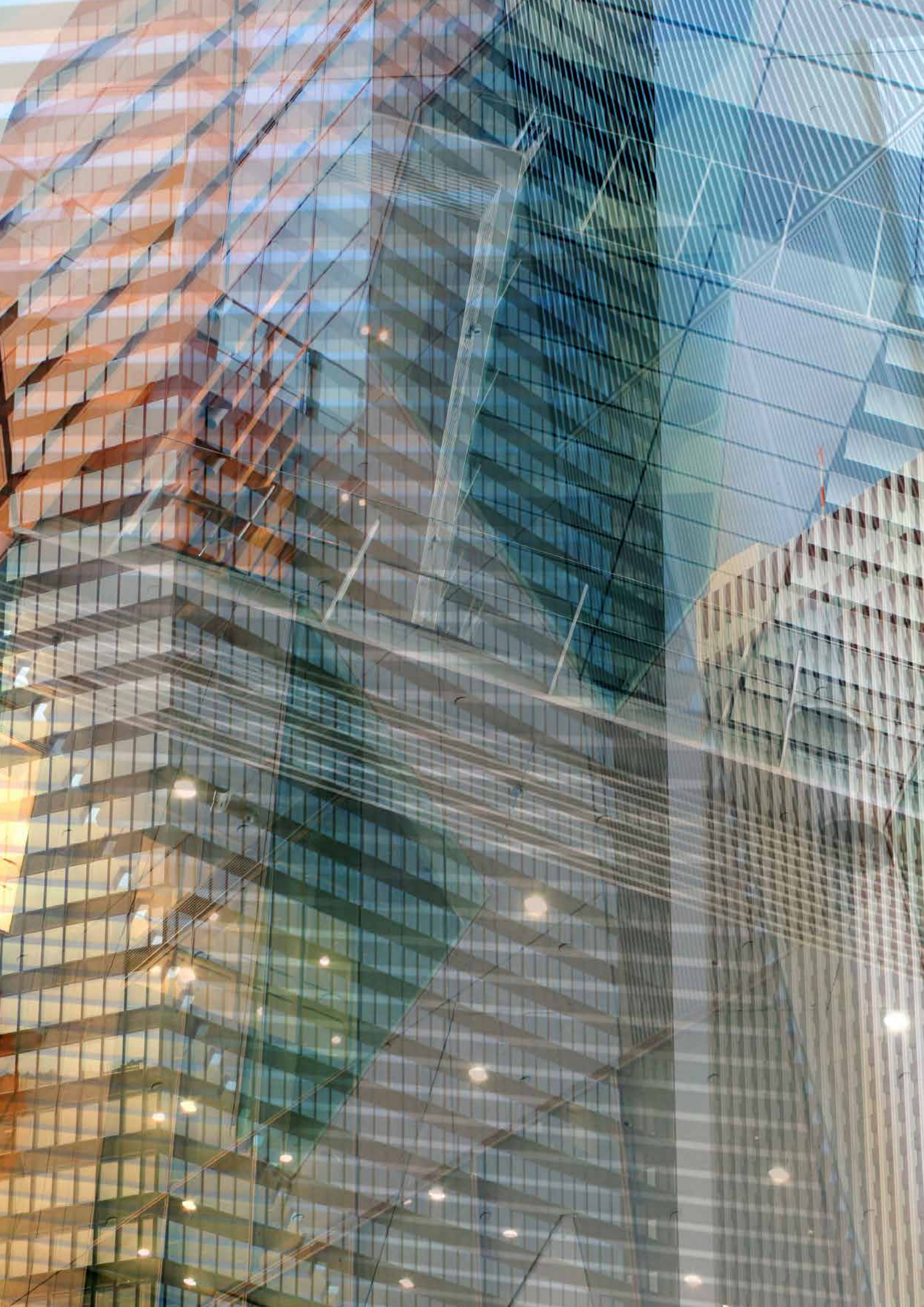
- real (ie, not fanciful) prejudice or unfairness must be proved, not a technical breach of the rules of natural justice. Sino Dragon failed to demonstrate that if the difficulties did not arise, a different final award would have been delivered; and
- a challenge cannot be made to set aside an order for procedural unfairness flowing from the conduct of the party seeking to set aside the award.

Ground 3

Finally, Sino Dragon unsuccessfully challenged the appointment of two of the arbitrators who were current or former partners of KWM (Australia). Sino Dragon claimed that because KWM (China), a financially separate partnership, acted for a Noble Resources related entity in China, the two arbitrators had a commercial interest in the outcome of the Final Award, in breach of the rule of apprehended bias.

Beach J refused the challenge on this Ground. The Act expressly required Sino Dragon to prove there was a "real danger" of bias assessed *from the court's perspective*. Even if the two KWM partnerships were not financially independent, this would not be proof of "real danger" or even satisfy the lower common law test of whether a lay person would have a reasonable apprehension of bias.

http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2016/2016fca1131



OZTON PTY LTD V CROMWELL SEVEN HILLS PTY LTD [2016] NSWSC 1339 (15 SEPTEMBER 2016)

KEYWORDS: DEMAND FOR PAYMENT; CALL ON SECURITY; SET-OFF

While only an interlocutory basis, this decision by McDougall J indicates a continuation of the general attitude of courts, particularly following *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd* [2015] VSCA 98, to give effect to parties' agreements about commercial risk allocation and ability to call on bank guarantees.

The case also conveniently collects the current law about when payment obligations exclude equitable set-off, an issue that sometimes comes up in construction projects.

Facts

The plaintiff was the tenant of premises in a building in North Sydney. The defendant, the owner of the building, started a major redevelopment and renovation of the building. The tenant took the view that the works were so disruptive that they constituted a breach of the covenant of quiet enjoyment and a derogation from grant. Presumably following a breakdown in negotiations, the tenant ceased paying rent.

The owner took the view that despite the disruption, the tenant remained liable to pay rent and threatened to call on bank guarantees provided by the tenant for the arrears. The tenant commenced proceedings for an interlocutory injunction to restrain the owner from doing so.

Relevantly, the lease required the tenant to pay rent "without set-off, counter claim, withholding or deduction".[1] The lease gave the owner the right to call on the bank guarantees if the tenant was in default, to the extent of the default. The tenant was prohibited from doing "anything which could prevent or delay payment by the bank to the [owner] under the [bank guarantees]".[2]

Decision

After hearing argument from senior counsel for both parties, McDougall J gave an ex tempore decision refusing to grant the interlocutory injunction sought.

Given the urgent interlocutory nature of the hearing, McDougall J did not finally decide the question of construction.[3] He expressed the "tentative opinion" that the relevant clause excluded equitable set-off,[4] and that the tenant's position to the contrary was "only weakly arguable".[5] This was on the basis of authorities that an obligation to pay "without deduction" does not exclude equitable set-off, but "without set-off" does.[6]

Drawing from "the analogous context of a performance guarantee under a building or engineering contract",[7] McDougall J also considered that the provision preventing interference with payment to the owner under the bank guarantees demonstrated an agreement about risk allocation, to the effect that the owner would have the benefit of an income stream despite the existence of a dispute.[8]

The tenant did not contend that the call on the bank guarantee would cause commercial or reputational harm,[9] and McDougall J was satisfied that damages would be an adequate remedy and that the risk that the owner would not be able to meet any damages award was "at its highest, minimal".[10]

https://www.caselaw.nsw.gov.au/decision/57e1c512e4b058596cb9fb8b

1 at [11]
2 at [11]
3 at [22]
4 at [27]
5 at [28]
6 at [23]–[26]
7 at [33]
8 at [32]–[34]
9 at [46]
10 at [55]

RICHARD CROOKES CONSTRUCTION PTY LTD V CES PROJECTS (AUST) PTY LTD (NO 2) [2016] NSWSC 1229

KEYWORDS: SECURITY OF PAYMENT; REMITTAL TO ADJUDICATOR

KEY TAKEAWAYS

This case provides an illustration of the requirement that adjudicators consider, assess, and grapple with the material before them in valuing construction work, rather than simply adopting one party's valuation.

Unusually in this case, the subcontractor sought to have the matter remitted to the adjudicator for further determination following the finding of jurisdictional error. (This may have been because the payment claim in issue was based on the last reference date of the contract[1]) This is an issue attracting differing dicta. McDougall J's reasoned contribution, though obiter, suggests that remittal will not usually be available, at least in New South Wales.

McDougall J also dismissed an argument by the claimant that critical comments by the adjudicator about the respondent's conduct amounted to "unclean hands" such as to prevent the court setting aside the determination.

Facts

The decision relates to an adjudicator's determination for over $500,000, for which the adjudicator's fees were over $45,000. The head contractor sought to have the determination set aside for jurisdictional error.[2] [3] The subcontractor said there was no jurisdictional error but, if there was, the adjudicator's determination should not be quashed but should be remitted to the adjudicator.[4]

The claimant subcontractor claimed about $870,000, including about $790,000 for contract work and about $100,000 for variations (presumably there were some deductions, as the total claimed amount was less than the sum of those two components).[5] The respondent head contractor communicated a scheduled amount of nil (in fact, negative about $230,000).[6]

The adjudicator rejected the head contractor's valuation (see at [34]). But he also identified deficiencies in the subcontractor's approach.[7] Despite this, he said he preferred the subcontractor's position and awarded the entire amount claimed by the subcontractor.[8]

Decision

Jurisdictional error

McDougall J held that the adjudicator's reasons showed that he did not undertake the task he was required to do, namely to assess the value of the claim.[9] McDougall J concluded:[10]

> *"it appears that the Adjudicator, having decided that the [head] contractor's submissions should be disregarded, simply adopted the subcontractor's valuation of its claim. In doing so, he failed to perform the task required: to determine the amount of the progress payment (if any) to be paid having regard to the matters set out in s 22(2) of the Security of Payment Act. Alternatively, adapting what Vickery J said in [SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd [2015] VSC 631] at [100], the Adjudicator's reasons do not demonstrate any rational assessment of value. They do not disclose any process of reasoning based on the only factual material that the Adjudicator found (even with the flaws that he pointed out) to be persuasive, leading to the conclusion that this aspect of the payment claim had been proved."*

Jurisdictional error was therefore demonstrated.[11]

Remittal to the adjudicator

Though McDougall J held that the question of remittal to the adjudicator did not arise for procedural reasons,[12] he nevertheless embarked on a helpful analysis about whether remittal to an adjudicator is available in New South Wales,[13]

One difficulty he identified is that remittal is often not appropriate where the error setting aside the decision is a jurisdictional error (as opposed to, say, an error of law on the face of the record).[14] There are also issues that arise under the security of payment legislation, including the difference of opinion about whether an adjudicator's determination made out of time is effective.[15]

The subcontractor also ran an alternative argument, namely that to "do justice", relief should be withheld unless the claimant consented to an extension of time for the adjudicator to complete his task (ie, make a valid determination).[16] McDougall J rejected this argument:[17]

> *"[The subcontractor's] submissions did not explain why the interests of justice required prolongation of the adjudication process, when that process has been set up to ensure a swift, although rough and ready, system for the interim determination of rights to payment under a construction contract. Nor did [they] explain why the interests of justice entitled his client to another opportunity to access that statutory scheme when it had available to it, on a final basis, its rights (whatever they may be) at law."*

"Clean hands"

The subcontractor submitted that the head contractor should be denied relief on a discretionary basis because it did not have clean hands. This was based on some unfavourable comments about the head contractor's conduct in the adjudicator's reasons.[18]

McDougall J, relying on earlier authority, held that, relevantly, "unclean hands" amounted to a plaintiff taking advantage of their own wrong,[19] and that "general naughtiness", even if made out, is insufficient to deny relief.[20]

McDougall J also considered that unclean hands were, in any event, irrelevant to the grant of declaratory relief,[21] which is usually the primary relief sought and given in matters setting aside adjudicator's determinations.[22]

https://www.caselaw.nsw.gov.au/decision/57c7d746e4b058596cb9f11f

1 see at [1]
2 at [3]–[5]
3 at [8]–[9]
4 at [10]–[11]
5 at [3]
6 at [4]
7 see at [32]
8 at [38]–[41]
9 at [47]
10 at [56]
11 at [57]
12 at [58]–[59]
13 at [60]–[85]
14 at [72]–[73]
15 at [81]
16 at [93]–[94]
17 at [96]
18 at [88]
19 at [91]
20 at [92]
21 at [89]
22 see at [15], [58]

TELL HIM HE'S DREAMING: COURT OF APPEAL REJECTS THE AUSTRALIAN DREAM AUSTRALIAN DREAM HOMES PTY LTD V STOJANOVSKI [2016] VSCA 133

KEYWORDS: SUBSTANTIAL BREACH; TERMINATION

KEY TAKEAWAY

Whether termination of a contract under a termination clause is reasonable will depend on the facts and the terms of the contract as a whole.

Whether there has been a substantial breach must be evaluated as at the time the default notice was sent.

Facts

Australian Dream Homes Pty Ltd agreed to build a house for Stojanovski.

The contract provided that Australian Dream Homes would carry out the works "in a proper and workmanlike manner". It also stated that if Australian Dream Homes was in "substantial breach of this contract", Stojanovski could give Australian Dream Homes a default notice stating Stojanovski's intention to terminate the contract unless the breach was remedied within 14 days after receipt of the notice.

In April 2012, Stojanovski served a default notice alleging that Australian Dream Homes was in substantial breach because of defective work. The breach was not remedied within 14 days and Stojanovski served a notice terminating the contract.

Australian Dream Homes commenced proceedings in the Victorian Civil and Administrative Tribunal. The Tribunal found that although the defective work constituted a significant defect, Australian Dream Homes was not in substantial breach of the contract. The Tribunal also held that Stojanovski had acted unreasonably in terminating the contract, and that the termination was thus ineffective. Stojanovski appealed to the Supreme Court of Victoria.

Dixon J found for Stojanovski, holding that the Tribunal erred both in finding that the defective work did not constitute a substantial breach of contract and in finding that Stojanovski had acted unreasonably in terminating the contract.

Australian Dream Homes sought to appeal to the Court of Appeal.

Grounds of appeal

Australian Dream Homes sought leave to appeal on five grounds. Significantly, Australian Dream Homes claimed that Dixon J had:

(i) viewed the default notice and termination notice in isolation from each other, and thus incorrectly assessed the reasonableness of the termination; and

(ii) erred in law in finding that it was not open to the Tribunal to hold that Stojanovski had acted unreasonably in terminating the contract.

Court of Appeal's Decision

Kaye JA (with whom Ashley JA and Osborn JA agreed) held that none of the proposed grounds of appeal had a real prospect of success, and did not grant Australian Dream Homes leave to appeal.

In coming to this decision, Kaye JA first addressed whether the defective work constituted a substantial breach of the contract.

Kaye JA found that Dixon J had been correct to determine that whether Australian Dream Homes was in substantial breach was to be evaluated at the time the default notice was sent. His Honour determined that the extensive nature of the defects constituted a substantial breach of Australian Dream Homes' obligation to carry out the works in a proper and workmanlike manner and in accordance with the plans and specifications contained in the contract.

Kaye JA also agreed with Dixon J's determination that Stojanovski's termination was not unreasonable. His Honour rejected the argument that the default notice provided insufficient time for the defects to be made good.

In addition, Kaye JA found that Australian Dream Homes' conduct following service of the default notice meant that it was not open to the Tribunal to hold that Stojanovski's service of the termination notice was unreasonable.

Kaye JA found that the fact that:

(i) Australian Dream Homes had continued to perform works after the date of the default notice; and

(ii) three months remained in the original construction period,

were not relevant to Australian Dream Homes' response to the default notice, or to whether, in light of that response, Stojanovski had acted reasonably in serving the termination notice.

Kaye JA determined as a matter of fact that Australian Dream Homes had proffered the works as complete to lock-up stage at the time of the default notice (and that Dixon J had taken this into account). However, Kaye JA found that whether the whole of the building works had been proffered up as complete was not relevant to whether Stojanovski's termination of the contract was reasonable.

Finally, Kaye JA determined that it was not relevant that Australian Dream Homes had appointed a building consultant or that the defects would take more than six weeks to rectify. This was because Australian Dream Homes had maintained that it would not remedy the defects unless the lock-up stage claim was paid.

http://www.austlii.edu.au/au/cases/vic/VSCA/2016/133.html

FACADE TREATMENT ENGINEERING PTY LTD (IN LIQ) V BROOKFIELD MULTIPLEX CONSTRUCTIONS PTY LTD [2016] VSCA 247

KEYWORDS: SECURITY OF PAYMENT; LIQUIDATION

KEY TAKEAWAYS

The Building and Construction Industry Security of Payment Act 2002 (Vic) (the Act) does not create an entitlement to progress payments for a party in liquidation.

In *obiter*, the Supreme Court of Victoria identified a constitutional inconsistency between sections 4(b)(i), 16(2)(a)(i) and 16(4)(b)(i) of the Act and section 553C of the Corporations Act 2001 (Cth). This confirmed the finding at first instance before Vickery J.

Facts

Façade was contracted to design, supply and install façade and curtain works for Multiplex.

Façade issued Payment Claim 18, which was not paid in full, and Payment Claim 19, which was not paid at all. On 25 October 2012, Façade served a demand for payment of the outstanding sums under these two payment claims. Multiplex did not pay. Façade is now in liquidation following winding up orders made on 6 February 2013.

Decision at first instance

Façade commenced proceedings on 26 September 2014 to recover the outstanding amounts under the payment claims, plus interest, and at first instance had its claim dismissed.

Multiplex made a counterclaim against Façade for completion costs and liquidated damages. This raised the question whether Multiplex could set off any amounts it owed with respect to the payment claims under section 553C of the Corporations Act 2002 (Cth). Vickery J identified (at [48]) a constitutional inconsistency between section 16(4) of the Act, which *"precludes a respondent to a proceeding to recover an unpaid payment claim from bringing any cross-claims or defences, and the right to set-off in s 553C of the Corporations Act."*

This was measured against section 553C(2), which disentitled a party from claiming a set off if at the time it gave or received credit from the company it had notice that the company was insolvent. His Honour determined (at [51]–[53]) that the time at which to assess this knowledge was at the time the contract was executed. As there were no indications of Façade's insolvency at that time, Multiplex were not precluded from relying on the set off under section 553C.

Court of Appeal

Façade appealed on eight grounds, including constitutional issues and the application of section 553C(2). Multiplex also claimed that the making of winding-up orders cut off the application of the Act in this instance.

At first instance, Vickery J did not address whether Façade's liquidation prevented it from relying on the Act to enter summary judgment against Multiplex. Multiplex submitted that this position could be construed from the objectives of the Act, as well as the right to progress payments under s 9(1), and that once a party is in liquidation it no longer depends on the cash flow prompted by the Act for its continued existence (at [51]–[53]). The Court held (at [84]) that:

> *"s 9(1) creates an entitlement to progress payments only for persons who have undertaken to, and continue to, carry out construction work or supply related goods and services. The term 'the claimant' used throughout pt 3 is commensurately limited. Consequently, the payment regime in pt 3 of the BCISP Act is not available to companies in liquidation, since such companies cannot carry out construction work or supply goods and services, and thus do not satisfy the requirements for 'a claimant."*

Upon finding that Façade could not avail itself of the Act, the Court continued to consider (in obiter) the constitutional claims made.

Inconsistency of s 16(2)(a)(i) and s 16(4)(b) of the Act with s 553C of the Corporations Act

The Court held that because Façade is in liquidation the claims Multiplex has against it would be set off under section 553C against the sum for which Façade was seeking to obtain a judgment debt. For a court to order summary judgment for a payment claim under section 16(2)(a)(i) of the Act, thus excluding the raising of any cross-claim of defence regarding matters under the contract under section 16(4)(b), would *"alter, impair or detract from the operation of the Corporations Act."* (At [138].)

The practical effect of the Court's decision is that as at the date on which Façade was ordered to be wound up, unpaid portions of the payment claims ceased to exist. So too did the sum Multiplex counterclaimed. Instead (at [176]), both were replaced by a single claim:

> *"For the purpose of ascertaining the balance between them, the sum claimed and the counterclaim are taken to exist separately, but the automatic effect of s 553C is that what remained after 6 February 2013 was a claim to a net balance. The automatic effect of s 553C was anterior to the commencement of the proceedings before the judge."*

Further, the Court continued (at [177]) to note that:

> *"Without the protection afforded by s 553C, summary judgment would mean that Façade would receive from Multiplex the full amount of the sum owed under the relevant payment claims, whereas Multiplex would be left to prove in the liquidation of Façade in respect of its counterclaim."*

Conclusion

The Court confirmed Vickery J's decision that sections 16(2)(a)(i) and s 16(4)(b) of the Act are inconsistent with section 553C of the Corporations Act, and are invalid to the extent of that inconsistency. Practically, where a company is being wound up and section 553C of the Corporations Act is enlivened (see [191]), an application for summary judgment should be dismissed.

http://www.austlii.edu.au/au/cases/vic/VSCA/2016/247.html

WA GOVERNMENT TABLES ITS PROPOSED AMENDMENTS TO THE CONSTRUCTION CONTRACTS ACT 2004 (WA)

KEYWORDS: SECURITY OF PAYMENT

KEY TAKEAWAY

Following a recent announcement that it would be implementing measures to provide greater protections to subcontractors,[1] the WA State government tabled the Construction Contracts Amendment Bill 2016 (WA) (the Bill) in parliament on 22 September 2016.

The legislative assembly subsequently passed the Bill (with one minor change) on 19 October 2016.

The majority of amendments are weighted in favour of subcontractors pursuing claims up the Contract chain.

Facts

In August 2016,[2] we reported that the State government had indicated its commitment to supporting subcontractor small businesses by:[3]

- amending the Construction Contracts Act 2004 (WA) (**the Act**); and
- from 30 September 2016, introducing mandatory Project Bank Accounts (**PBA**) and a code of conduct for state government run projects between $1.5 million and $100 million (This is discussed in the following article).

The State government has advanced the first of those steps by tabling the Bill in Parliament. The Bill has now been passed (with a minor change) by the Legislative Assembly.

Most amendments take effect from 15 December 2016, and the changes to sections 7 and 20 take effect from 3 April 2017.

Amendments

The Hon Michael Mischin, Minister for Commerce, tabled a report prepared by Professor Philip Evans with 28 recommendations in the Legislative Council in August 2016. The State government has drafted a number of amendments consistent with the initial recommendations,[4] but has also excluded some. The Bill makes the following amendments to the Act:

1 Including a definition of "business day" which excludes Saturday, Sunday and public holidays, as well as the "Christmas period" from 25 December until 7 January the following year. References to days in various provisions of the Act have been amended to business days.

2 Increasing the time to apply for adjudication of payment disputes from 28 days to 90 business days.

3 Enabling "claims recycling" (by which payment claims which have previously been rejected or disputed by a respondent may be made again later in the life of the contract).

4 Reducing the maximum time within which payments are to be made from 50 days to 42 days. This will come into effect on 3 April 2017.

5 Amending the mining exception under section 4(3), so it applies only it to the fabrication or assembling of items of plant used to extract or process the described substances, as opposed to the previous formulation of "constructing any plant" for "the purposes of" doing so.

6 Providing the adjudicator greater discretion to determine the application and to give effect to any settlement before the determination is issued.

7 Removing the requirement to obtain leave from the court before an adjudication determination can be entered as an order of the court and enforced accordingly.

8 Including transitional provisions to allow for the new amendments to take effect.

The implications of each of these proposed changes is discussed in further detail below.

Change 1: Definition of business day

The practical effect of this amendment is that, in relation to various time frames within the Act, public holidays are not included in those time frames and time stops running over the Easter and Christmas periods.

The time frame to respond to an adjudication application would be changed to 10 business days instead of 14 calendar days. This is a welcome relief to those responding to adjudication applications as a party will no longer be able to ambush another party with an adjudication application right before the Christmas break when a number of people are on leave and it is difficult to formulate a response.

There is no proposal to change the time frames (in the terms to be implied into contracts if those matters are not already addressed) within which a party must reject, dispute or pay any amounts in response to a payment claim. Those time frames, in clause 7 of Schedule 1 of the Act, would remain expressed in days, being calendar days.

Change 2: Increasing the time for adjudication applications

The Bill amends the 28 day period under section 26 of the Act to 90 business days. This increases the time by which a party must prepare and serve any application to have a payment dispute adjudicated.

The current, comparatively short, time frame for making an adjudication application was a concern expressed to the Small Business Commissioner in the course of a 2013 investigation into subcontractor insolvencies.[5] The proposed change addresses the concern that the 28 day period impedes the ability of smaller subcontractors to try to resolve claim disputes amicably before having access to the rapid adjudication scheme. It is directed towards striking a better balance between accessibility for smaller contractors and maintenance of the rapid nature of the scheme.

The Society of Construction Law Australia's (**SoCLA**) Legislation Reform Subcommittee has previously suggested that a 90 calendar day period be applied, noting that, among other things, the near equivalent Northern Territory security of payment legislation provides for 90 calendar days and New South Wales's security of payment legislation provides for a period of 12 months.[6]

The 90 business day period in the Bill is longer than the 90 calendar day period that SoCLA had suggested. Further, though there is some ambiguity in the drafting, when combined with the proposal to enable claims recycling, the amendments have the potential to provide for an even greater period within which adjudication applications for particular payment claims can be made.

Change 3: Enabling claims recycling

The Bill responds to a body of case law which does not allow the adjudication of "recycled claims".[7] The definition of "payment claim" in the Bill includes a payment claim that includes matters covered by a previous payment claim.

This amendment allows a party whose initial claim for a progress payment under a construction contract has been rejected or disputed to include those disputed matters in a subsequent progress payment claim.[8]

This may give rise to an ambiguity as to when a payment dispute is be taken to arise in relation to a recycled claim that is rejected outside the period of 90 business days from when the amount claimed was first due. The time for serving an adjudication application may yet be taken to have elapsed in such a case, because proposed amendments to clause 6 define a payment dispute, among other things, as arising on the **earlier** of a payment claim being rejected or the amount claimed being due and not paid in full.

If the Bill is intended to remove such a limitation on recycled claims being adjudicated, then a question arises whether the purposes of the Act are achieved if disputes are not rapidly resolved because a claiming party can delay commencing the adjudication process by recycling the claim again and again.

The legislature has, however, sought to target and prevent "adjudication shopping" where claims can be repeated or "recycled" in different adjudication applications in the hope of a favourable result. It has done so by establishing that a payment dispute does not arise where the payment claim includes matters that have already been dismissed or determined under an adjudication application.[9]

Change 4: Reducing maximum time for payment

The Bill reduces the time period for payments from 50 calendar days to 42 calendar days. The amendment seeks to encourage prompt payment and increase cash flow in the building and construction industry. It follows the Department of Commerce's bulletin earlier this year reminding contractors of their rights under the Act[10] in response to revelations that some construction contracts had payment terms greater than 50 days.

The time period was amended from 30 days in the first draft of the Bill to 42 (calendar) days during the second reading speech. The government apparently intended the earlier-included time period to be 30 business days, an interval that is approximately 42 calendar days. The Bill provides for this amendment to come into effect on 3 April 2017, allowing businesses some time to amend their contracts and payment systems if necessary.

Change 5: Amending the mining exclusion

The Bill amends the mining exclusion in section 4(3) of the Act to give it a narrower and more precise application. The Hon Sean L'Estrange has stated that the amendment is to make it clear that only the fabricating and assembling of items of plant used for extracting or processing oil, natural gas or minerals is excluded and that normal construction work associated with processing facilities is not excluded. This responds to a perceived uncertainty among parties and adjudicators as to whether the exclusion applied to individual items of equipment (eg, a catalytic cracker within an oil refinery) or the whole project (ie, the oil refinery itself).[11]

There is likely still to be some uncertainty in this area for the courts to resolve. For example, are some components — say, concrete works — of the installation of large LNG processing modules within or outside the exception?

Change 6: Greater flexibility to adjudicator

The Bill gives greater flexibility to the adjudicator to:

- hear the application despite the form not being in accordance with the Regulations under the Act, showing a preference for substance over form; and
- issue a determination giving effect to the terms of any settlement reached between the parties.

Change 7: No leave of the court required to enforce determination

The Bill removes the requirement to obtain leave from the court before the adjudication determination can be enforced.

The courts have stated that there is a predisposition in favour of granting leave in that the party resisting enforcement had to show why the determination should not be enforced. However, the purpose of this change is to reduce delay, complexity, legal costs and the ability for a party to frustrate the enforcement process by contesting the grant of leave.[13]

Now the party resisting enforcement will need to make its own separate application seeking to stay, vary, set aside or appeal the court order. The party resisting enforcement will have a high threshold to overcome, particularly in light of recent jurisprudence demonstrating the court's reluctance to overturn adjudicators' determinations on the ground of jurisdictional error.[14]

Change 8: Transitional provisions

The Bill also provides transitional provisions about how the amendments will come into effect. What is particularly important about these is the timeframes. If a party whose right to make an adjudication application has lapsed prior to 15 December 2016 because they fail to make the application, that right will be available after 15 December 2016 provided 90 business days have not elapsed from the date of the payment dispute.

Other amendments not included in the Bill

Although flagged as potential changes, the Bill does not include amendments in relation to:

- making it an offence to intimidate, coerce or threaten a person or business in their access to remedies available under the Act; or
- developing express statutory trust arrangements for retention money on high-value construction projects to protect retention moneys during insolvency events.

1 https://www.mediastatements.wa.gov.au/Pages/Barnett/2016/08/Greater-protection-measures-for-subcontractors.aspx
2 http://www.corrs.com.au/publications/corrs-in-brief/wa-government-announces-proposed-measures-to-protect-subcontractors/
3 Western Australia, *Parliamentary Debates*, Legislative Council, 16 August 2016, p. 3 (Michael Mischin, Minister for Commerce)
4 Western Australia, *Parliamentary Debates*, Legislative Council, 16 August 2016, 4479b (Michael Mischin, Minister for Commerce)
5 Professor Phil Evans, *Discussion Paper — Statutory Review of the Construction Contracts Act 2004 (WA)* (October 2014), citing the Final Report Construction Subcontractor Investigation — Advice and Recommendations Provided to the Minister for Small Business from the Western Australian Small Business Commissioner, David Eaton, March 2013
6 Professor Phil Evans, *Discussion Paper — Statutory Review of the Construction Contracts Act 2004 (WA)* (October 2014), citing the *Report on Security of Payment and Adjudication in the Australian Construction Industry* by the Australian Legislation Reform Sub-Committee of Society of Construction Law Australia (February 2014)
7 See for example *Georgiou Group Pty Ltd v MCC Mining (Western Australia) Pty Ltd* [2011] WASAT 120
8 Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 September 2016, 6612 (Sean L'Estrange)
9 Construction Contracts Amendment Bill (WA) cl 6(2)
10 https://www.commerce.wa.gov.au/sites/default/files/atoms/files/ib_065_payment_terms_under_cca.pdf
11 Western Australia, Parliamentary Debates, Legislative Assembly, 19 October 2016, 84 (Sean L'Estrange)
12 *Samsung C&T Corporation v Loots* [2016] WASC 330 [431]
13 Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 October 2016, 87 (Sean L'Estrange)
14 *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130; *Samsung C&T Corporation v Loots* [2016] WASC 330

WA GOVERNMENT ANNOUNCES PROPOSED MEASURES TO PROTECT SUBCONTRACTORS

KEYWORDS: SUBCONTRACTORS; PROJECT BANK ACCOUNTS

KEY TAKEAWAY

Following calls in the lead up to the March 2017 state election to "give small businesses a fair go", the Western Australian government has recently announced that it will be implementing measures to provide greater protections to subcontractors.[1]

Facts

The state government has described subcontractors as the backbone of the construction industry and has stated it is committed to supporting subcontractor small businesses by introducing mandatory Project Bank Accounts (**PBA**) and a code of conduct for State government run projects between $1.5 million and $100 million.[2]

The introduction of Project Bank Accounts on government projects

The State government has also delivered on its promise to introduce a measure to guarantee payments to subcontractors when the government contractor becomes insolvent. Following a three year trial on seven government contracts, from 30 September 2016, PBA's will be mandatory for projects valued between $1.5 million and $100 million run by the Building Management and Works section of the state government.

The opposition has put pressure on the State government following the fallout from the CPD Group collapse.[3] After the introduction of the measures, the opposition criticised the government for not going far enough and has promised that, if elected, it will introduce PBAs on construction projects run by the Treasury Office valued at greater than $100 million.[4]

PBAs are a dedicated trust account to facilitate payments directly from the principal to the head contractor and participating subcontractors as follows:[5]

1. the principal, head contractor and subcontractors sign a PBA trust deed;
2. the principal, head contractor and the Commonwealth Bank of Australia (**Bank**), who has pre-agreed to the PBA documentation, sign a PBA agreement;
3. the head contractor establishes the PBA with the Bank;
4. subcontractors who have a direct contract with the head contractor are required to sign up and participate in the PBA if the value of the contract exceeds a specified amount or otherwise can opt to sign up and participate in the PBA;
5. during the project, the head contractor submits a "payment instruction" to the Bank which allocates a certain amount to be paid between the head contractor and subcontractors and provides for retention; and
6. the principal pays the money into the PBA and the Bank disburses those funds according to the payment instruction (including retention arrangements).

Other than increased administration work, compliance with the PBA mechanism should not be of major concern to contractors and subcontractors. The major concern is how the release of retention is dealt with, which is unclear. The Bank will hold the retention funds, but under the PBA arrangements, it is not clear when the retention is released to subcontractors and whether a contractor can call on retention funds where there are significant defects and the parties are in dispute.

The introduction of a Code of Conduct on government projects

In addition to the PBAs and following requests by construction industry participants,[6] the State government also proposes to introduce a code of conduct for tenderers on State government - funded construction projects.

This code will be used to actively weed out bad behaviour on building sites, poor payment practices and anti-competitive behaviour. Those companies who do not adhere to the code of conduct will be ineligible to tender on future state government projects.

Note: this article was previously published as a Corrs in Brief article.

1 https://www.mediastatements.wa.gov.au/Pages/Barnett/2016/08/Greater-protection-measures-for-subcontractors.aspx
2 Western Australia, Parliamentary Debates, Legislative Council, 16 August 2016, p. 3 (Michael Mischin, Minister for Commerce).
3 Western Australia, Parliamentary Debates, Legislative Assembly, 28 June 2016, p4158f-4169a.
4 Protection to help safeguard subcontractors is welcome, The West Australian,13 August 2016.
5 https://www.finance.wa.gov.au/cms/uploadedFiles/Building_Management_and_Works/New_Buildings/introduction_to_project_bank_accounts.pdf
6 https://cciwa.com/about-us/CCI-News-Centre/news-articles/2015/07/29/wa-needs-a-construction-code-of-conduct

AVOIDING JURISDICTIONAL ERROR: IS NEAR ENOUGH GOOD ENOUGH? LAING O'ROURKE AUSTRALIA CONSTRUCTION PTY LTD V SAMSUNG C&T CORPORATION [2016] WASCA 130

KEYWORDS: ADJUDICATION; JURISDICTIONAL ERROR

KEY TAKEAWAY

In *LORAC v Samsung*, the Court of Appeal emphasised that the speed and efficiency of the adjudication process is a trade-off, which the legislature has accepted, for contractual and legal precision.

The decision appears to buck the recent trend of the Western Australian Supreme Court to emphasise the importance of adjudicators making determinations in accordance with ordinary legal principles[1].

The decision may make it difficult for a party to resist enforcement of a determination on the grounds that an adjudicator has misapplied the contract or the law. Although industry participants may be aggrieved by an adjudicator's determination, this decision emphasises the interim nature of the adjudication process.

Why is this decision important?

The recent decision of the WA Supreme Court of Appeal in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130 (LORAC v Samsung) is an important one for parties seeking (or resisting an application for) judicial review of an adjudicator's determination.

In particular, the decision confirms that courts will be reluctant to find jurisdictional error in a determination if the adjudicator at least means to apply the contract, even if he or she falls into error in that application. The decision is also important for three additional reasons:

1. It makes clear that a payment dispute can arise before the amount claimed in a payment claim is due under the contract.
2. There has been some judicial comment (by Mitchell J) to the effect that whether an adjudicator should dismiss an application by reason of complexity will depend on an adjudicator's ability and experience. The Court of Appeal left open the question whether this is the correct approach.
3. It clarifies that the court, in deciding whether to grant leave to enforce a determination, has discretion to consider all the facts and circumstances of the individual case (including extraneous payments not made directly in respect of the relevant determination).

Facts

The first respondent (**Samsung**) subcontracted the appellant (**LORAC**) to undertake the Port Landside Structural, Mechanical, Piping (SMP) and Electrical and Instrumentation (E&I) works at the Roy Hill project.

In January 2015, LORAC issued a progress claim under the subcontract. Samsung then exercised its contractual entitlement to terminate the subcontract for convenience. A dispute arose.

The parties signed an "Interim Deed" which required Samsung to pay LORAC termination payments including an "on account" amount of $45 million. Amongst other things, the termination payments covered all work done prior to termination. Samsung made the $45 million payment.

Importantly, the other termination costs payable under the Interim Deed were subject to two qualifications:

- firstly, Samsung's right to set-off; and
- secondly, a qualification that the total amount to be paid under the Interim Deed could not exceed the subcontract sum.

In February 2015, LORAC issued a second claim in respect of works it had performed prior to Samsung's termination of the subcontract. Samsung did not pay and LORAC applied for adjudication of both the January progress claim and the February claim under the *Construction Contracts Act 2004* (WA) (**Act**). The adjudicator determined both applications in favour of LORAC, requiring Samsung to pay LORAC a combined (additional) amount of about $44.1 million.

LORAC sought the WA Supreme Court's leave to register the determinations as judgments. In response, Samsung applied for judicial review of each determination, seeking to quash the determinations by writs of certiorari.[2]

The decision at first instance

His Honour Mitchell J heard LORAC and Samsung's applications together. His Honour upheld Samsung's applications for judicial review and quashed each of the adjudicator's determinations.

Mitchell J found that the adjudicator failed to resolve the payment disputes by reference to the terms of the parties' contract, thereby misapprehending the nature of his adjudicative function.

Therefore, Mitchell J denied leave to enforce those adjudication determinations. In any event, his Honour found that, even if the determinations were validly made, Samsung's liability to pay those amounts was discharged by its payments under the Interim Deed.

Mitchell J also dismissed Samsung's contention that a "payment dispute" under the Act could not arise prior to the time that payment for a payment claim was due to be paid pursuant to the provisions of the contract.

The decision on appeal

The WA Supreme Court of Appeal unanimously overturned the decision and determined that the adjudicator had not fallen into jurisdictional error. However, the Court of Appeal declined to enforce the determinations in light of the payments Samsung had made under the Interim Deed.

Jurisdictional error

The Court of Appeal found that the adjudicator did not, in either determination, commit jurisdictional error.

Martin CJ (with whom McLure P and Newnes JA agreed) set out the relevant authorities before concluding that:

- on one end of the spectrum, an adjudicator will not exceed jurisdiction if he or she merely misconstrues, or makes an error in the application of, a construction contract;
- on the other end of the spectrum, an adjudicator who expressly excludes consideration, or "takes no account whatever", of a construction contract will exceed jurisdiction; and
- in cases falling along the spectrum (between these extremes), the court must approach the question of jurisdictional error on a case-by-case basis.

Applying these principles, Martin CJ held that the adjudicator had not fallen into jurisdictional error because any error made by the adjudicator was (merely) "an error in the construction or application of the construction contract".

For example, his Honour said of the adjudicator's failure to correctly identify the date from which interest was payable:

> *'... an error of this kind is precisely the kind of departure from contractual and legal precision which the legislature has accepted as part of the 'trade-off' for speed and efficiency.'*[3]

When does a 'payment dispute' arise?

Samsung argued that (properly construed) section 6(a) of the Act[4] has the effect that no payment dispute can arise prior to the time at which the amount claimed in a payment claim is due to be paid under the provisions of the contract. Mitchell J found that there was a payment dispute at the time LORAC submitted the first adjudication application.

Martin CJ (Newnes JA agreeing) held that Mitchell J was correct to reject Samsung's submissions.

McLure P delivered separate reasons, but nonetheless agreed that a payment dispute can arise before payment is "presently due, as in the phrase 'due and payable".[5]

The enforcement of a determination

Martin CJ found that the Court, in considering an enforcement application, has discretion to consider all the facts and circumstances of the individual case.[6] Those circumstances extend to considering other payments, and whether or not they were made directly as a result of the determination.[7]

Martin CJ considered that extraneous payments made under the Interim Deed were made 'on account' and formed a running account of termination and post-termination costs. Martin CJ found that Samsung was not liable to pay the adjudication determination amounts as its liability was satisfied by the relevant appropriation in the running account, leaving Samsung with a reduced credit balance.[8]

Although neither party made submissions on that point, Martin CJ stated in obiter that it is arguable that the Interim Deed itself could be a construction contract or a variation to the subcontract. The effect of this would be that the Interim Deed (and any liability to pay under the Interim Deed) would fall within the jurisdiction of the adjudicator and therefore not be amenable to review absent jurisdictional error.[9]

The question of complexity

The Court of Appeal left open the question as to the proper approach for the court to take in reviewing an adjudicator's refusal to decline jurisdiction for complexity.[10]

In the decision at first instance, Mitchell J stated that in cases where the quantum in dispute is large or the primary issue is one of complicated contractual construction and the adjudicator is not legally trained, the proper approach is to dismiss the application for reasons of complexity under s 31(2)(a)(iv) of the Act.

Martin CJ did not comment on this. McLure P addressed the issue, albeit indirectly, in the course of discussing the distinction between narrow and broad jurisdictional facts. McLure P found that the complexity ground is a jurisdictional fact in the broad sense, as it requires the subjective view of the adjudicator.

In these circumstances, McLure P found that an adjudicator's decision on the question of complexity was open for judicial review.[11] Her Honour did not, however, express a view as to whether the adjudicator's legal training should be taken into account in determining whether he or she erred in determining a legally complex dispute.

Note: this article was previously published as a Corrs in Brief article.

1 *Red Ink Homes Pty Ltd v Court* [2013] WASC 52; *Delmere Holdings Pty Ltd v Green* [2015] WASC 148

2 Certiorari: a remedy issued by order or judgment of a court quashing the decision of a tribunal or inferior court on the grounds of jurisdictional error, an error of law on the face of the record or denial of procedural fairness.

3 [2016] WASCA 130 [107]

4 Which provides that: '*For the purposes of this Act, a payment dispute arises if — (a) by the time when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed;*'

5 See [2016] WASCA 130 [200]-[207] (McLure P)

6 [2016] WASCA 130 [141]

7 This is at odds with the District Court decision in *Kuredale Pty Ltd v John Holland Pty Ltd* [2015] WADC 61 where Keen DCJ held that an overpayment under a construction contract does not constitute a "sufficient reason" for a court to decline to grant leave under section 43 of the Act

8 [2016] WASCA 130 [161]

9 [2016] WASCA 130 [146]

10 [2015] WASC 237 at [223]-[226]

11 [2016] WASCA 130 [194], [198]

SECURITY – YOU GET WHAT YOU BARGAIN FOR – FLSMIDTH PTY LTD V DURO FELGUERA AUSTRALIA PTY LTD [2016] WASC 191

KEYWORDS: PERFORMANCE SECURITY

KEY TAKEAWAY

This case illustrates the importance of security as a risk allocation device pending the final resolution of the dispute. The decision is important for four reasons:

1 Parties must ensure security provisions accurately reflect their intentions. For example, provisions that allow a party to call on security if they act "bona fide" grant a far wider power than requirements to act "reasonably".

2 A contractual obligation for a subcontractor to be "responsible" for moneys deducted from the head contractor under the head contract is not the same as an obligation to be "liable" for those moneys. The word "responsible" imports a limitation of scope and causation.

3 It confirms a party must provide clear evidence that, on receiving notice of the call, it was unable to pay.

4 To establish that the party that called on the security will be unable to repay it (for example, due to insolvency), clear evidence should be provided. Mere speculation is insufficient.

Facts

Duro Felguera Australia Pty Ltd (**Duro**) engaged FLSmidth Pty Ltd (**FLSmidth**) under a subcontract to design, manufacture and supply three heavy-duty cone crushers (**Subcontract**). Duro's head contract was with Samsung C&T Corporation (**Samsung**), who was the EPC contractor on the Roy Hill Iron Ore Project.

Pursuant to clause 5 of the Subcontract, FLSmidth provided Duro two unconditional bank guarantees (10% of the Subcontract Sum each), one for performance and the other for warranty.

Under the Subcontract, if FLSmidth failed to supply the cone crushers by a milestone date, it would be liable for liquidated damages of 1% of the Subcontract Sum each week, up to a maximum of 10% of the Subcontract Sum.

Under clause 36.1 of the Subcontract, Duro could deduct money otherwise due to FLSmidth if:

1 any debt was due from FLSmidth to Duro; or

2 FLSmidth was responsible for Samsung's deductions from payments to Duro.

Duro exercised its right under clause 36.1 to deduct money from FLSmidth for:

- defective work;
- a negative variation;
- liquidated damages under the Subcontract: and
- Samsung's claim for liquidated damages,

which Duro passed on to FLSmidth as it claimed FLSmidth was responsible.

These deductions resulted in a negative payment schedule to FLSmidth, which it did not pay.

FLSmidth disputed Duro's entitlement to pass through delay liquidated damages under the head contract given there was a liquidated damages regime for delay under the Subcontract. Duro then notified FLSmidth it intended to call on its bank guarantee. FLSmidth sought an interlocutory injunction to prevent Duro from making that call.

Decision

Tottle J dismissed FLSmidth's injunction application because:

1 There was no serious question to be tried as Duro had an honest or bona fide belief that it could call on the security; and

2 The balance of convenience did not favour granting the injunction where FLSmidth had notice of Duro's intention to call on the security and could have paid Duro to avoid reputational damage.

Serious question to be tried

Tottle J reiterated well established jurisprudence that security is a risk allocation device pending the ultimate resolution of the dispute. His Honour took the position that the parties are sophisticated and well-advised commercial entities who would have carefully chosen their words on when that security can be called on.[1]

Tottle J interpreted clause 5 of the Subcontract to give Duro a wide discretion to call on the security as the use of the phrase "acting bona fide" merely required the parties to deal with each other honestly.[2]

Tottle J refused to infer that Duro could only call on the security if it adopted either the correct construction of the Subcontract or, at the very least, a reasonable construction of it. The Subcontract did not contain those specific words.[3]

His Honour did note objective considerations may be relevant to considering the phrase "acting bona fide", however, as an absence of a proper or real foundation for the construction of the Subcontract would reflect adversely on whether a party acted in good faith.

Tottle J examined clause 36.1(b) to determine whether Duro's construction of that clause was so untenable that it was not acting bona fide. That clause permitted Duro to pass through Samsung's delay liquidated damages to FLSmidth where FLSmidth was responsible for them. Tottle J distinguished the word "responsible" from "liable", finding that the use of the word "responsible" conveyed a meaning other than "liable", as "liable" was used in other provisions of the Subcontract. Tottle J applied the Macquarie Dictionary meaning of "responsible" to mean "accountable". Therefore, Duro's ability to pass on liquidated damages was limited by the "scope of causation" identified by Duro as to the likely damages suffered. As a result, Duro could pass through damages for which FLSmidth was not "liable" for but for which it was "responsible". Tottle J accepted this construction could result in the possibility of double recovery on an interim basis, which was a consequence of security being a risk allocation device.

Tottle J held that FLSmidth failed to establish that Duro was acting dishonestly when it considered that it was entitled to amounts under the Subcontract and to call on the security. Therefore, his Honour concluded that FLSmidth failed to establish that there was a serious question to be tried.

Balance of convenience

Avoiding reputational damage

Despite finding there was no serious question to be tried, his Honour still considered whether damages were an adequate remedy. Tottle J acknowledged that a company in the construction industry that has its performance security called on could very well suffer damage to its reputation that would be difficult to quantify.[4] However, FLSmidth agreed to provide the performance security under the terms of the Subcontract. It was aware of the risk the security would be called on and result in reputational damage. His Honour also held FLSmidth could have avoided any reputational damage by making payment after receiving notice. FLSmidth failed to adduce any evidence why it could not meet this debt.

Risk of insolvency

Tottle J (in obiter) said that where there is a risk the party calling on security will be unable to repay that amount at the final resolution of the dispute (due to insolvency or otherwise), the other party must be able to bring sound evidence of that risk, rather than mere speculation. FLSmidth adduced evidence in the form of financial statements (which showed a modest positive cash balance) and evidence of Duro's involvement in litigation with Samsung. Tottle J held that there was a considerable element of speculation Duro could not repay the security. FLSmidth failed to bring any real evidence to establish there was a "high level of likelihood of insolvency". Tottle J concluded that the risk in this case did not justify the granting of an injunction and, therefore, depriving Duro of the benefit of the bargain they contracted for.

1 At [40], citing *FMT Aircraft Gate Support Systems AB v Sydney Ports Corporation* [2010] NSWSC 1108 at [10] (Pembroke J)
2 At [38] citing *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222 at [61]
3 At [41]
4 At [58]
5 *Romaldi Constructions Pty Ltd v Adelaide Interior Linings Pty Ltd* (No 2) [2013] SASCFC 124 at [99]

CARILLION CONSTRUCTION LIMITED V WOODS BAGOT EUROPE LIMITED [2016] EWHC 905 (TCC)

KEYWORDS: EXTENSION OF TIME CLAUSES; CONTRACTUAL INTERPRETATION

KEY TAKEAWAY

In interpreting extension of time clauses — like any other clause — courts will typically prefer the plain meaning of words, even if that entitles the contractor to extra time that may not reflect the actual delay suffered.

Facts

In June 2007, Rolls Development UK Ltd engaged Carillion Construction Ltd to design and construct the Rolls Building (under the **Contract**). The Rolls Building is a court complex comprising 31 court rooms, including "super courts" for large, multi-party disputes. It is also home to the UK's Technology and Construction Court, where this case was heard. Carillion entered into a subcontract with EMCOR for the provision of mechanical, electrical and other services (**Subcontract**).

Under the Contract, Carillion was liable for liquidated damages for late and non-completion. Clause 12 of the Subcontract allowed Carillion to recover from EMCOR direct loss or expense suffered as a result of EMCOR failing to complete the works on time.

The project was late in reaching practical completion. Carillion brought proceedings against EMCOR (and another subcontractor, AECOM) in respect of the liquidated damages levied against it by Rolls.

EMCOR argued that it was not liable because it was entitled to an extension of time. EMCOR (and AECOM) also argued that Carillion was not liable to Rolls for liquidated and ascertained damages; alternatively, it had not paid such sums to Rolls; alternatively, that such sums had not been deducted from sums otherwise payable to Carillion.

Decision

1 If EMCOR was entitled to an extension of time, was this period to be added contiguously (that is, on top of the date for completion)?

Clause 11.3.2 of the Subcontract read:

> *"if the completion of the Sub-Contract works is likely to be delayed thereby beyond the period or periods stated in the Appendix part 4, or any revised such period or periods, then the Contractor shall, in writing, give an extension of time to the Sub-contractor by fixing such revised or further revised period or periods for the completion of the Sub-contract works as the Contractor then estimates to be reasonable".*

EMCOR argued that any additional period for completion was to be added on top of the pre-existing dates for completion under the Subcontract.

Carillion conceded that if EMCOR's right to an extension of time arose before the date for practical completion, then it could be additional to the relevant date or period for completion. However, if the extension of time arose after the date for EMCOR's practical completion had passed, then this would not necessarily be the case. Carillion argued that the further time could be added to the existing period for completion as a "floating" time frame, distinct from and not immediately following, the date for EMCOR's completion.

Carillion submitted that the Subcontract contemplated a "period" of completion, so an extension of time need not be given by fixing a single completion date and an aggregate period of completion. Further, as the extension of time clause included an obligation to pay an amount in respect of loss and expense caused by its breach (rather than "liquidated damages"), EMCOR was obliged to pay an amount that reflected the actual loss caused by its failure to complete on time.

The Recorder, Jefford QC, noted that the determination of this issue required preferring the natural meaning of the words over the meaning the court thinks accords with commercial common sense.

In accepting EMCOR's argument, the Recorder found that there was no significance in the use of words "period or periods" and that they did not serve to indicate that the provisions operated by creating fresh periods for carrying out the rest of the Works. She observed that:

- The clause contemplates a revision of the period or periods and not a "fresh and distinct period" in which the Subcontract Works can be carried out.
- The reference to "extended period or periods" previously fixed itself demonstrates that the way an extension of time may be given is by fixing an extended period for completion.
- Clause 11.7 (which provided that the periods for completion may be shortened or lengthened) reinforces this interpretation.

2 Were EMCOR and AECOM liable to Carillion for liquidated damages?

As practical completion had been delayed, Carillion and Rolls entered into a further supplementary agreement on 29 July 2011 to:

- revise the contract sum;
- satisfy Carillion's liability for liquidated damages payable up to 22 July 2011; and
- agree new dates for practical completion.

EMCOR argued that any liability Carillion may have had for late completion was extinguished by this further agreement.

The Recorder rejected this argument and found that the further agreement did not extinguish Carillion's liability, but rather crystallised or satisfied the liability as at 22 July 2011, by way of deduction from the Contract sum. This meant that Carillion was still liable under the contract for the liquidated damages it incurred prior to the agreement.

Therefore, the agreement did not extinguish EMCOR's liability to Carillion for sums paid or allowed as liquidated damages under the main contract.

As Carillion's liability was not extinguished by the further supplementary agreement, it was not necessary to determine whether EMCOR was liable to Carillion for the liquidated damages it incurred.

http://www.bailii.org/ew/cases/EWHC/TCC/2016/905.html

PERENCO UK LIMITED V BOND [2016] EWHC 1498 (TCC)

KEYWORDS: IMPLIED TERMS

KEY TAKEAWAY

The case reinforces conventional principles about implied terms. An implied term will not be recognised in a commercial agreement merely because there would be an unfair outcome without it.

Facts

In June 1994, Mr Bond entered into a deed with British Gas plc (**BG**) granting BG an easement to run a pipeline across his land (the **BG Deed**). In September 1994, Bond entered into a similar agreement with BP Exploration Operating Company Ltd (BP), granting BP a lease over a strip of his land to run their pipeline (the **BP Lease**). The BG Deed and BP Lease are referred together as "**the agreements**".

In October 2011, Bond obtained planning permission to extract minerals from his land. He then gave notice to BG and BP seeking compensation under the agreements as their pipelines prevented the extraction.

Both agreements had a compensation clause covering the situation where pipelines prevented development on the land. Under the BG Deed, Bond would have to give 30 days' notice, upon which BG could serve a counter-notice "at any time" stopping further work. The BP Lease contained a similar clause, but required a counter-notice to be served within three months, during which BP would either divert its pipeline or pay compensation. Both agreements also had a provision preventing double compensation. If a common mining development affected both pipelines and BG and BP both paid compensation, each would be liable for only half of the greater of the two amounts.

On 24 February 2012, Perenco UK Ltd (**Perenco**), the successor to BP, notified Bond it would pay compensation of £287,525 (plus interest) rather than divert its pipeline. The successor to BG, Southern Gas Networks plc (**SGN**), chose not to serve a counter-notice (and therefore, not to pay any compensation). In SGN's assessment, it would have owed £2,382,817.

The compensation claim was the subject of an arbitration, in which Bond argued that there was an implied term "*that BG would serve a counter notice in the event that the proposed works would interfere with its pipe*".

The opinion of the legal adviser in the arbitration was that a term implied in the BG Deed should be recognised because without it, BG (or SGN) could both keep their pipeline and avoid paying compensation merely by waiting three months for BP (or Perenco) to file a notice, and then not doing so itself. The legal adviser set out the implied term as a proviso to the compensation clause of the BG Deed, with a similar effect but different wording from that that Bond proposed. The implied term was the subject of the appeal.

Decision

Nerys Jefford QC, sitting as a Deputy High Court Judge, allowed the appeal, finding that the requirements for an implied term had not been satisfied. Her Honour referred to the recent case of *Marks and Spencer v BNP Paribas*,[1] in which Lord Neuberger considered the five conventional conditions required to establish an implied term. Lord Simon identified these conventional requirements in *BP Refinery (Westenport) Pty Ltd v Shire of Hastings* — the implied term:[2]

1 must be reasonable and equitable;

2 must be necessary to give business efficacy to the contract;

3 must be so obvious that it goes without saying;

4 must be capable of clear expression; and

5 must not contradict any express terms of the contract.

Lord Neuberger provided six additional qualifications to those principles:[3]

1 implication of a term was not dependent on proof of the actual intention of the parties, but that of notional reasonable people in the position of the parties at the time at which they were contracting;

2 a term should not be implied merely because it appears fair;

3 the term will generally be considered reasonable and equitable if the other requirements are satisfied;

4 business efficacy and obviousness should be considered as alternatives, although it would be rare for only one to be satisfied;

5 it is "vital to formulate the questions to be answered by the [officious bystander] with the utmost care"; and

6 necessity for business efficacy should be assessed by reference to whether the contract would "lack commercial or practical coherence" without it.

Her Honour found that the respondent's arguments made too many assumptions about the intentions of the parties and the commercial effect of the agreements. The agreements as they were written did not expressly set out any situations in which compensation had to be paid. In the case of the BG Deed, the provision to serve a counter-notice "at any time" meant that there was no necessary requirement to serve a counter-notice.

That the agreements provided for one scenario where both of the appellants paid compensation did not automatically lead to the conclusion that compensation would be payable by both parties in all circumstances. If the two agreements had to match each other, they would have mirrored each other more closely. In fact there were significant differences between the two. Her Honour concluded that "*the implied term does not seem to me to be one which is either necessary to give the BG Deed business efficacy or one that goes without saying*". The fact that the implied term went through multiple iterations also went against obviousness, while the deeming provision of the suggested implied term appeared to contradict the clause of the BG Deed which allowed BG to serve its counter-notice "at any time". Accordingly the appeal against the arbitrator's award was allowed.

http://www.bailii.org/ew/cases/EWHC/TCC/2016/1498.html

1 [2015] UKSC 72

2 (1977) 180 CLR 266, 282–283

3 *Marks and Spencer v BNP Paribas* [2015] UKSC 72 at [21]. For a contrasting but arguably consistent approach, see the advice of the Privy Council advice in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10

4 Citing Kim Lewison, *The Interpretation of Contracts* (5th ed, 2011)

ALLEN TOD ARCHITECTURE LTD V CAPITA PROPERTY & INFRASTRUCTURE LTD [2016] EWHC 2171 (TCC)

KEYWORDS: EXPERT EVIDENCE

KEY TAKEAWAY

In England and Wales, under the Civil Procedure Rules, the price for changing expert is normally waiver of privilege over any previous experts' reports. The price goes up where there is strong evidence of "expert shopping", and may entail disclosure of a much broader scope of documents and a greater erosion of privilege.

There is no equivalent approach in Australian jurisprudence. Interestingly, however, the rule giving rise to this "price" in the Civil Procedure Rules[1] is not dissimilar to the comparable rule in the Victorian Civil Procedure Act.[2]

There is no reason in principle why a Victorian Court could not impose an analogous "price" (for changing experts) in applying its discretion under the Victorian Civil Procedure Act.

Facts

In January 2005, Allen Tod Architecture Ltd (**the plaintiff**) was engaged by Barnsley MBC (**Barnsley**) to design the renovations for the Barnsley Civic Hall. As part of fulfilling its obligations to Barnsley, the plaintiff retained Capita Property & Infrastructure Ltd (**the defendant**) for structural engineering advice. The project encountered serious problems in mid-2007, including weaknesses in the walls and foundations, which delayed the project.

In January 2010, Barnsley brought a claim in professional negligence against the plaintiff in arbitral proceedings which were settled in October 2015 for £2 million. Prior to settling, the plaintiff initiated separate proceedings against the defendant in December 2013.

The defendant denied liability and causation, and challenged the reasonableness of the settlement sum that the claimant agreed with Barnsley. During the proceedings between the plaintiff and the defendant, the plaintiff sought to change its structural engineering expert. The defendant then applied for interlocutory orders that the plaintiff disclose all documents relating to the former expert's report.

The plaintiff's claim

The plaintiff claimed that:

- it should not be required to disclose any further documents given that it had released both the letter of instruction and the final report prepared by the former expert;
- all other documents relating to the former expert's report were protected by privilege; and
- it had not engaged in "expert shopping" and had reasonable grounds to obtain a new expert given the delays it suffered when seeking a report from the former expert.

The defendant's claim

The defendant claimed that:

- the late and unexpected change of the plaintiff's structural engineering expert should be conditional on the plaintiff being required to waive privilege over any correspondence between it and the former expert in relation to the former expert's report;
- the court has jurisdiction to order that the plaintiff waive privilege; and
- the court does not need to find evidence of "expert shopping" to require a party who has changed experts to disclose any documents which relate to the former expert's report.

Issues

The first issue was whether the plaintiff had disclosed sufficient material to provide a proper basis for the plaintiff to call the new expert to give evidence.

The second issue was whether it was reasonable for the plaintiff to waive privilege to any documents relating to the old report, beyond that which had been disclosed, if the plaintiff could prove that it had not been "expert shopping".

Was there sufficient disclosure?

Judge Grant held that the court has a wide and general power to exercise its discretion whether to impose terms when granting permission to a party to adduce expert opinion evidence.

However, the power is one to be exercised reasonably on a case-by-case basis, having regard to all the circumstances of the particular case.

His Honour found that the evidence indicated that the former expert's notes and preliminary report were documents in which that expert had expressed his opinion on the issues in the case. His Honour further found that where the substance of the expert's opinion could be found in extrinsic documents, then sufficient disclosure would necessarily require a party to waive privilege in those documents.

Is an absence of "expert shopping" a bar to disclosure?

The second issue concerned the threshold of waiving privilege to the secondary expert documents.

Counsel for the plaintiff argued that such extensive disclosure should only be allowed where it could be proven that a party had engaged in "expert shopping".

Counsel for the defendant argued the court had jurisdiction to order a party to waive privilege, irrespective of whether or not a case of "expert shopping" had been proven.

Judge Grant found that there was faint evidence to suggest that the case concerned "expert shopping."

However, his Honour was persuaded by the defendant's arguments and determined that "expert shopping" was an irrelevant consideration when examining the power of the court to direct disclosure of documents containing the first expert's opinion. His Honour accepted, however, that "expert shopping" was relevant in respect of attendance notes and so on which record (or purport to record) the substance of the first expert's opinions.

http://www.bailii.org/ew/cases/EWHC/TCC/2016/2171.html

1 Civil Procedure Rules 1997 (UK) c 12, r 35.4
2 Civil Procedure Act 2010 (Vic) s 65G

ARCADIS GLOBAL CONSTRUCTION DISPUTES REPORT 2016

KEYWORDS: CONSTRUCTION DISPUTES AROUND THE WORLD

KEY TAKEAWAY

The Arcadis Global Construction Disputes Report 2016 predicts further turbulence in the construction industry, particularly due to commodity and currency price fluctuations.

Joint venture (JV) difficulties are a leading cause of construction disputes, with one in four JVs ending up in dispute.

Arcadis observed a notable increase in the volume of arbitrations and mega disputes. The largest exceeded US$2.5 billion.

Globally, construction disputes have decreased marginally in value, but have increased in duration.

Global trends

Arcadis reports that both arbitration and mediation are on the rise.

The study also indicates that dispute resolution is often initiated earlier.

Another reported observation is that there has been an increase in mega disputes.

Regional trends

In **Asia**, Arcadis identified that the value of disputes dropped significantly during 2015 to an average of US$67 million, yet remained approximately 45% higher than the global average.[1] Such disputes involved a JV-related dispute in 41.4% of all cases.[2]

The region remained very active in the quantity of institution and ad hoc arbitrations, namely in the Hong Kong and Singapore International Arbitration Centres.[3] Within the Asian market, many large scale infrastructure projects are nearing completion, which will present challenges in China, Hong Kong and Singapore particularly.[4]

In the **United Kingdom**, Arcadis suggests that Brexit fears have influenced investment decisions but predict that any additional impact on the construction industry (beyond the labour market) will be limited.[5]

In the **Middle East**, Arcadis noted a rise in the use of mediation and adjudication instead of litigation and arbitration.[6] From a front-end perspective, the report commented on a tendency to use traditional contracting strategies ill-suited to the complexity of projects.[7] More positively, though, projects in the Middle East experimented with the New Engineering Contract (NEC) suite and PPPs to mitigate budget deficits arising from low oil prices.[8]

In **Australia**, Arcadis highlights the decline in the mining, oil and gas sectors.[9] Areas of growth include commercial and residential developments and rail and road projects, particularly in Victoria and New South Wales.[10] As projects involving natural resources have reached their peak, multibillion-dollar disputes are predicted over the next few years. The report suggests three current reasons for construction disputes in Australia:[11]

- haste to get product to market;
- inadequate risk allocation between contracting parties; and
- incomplete contract documentation.

Key statistics

Preferred methods of dispute resolution

In 2014 and 2015, party-to-party negotiation ranked first, followed by mediation, and then arbitration.

Causes of disputes

The most common global cause of disputes in both 2014 and 2015 was "*failure to properly administer the contract*".

The report also includes a new cause, ranked as number four: "*incomplete design information or employer requirements (for Design and Build)*".

Value of disputes

The global average value of disputes in 2015 was US$46 million, down from US$51 million in 2014.

Length of disputes

Interestingly, 2015 saw an increase in the global average length of disputes, from 13.2 months in 2014 to 15.5 months in 2015. This was the highest average in the last five years, the lowest being 9.1 months in 2010.

Of the five key regions tabled in 2015, Asia reported the highest average of 19.5 months. The United Kingdom scored an impressive 10.7 months. Arcadis attributes this to London's reputation as a "dispute resolution powerhouse".[12]

Kinds of disputes

Joint ventures continue to be regarded as a significant source of disputes. Globally, over one in four JVs ended up in dispute in 2015. The breakdown is: 41.4% in Asia, 32.3% in the Middle East, 20.45% in North America, 17.7% in continental Europe, and 12.5% in the United Kingdom (down from 50% in 2014).

https://www.arcadis.com/media/3/E/7/%7B3E7BDCDC-0434-4237-924F-739240965A90%7DGlobal%20Construction%20Disputes%20Report%202016.pdf

1 At 16–17
2 At 17
3 At 17
4 At 17
5 At 9
6 At 19
7 19
8 19
9 24
10 24
11 24–25
12 21

LUCAS SHIPWAY, "NEGLIGENCE IN DESIGN AND CONSTRUCTION: THE IMPACT OF THE CONTRACTUAL MATRIX" (2016) 32(5) BUILDING AND CONSTRUCTION LAW JOURNAL 289

KEYWORDS: NEGLIGENCE, CONTRACT

KEY TAKEAWAY

This article contains a useful discussion of the background to concurrent liability in contract and tort, and some of the problematic issues that arise on the current state of the law.

Abstract

Claims in negligence for defective design and construction generally fall to be resolved against a contractual backdrop. This article examines the impact of that "contractual matrix" on liability in negligence.

After revisiting the principles that have traditionally governed the interplay between tort and contract, the article considers some significant recent decisions, including *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288* (2014) 254 CLR 185. It concludes that the existence and scope of a duty of care can be affected not just by the terms of any contract to which the plaintiff and defendant are parties but also by implication from the wider contractual matrix more generally.

This has important ramifications not only for principals and contractors but also for others, such as prospective purchasers.

http://www.westlaw.com.au/maf/wlau/app/document?docguid=Iabd7466d9a6711e6b540ae4964051fca&tocDs=AUNZ_AU_JOURNALS_TOC&isTocNav=true&startChunk=1&endChunk=1

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Best Lawyers Peer Review, 2015-2017

Best Lawyer - Construction/ Infrastructure & Litigation
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Best Lawyers Peer Review, 2011

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International Who's Who Legal of Construction Lawyers, 2012 & 2015

Leading Lawyer – Construction
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