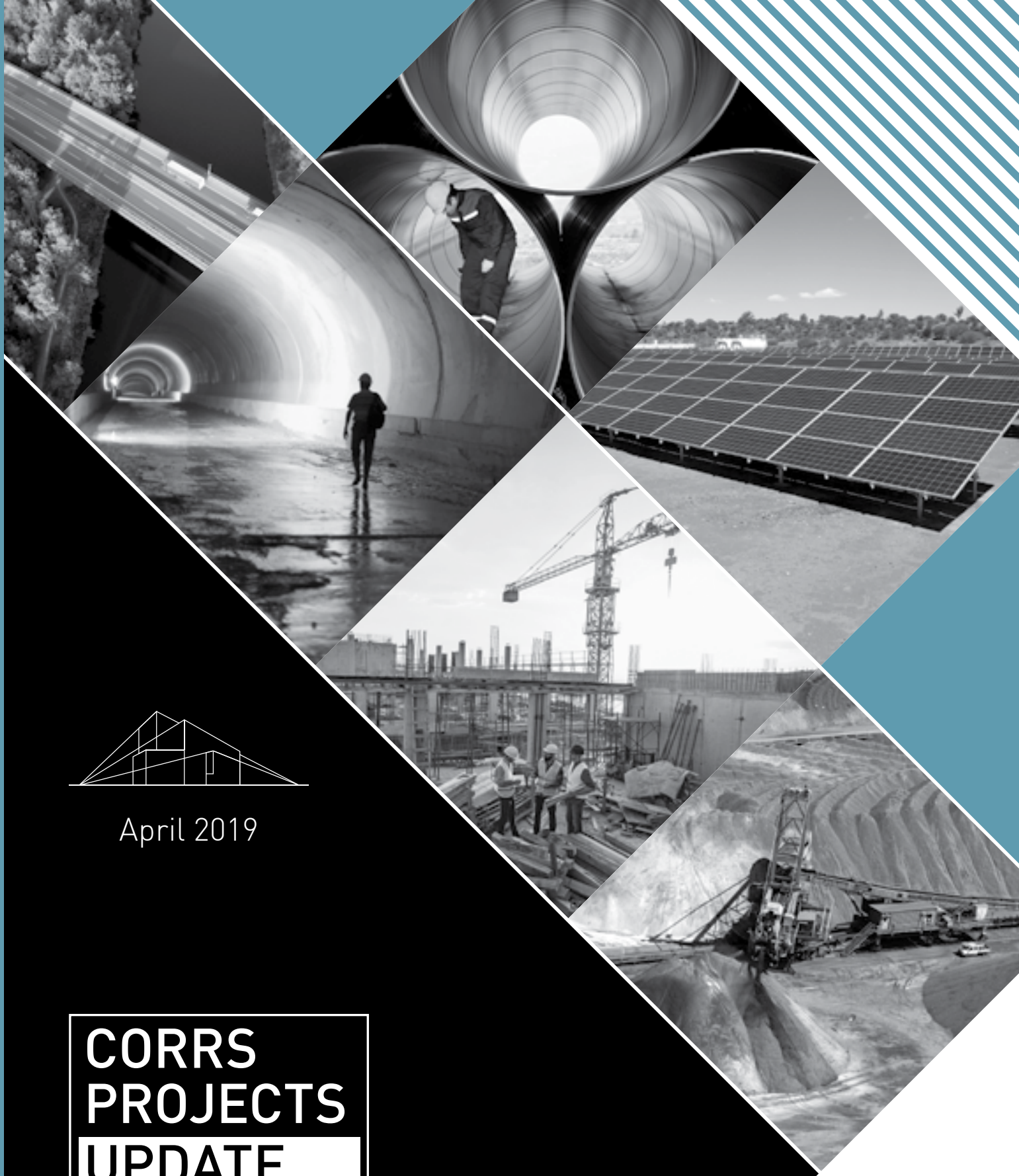

April 2019

CORRS PROJECTS UPDATE

CORRS CHAMBERS WESTGARTH

lawyers

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Welcome to the latest edition of Corrs Projects Update April 2019

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.

We hope that you find it interesting and stimulating.

CORRS PROJECTS UPDATE

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 Update links to some of our recent thinking on issues affecting the construction industry.

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CPB Contractors Pty Limited v Celsus Pty Limited (No 2) [2018] FCA 2112

CORRS PROJECTS UPDATE

The facts

This case concerned disputes about the new Royal Adelaide Hospital, a public–private partnership project. There was a complex background of arbitral proceedings and litigation in the FCA.

Background

In 2017, against the background of existing arbitral proceedings, the applicants (**Builders**) commenced proceedings in the FCA seeking a range of relief against the special purpose vehicle created for the project (**Project Co**), the Minister for Health of South Australia and the State of South Australia (collectively, the **State**) and the independent certifier for the project (**IC**).

The existing arbitrations, conducted before the Hon Kevin Lindgren AM QC, were between the State, Project Co and the Builders in relation to delays and defects. The factual matters to be determined in the existing arbitral proceedings substantially overlapped with those in the FCA proceedings.

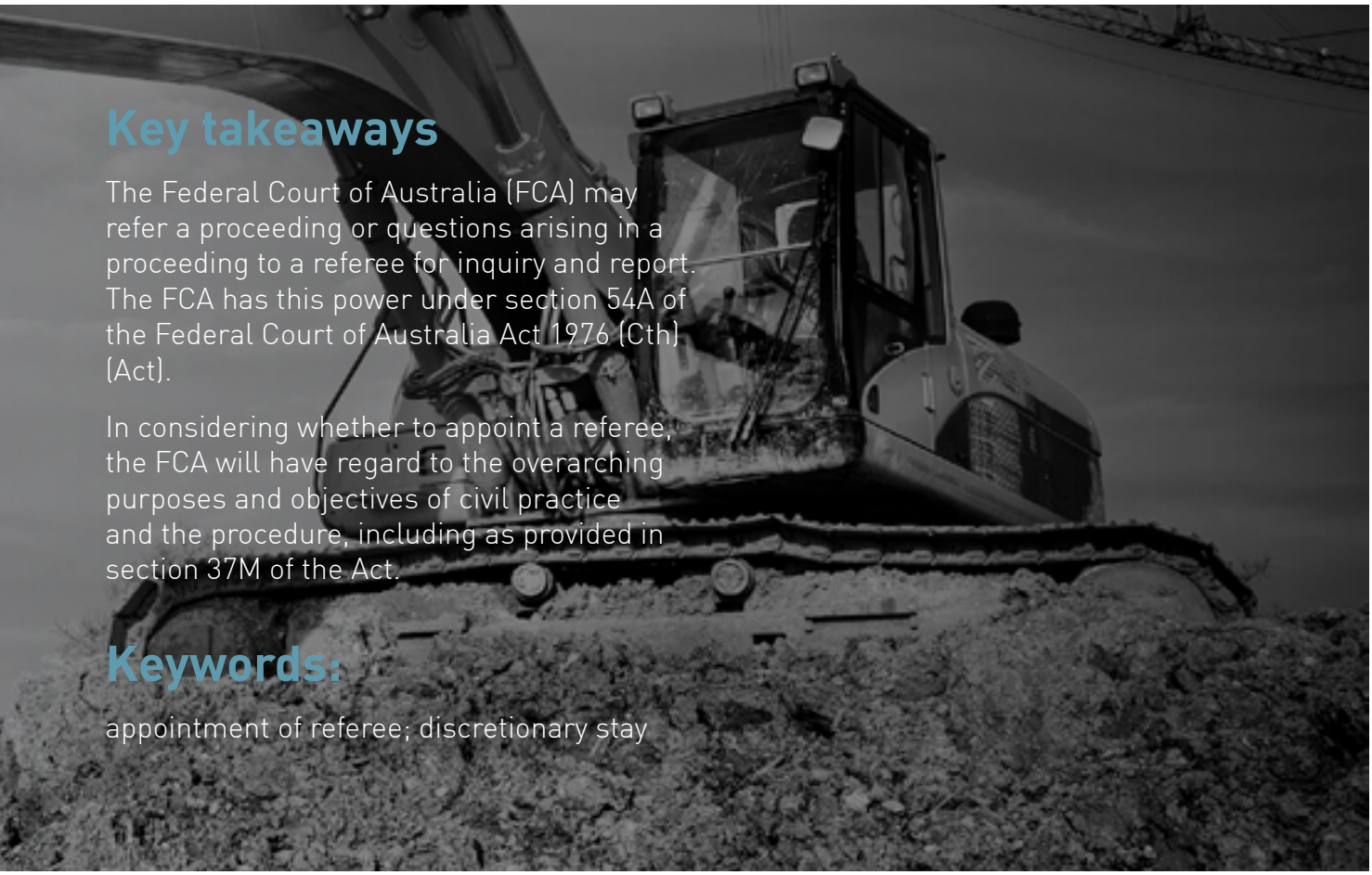
In December 2017, Lee J ordered:

- a mandatory stay in respect of claims brought by the Builders against Project Co under section 8 of the Commercial Arbitration Act 2010 (NSW); and
- temporary (discretionary) stays in respect of direct claims between the Builders and the State, and the Builders and the IC, until the conclusion of the arbitrations currently before Dr Lindgren.[1]

Subsequently, the Builders commenced an arbitration which included claims against the State and the IC (**Builders' Claims Arbitration**). However, the relevant contracts did not provide for arbitration between the Builders and the State, or the Builders and the IC. Accordingly, the Builders served Project Co with a notice of arbitration in respect of the Builders' Claims Arbitration. In turn, Project Co served a notice of arbitration on the State, by which it "passed through" those claims to the State. Dr Lindgren was appointed to hear those arbitrations.

Project Co also commenced an arbitration against the IC (**IC Claims Arbitration**) which sought to "pass through" the relevant parts of the Builders' Claims Arbitration to the IC. The IC disagreed with the appointment of Dr Lindgren as arbitrator and Professor John Sharkey AM was appointed. The IC then brought a jurisdictional challenge against Project Co's commencement of the IC Claims Arbitration. Professor Sharkey concluded that there was no jurisdiction to determine the disputes because the notice of arbitration was invalid as it had not been given jointly by Project Co and the State. The State refused to jointly commence arbitral proceedings against the IC as the allegations extended to impropriety between the IC and the State.

1 *CPB Contractors Pty Limited v Celsus Pty Limited (formerly known as SA Health Partnership Nominees Pty Ltd)* [2017] FCA 1620



Key takeaways

The Federal Court of Australia (FCA) may refer a proceeding or questions arising in a proceeding to a referee for inquiry and report. The FCA has this power under section 54A of the Federal Court of Australia Act 1976 (Cth) (Act).

In considering whether to appoint a referee, the FCA will have regard to the overarching purposes and objectives of civil practice and the procedure, including as provided in section 37M of the Act.

Keywords:

appointment of referee; discretionary stay

Interlocutory application

In what appeared to be an attempt by the Builders to pursue their claims against all parties (including the IC) before Dr Lindgren, the Builders filed an interlocutory application seeking orders that would have the effect of:

- vacating the temporary stays for the Builders' claims against the State and the IC; and
- appointing Dr Lindgren as the referee for the Builders' claims against the State and IC, to:
  - hold an inquiry into the claims against the State and the IC in conjunction with the arbitrations currently before Dr Lindgren; and
  - provide a report to the Court in relation to those claims.

The State and the IC opposed the application. The issues for the Court were:

1. whether the Court had the power to grant the relief sought, specifically:

a) whether the referee would be impermissibly exercising judicial power; and

b) whether the Court, in adopting the referee's report, would be acting inconsistently with its status as a repository of federal jurisdiction; and

2. if the Court had the requisite power, whether the Court should exercise its discretion to appoint a referee to hear the matters.

The decision

First issue — Power

Lee J found that there was no inhibition on the power of the Court to grant the relief sought by the Builders because:

- the referee does not exercise judicial power because it has no role in determining rights and liabilities; and
- the Court has the discretion to accept or reject the report, and the report by a referee has no legal status unless it is adopted.

Second issue — Discretion

In considering whether to exercise the Court's discretion to appoint a referee, Lee J had regard to the overarching objectives in section 37M of the Act, which include:

- the just determination of all proceedings before the Court (**Justice Factor**);
- the efficient use of the judicial and administrative resources available and the efficient disposal of the Court's overall caseload (**Efficiency Factor**);
- the disposal of the proceedings in a timely manner (**Timeliness Factor**); and
- the resolution of disputes at a cost proportionate to the importance and complexity of the matters in dispute (**Cost-effectiveness Factor**).

Lee J weighed the submissions made by the parties, including the Builders' argument that it would be just, efficient and cost effective to have all relevant matters heard by Dr Lindgren. However, his Honour found that three arguments raised by the State and the IC were decisive against granting the referral.

- The temporary stays were ordered because they were ancillary to the matters that were the subject of Project Co's mandatory stay, and there had been no application to lift the mandatory stay.
- The Builders relied on a "novel" claim against the State and IC, a standalone action for causing loss by unlawful means. Issues of both fact and law were likely to be contested and it was preferable that the facts be found by a judicial officer.
- As the case made against the State and IC was for unlawful conduct, the seriousness of the Builders' allegations was a significant factor. This included the quantum of the claim but more significantly, the nature of what was alleged and against whom it was alleged.

Lee J dismissed the interlocutory application.

Conclusion

This case confirms that the FCA can appoint a referee and gives some guidance on the referee's power. The case also illuminates when the FCA may exercise its discretion to appoint a referee. Although not an "inflexible rule", the Court in this case did not consider it appropriate to refer where serious allegations of wrongdoing were made against the State.

http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2018/2018fca2112

Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International B.V. (No 6) [2019] FCA 337

CORRS PROJECTS UPDATE

The facts

Federal Treasury Enterprise (FKP) Sojuzplodoimport and Federal Public Unitary Enterprise Eternal Economic Union Sojuzplodoimport (FGUP VO) (**Federal**) sued Spirits International B.V. (**Spirits**) to rectify the Australian register of trademarks.

Spirits sought to dismiss these proceedings in an interlocutory application (**First Interlocutory Application**).

In the affidavit of Ms Semenova filed in the First Interlocutory Application, Federal disclosed and relied on legally privileged documents (the **Documents**) by referring to and exhibiting redacted versions. The Documents concerned communication between Federal and Federal's former Australian solicitors, including memoranda and opinion of counsel.

In response, Spirits filed an interlocutory application seeking orders that Federal produce several of the Documents unredacted (**Second Interlocutory Application**). Spirits argued Federal impliedly waived privilege by disclosing and relying on the Documents in Ms Semenova's affidavit.

Federal argued Ms Semenova did not intend and did not have Federal's authority to waive legal professional privilege, other than to the extent waived by annexing to her affidavit redacted copies of the Documents.

Federal Court decision

To determine whether Federal impliedly waived privilege, Stewart J had regard to the redacted parts of the Documents in unredacted form.

His Honour noted the Second Interlocutory Application did not concern whether the documents attracted privilege or whether it had been waived. Rather, it concerned the production of documents under notices to produce. Therefore, sections 118 and 121–122 of the Evidence Act 1995 (Cth) did not apply.

In determining the issue before the Court, Stewart J referred to the test outlined in *Bailey v Director-General, Department of Land and Water Conservation* (***Bailey***):

> "where the whole of a document is a privileged communication between legal adviser and client, the party entitled to claim that privilege cannot waive the privilege as to part of the communication but claim it with respect to the remainder if to do so would result in unfairness. Either privilege is claimed with respect to the whole or waived as to the whole. The only exception to this would be where the communication dealt with two entirely different subject matters in respect of which privilege was claimed for the one that was relevant to the issues at hand and waived for the other which was not."[2]

Key takeaways

Where legal professional privilege is waived for part of a document or communication, the privilege is not necessarily waived for the remainder of the document. Nonetheless, the privilege can easily be lost.

Legal professional privilege is impliedly waived where there is an inconsistency between the conduct of the party entitled to the privilege and the confidentiality the privilege is intended to protect. This will depend on the facts, including:

- whether any forensic unfairness would arise if a party could make assertions without disclosing the communication;
- whether the assertion is made in a pleading (which would waive privilege); and
- whether partial disclosure might distort the meaning of the communication.

To retain privilege, documents or communications must remain confidential. Parties must be conscious of the documents they disclose in evidence, including in witness affidavits.

Keywords:

waiver of legal professional privilege

His Honour held that the test as to whether privilege has been waived over part of a communication and not another part is not as rigid or absolute as the test identified in Bailey. Rather, the applicable test is one of inconsistency of conduct.

Stewart J held a party impliedly waives legal professional privilege where there is an inconsistency between the party's conduct and the maintenance of the confidentiality the privilege is intended to protect.[3] Whether there is an inconsistency depends on the circumstances of the case.[4]

His Honour noted relevant circumstances include:

- whether any forensic unfairness would arise if a party could make assertions without disclosing the communication;
- whether the assertion is made in a pleading (which would waive privilege); and
- whether partial disclosure might distort the meaning of the communication.

Based on this test, Stewart J assessed the documents individually and held that Federal impliedly waived legal professional privilege in relation to some but not all of the Documents sought by Spirits. Therefore, Federal were required to produce unredacted versions of these Documents.

http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2019/2019fca0337

1 At [14], relying on *Esso Australia Resources Limited v Commissioner of Taxation* (Cth) (1999) 201 CLR 49. In respect of Federal Court proceedings, section 118 of the *Evidence Act 1995* (Cth) outlines the dominant purpose test for determining whether communications between a lawyer and client attract legal professional privilege. Sections 121–122 outline the circumstances in which client legal privilege is waived

2 At [26]; (2009) 74 NSWLR 333 at [132]

3 At [21]–[23], [29], relying on *Mann v Carnell* (1999) 201 CLR 1 at [29]; *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at [45]; and *British American Tobacco Australia Ltd v Secretary, Department of Health and Ageing* (2011) 195 FCR 123

4 At [22], relying on *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at [49]

Where to from Opal and Lacrosse? Towards a better assurance system in NSW

CORRS PROJECTS UPDATE

Background

The Shergold Weir Building Confidence Report (**Report**) found that building certifiers are unaware of, or have lack of access to, critical information including changes to approved designs. This is due to the D&C delivery structures used for multi-storey buildings, inaccurate designs, and use of performance-based solutions.

Responses by government

The NSW Government Response to the Report proposes that:

- building designers and builders be registered;
- building designers be required to declare that buildings have been built according to their plans;
- the law be clarified to ensure that there is a statutory duty of care owed to owners and owner corporations by certifiers for residential buildings; and
- a Building Commissioner be appointed.

Consultations on the proposed changes will start in spring 2019.

Current regulatory frameworks

At present, owners, owners' corporations and occupiers in NSW are protected by a range of regulatory oversight mechanisms.

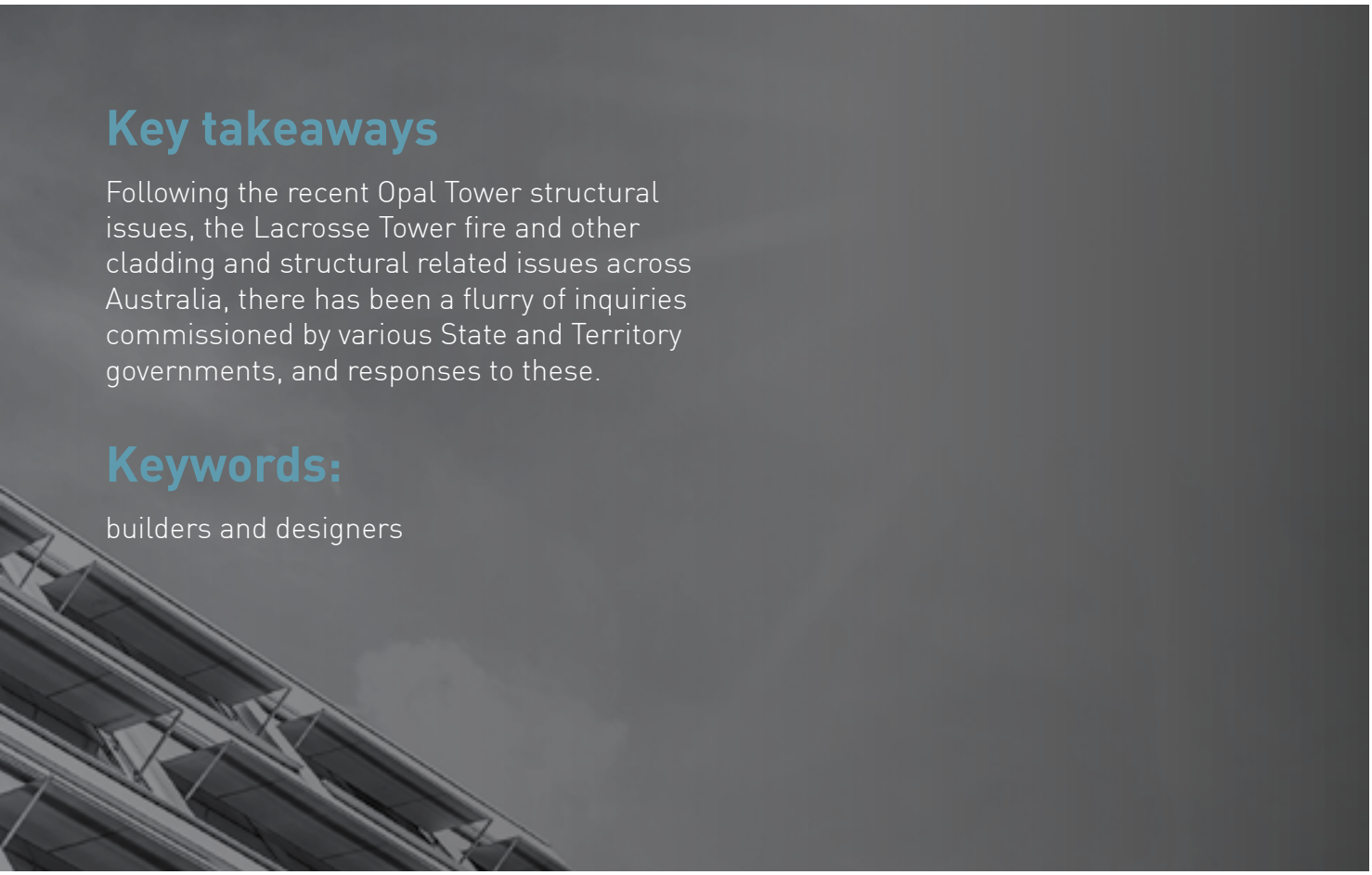
In Australia, building work must comply with the National Construction Code (which sets out the minimum level of technical requirements for the design and construction of a building). The requirements can be met using a Deemed-to-Satisfy (DTS) solution or a Performance solution (which is unique for each situation).

The Building and Development Certifiers Act 2018 (NSW) is intended to improve the oversight of building certifiers in NSW. Although this Act has been passed by Parliament, it is yet to commence.

The Work Health and Safety legislation imposes duties on a person conducting a business or undertaking to ensure, amongst other things and so far as reasonably practicable, the health and safety of its workers and a safe working environment.

It also requires people who design plant, substances and structures to ensure, so far as is reasonably practicable, that they are without risks to health and safety. A designer is considered to be a 'person conducting a business or undertaking' if their profession, trade or business involves:

- preparing sketches, plans or drawings for a structure, including variations to a plan or changes to a structure; and
- making decisions for incorporation into a design that may affect the health or safety of people who construct, use or carry out other activities in relation to the structure.



Key takeaways

Following the recent Opal Tower structural issues, the Lacrosse Tower fire and other cladding and structural related issues across Australia, there has been a flurry of inquiries commissioned by various State and Territory governments, and responses to these.

Keywords:

builders and designers

It is important that corporations be aware of their current legal obligations. This can be supplemented by greater transparency of information to the stakeholders in the design and construction supply chain, and governance of the professionals involved in that supply chain.

For the residential building sector in NSW, there is a range of statutory remedies (including statutory warranties, defects bonds for longer periods and home warranty insurances) available to the occupiers, owners and owners' corporations. There is also supply chain related legislation in the form of the Building Products (Safety) Act 2017 (NSW). (For Queensland, see the Building and Construction Legislation (Non-Conforming Building Products – Chain of Responsibility and Other Matters) Amendment Act 2017 (Qld)).

In the case of work on infrastructure assets – in particular, rail infrastructure – there are well-established regulatory and engineering oversight mechanisms. When constructing over or adjacent to rail infrastructure (such as OSD developments), the parties must comply with the requirements imposed on rail infrastructure, and only Authorised Engineering Organisations (AEOs) may carry out engineering work.

AEOs are required to manage their engineering assurance (which must be supported by systems engineering, configuration and technical data management) to establish and maintain continuous process and product improvement systems including an ISO 9001-compliant quality management system. Perhaps consideration should be given to prescribing the adoption of this 'systems engineering approach' to safety and assurance in the case of high rise commercial and residential buildings.

Effect on certifiers' legal liability

The proposed extension of statutory duty of care by certifiers to owners and owners' corporations will add to the available remedies. However, it is also important to consider whether those certifiers are able to meet their legal liabilities.

At a practical commercial level, the professionals generally limit their liabilities under their agreements to a monetary limitation of liability and the limits of their insurance cover. With the proposed introduction of a statutory duty of care on certifiers (and with it, a likely statutory obligation for certifiers to hold a minimum amount of cover), it is likely that the insurance market will reconsider the extent and availability of professional indemnity cover available to those certifiers. An increase in premiums to cover the increased risks exposure is also likely. Any legislative changes should consider the impact of proportionate liability legislation on risk allocation between the parties.

Digital information and BIM

As mentioned earlier, the Report notes that it is difficult for certifiers to keep up to date with changes to building designs, and attributes this to the commonly used D&C delivery structure. Another issue is the performance based Building Compliance Code under the National Construction Code. This choice of delivery structure and performance based specifications is quite common, depending on the nature of the project and the appropriate risk management approaches.

To allow better access to, and oversight of, information to enable the appropriate certification, governments could encourage the use of Building Information Modelling (**BIM**) and other digital technology (such as Blockchain). This would enable the sharing of digital records and information in the overall design and construction supply chain. It would give transparency, increase the parties' accountability to each other and enable appropriate certification of the work from design through to procurement, construction and defects rectification.

For example, BIM brings together all parties and connects them into a virtual 'design' forum to review the simulated structure, share information and raise issues. All the design and construct elements (including civil infrastructure, structural and architectural elements, mechanical and electrical services, data and other communication systems) are integrated into the model along with spatial relationships, quantities survey and operational elements.

In the UK, the government has mandated the use of BIM Level 2. There has been good take up of BIM in the private sector and it is becoming the norm. In Australia, there has been much less use of that digital information platform.

The Opal inquiry recommended a digital repository of all certifications available to owners' corporations and unit owners over time. If implemented, this would require central administration by Government.

Registration of building professionals?

There has been a push for greater scrutiny and accountability of professionals. The Victorian Government proposed the Engineers Registration Bill 2018 (Vic) which lapsed and will need to be reintroduced if it is to progress. The Labour opposition party in NSW has announced that it will introduce an engineering registration scheme to improve project quality. To date, only Queensland has enacted legislation in this area, with the Professional Engineers Act 2002 (Qld).

A key recommendation of the Senate Economics References Committee's *Inquiry into Non-Conforming Building Products*, set out in an interim report, is to establish a national licensing scheme, requiring all building practitioners to undertake continuous professional development.

It is important that a structure be put in place to ensure that only qualified and certified professionals be allowed to carry out design related and certifier duties.

Where to now?

Although the recent inquiries have been limited to the residential building sectors, governments should focus on the overall engineering safety and integrity of infrastructure, including commercial buildings. In NSW there is an increased number of integrated station (or over station) developments, and mixed use developments involving both commercial and residential buildings.

Resolving the concerns around certification will require competence, good governance and assurance – and regular reviews to ensure standards are maintained. This necessitates a combined public and private sector response.

[Note: this article by Andrew Chew and Christine Covington was first published online at https://corrs.com.au/thinking/insights/where-to-from-opal-and-lacrosse-towards-a-better-assurance-system-in-nsw/.]

Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liquidation) [2019] NSWCA 11

CORRS PROJECTS UPDATE

Background

In September 2016, Seymour Whyte Constructions Pty Ltd (**Seymour Whyte**) subcontracted Ostwald Bros Pty Ltd (**Ostwald**) to perform road works on the Pacific Highway north of Grafton.

On 28 July 2017, Ostwald served a payment claim on Seymour Whyte. Seymour Whyte in turn served a payment schedule for a substantially smaller amount. On 24 August 2017, Seymour Whyte terminated the contract. The next day, the directors of Ostwald resolved to appoint administrators.

Ostwald did not receive any part of the scheduled amount. On 27 September 2017, it applied for adjudication, relying on section 16(2)(a)(ii) of the Building and Construction Industry Security of Payment Act 1999 (NSW) (**SOPA**). The adjudicator issued a determination requiring Seymour Whyte to pay Ostwald significantly more than the amount in the payment schedule.

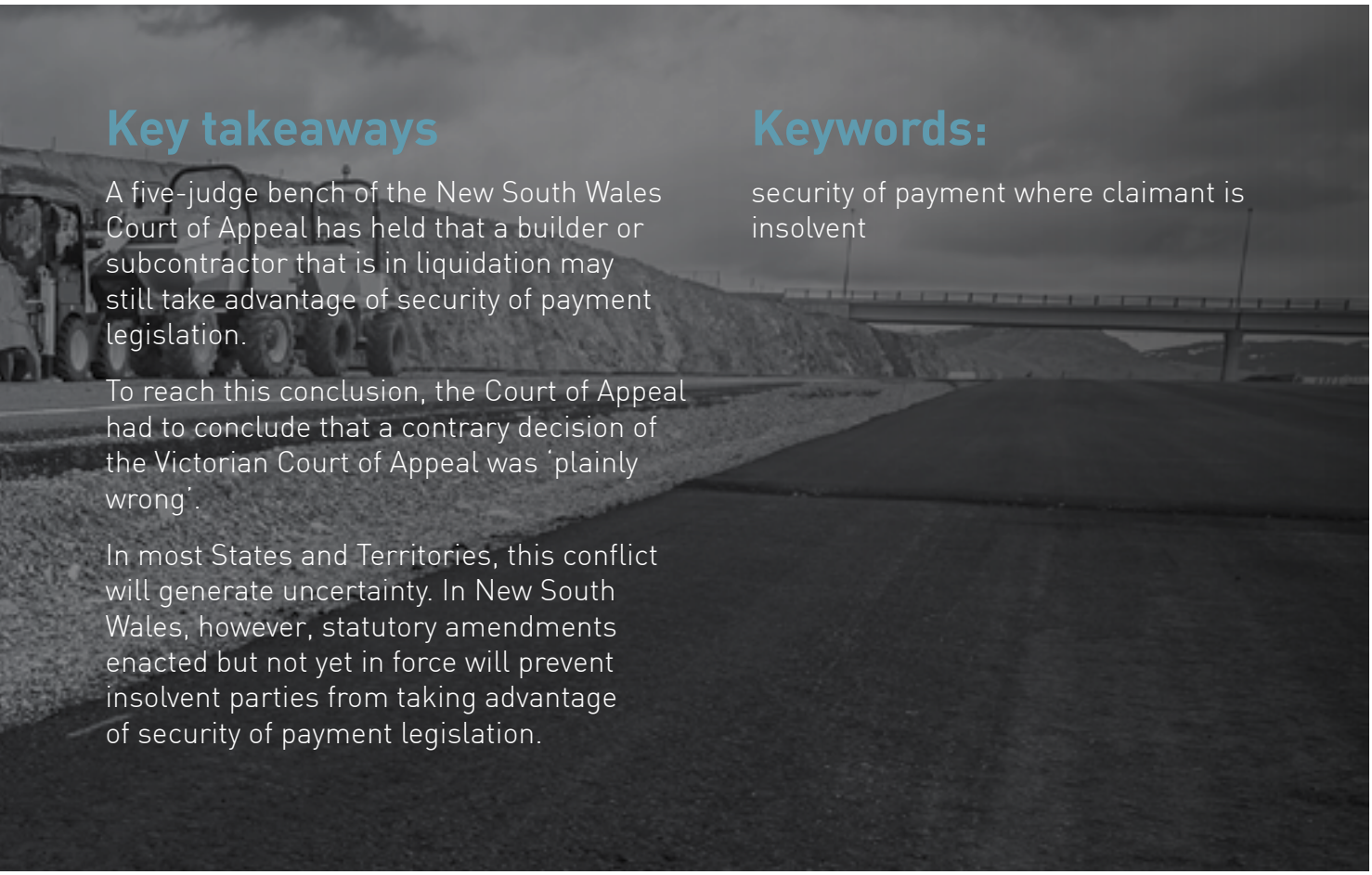
On 30 November 2017, Ostwald's creditors resolved to wind up the company. The winding up was taken to have commenced on 25 August 2017, when Ostwald entered administration. (This was because of sections 513B and 513C of the Corporations Act 2001 (Cth) (**Corporations Act**).

Supreme Court

On 17 November 2017, Seymour Whyte commenced proceedings in NSW Supreme Court, challenging the validity of the adjudication determination. Ostwald sought to have the construction contract rectified. Without the rectification, Ostwald's adjudication application would have been made outside the time prescribed by the SOPA and therefore was invalid. In the alternative, Ostwald claimed the unpaid scheduled amount as a statutory debt pursuant to section 16(2)(a)(i) of the SOPA.

Stevenson J held that:

1. rectification was appropriate and therefore the adjudication determination was valid;
2. even if the adjudication determination was invalid, Ostwald was not precluded from suing to recover the unpaid amount as a statutory debt;
3. the SOPA continued to apply even though Ostwald's winding up had commenced; and
4. notwithstanding these conclusions, Ostwald's enforcement of its adjudication determination should be stayed in accordance with section 553C of the Corporations Act.[1]



Key takeaways

A five-judge bench of the New South Wales Court of Appeal has held that a builder or subcontractor that is in liquidation may still take advantage of security of payment legislation.

To reach this conclusion, the Court of Appeal had to conclude that a contrary decision of the Victorian Court of Appeal was 'plainly wrong'.

In most States and Territories, this conflict will generate uncertainty. In New South Wales, however, statutory amendments enacted but not yet in force will prevent insolvent parties from taking advantage of security of payment legislation.

Keywords:

security of payment where claimant is insolvent

Court of Appeal

Findings 1 - 3 of Stevenson J's judgment were the main issues on appeal. Sackville AJA delivered the lead judgment.[2]

Issue 1 — Rectification of the contract

The Court of Appeal held that Stevenson J erred in rectifying the contract to alter the due date for payment. Sackville AJA agreed with the primary Judge that the relevant question is what was "the common intention of the parties up to the time the relevant instrument was made",[3] and that it is the parties' subjective intention that is relevant.[4] However, Sackville AJA held that there was no convincing proof, to the high standard required for rectification in equity, that it was the parties' common intention at formation that Seymour Whyte should have longer to pay Ostwald than specified in the contract.

Issue 2 — A "fork in the road" under section 16(2)(a)

Under section 16(2)(a) of the SOPA, where a scheduled amount has not been paid, a claimant may apply for adjudication under section 17(1)(a)(ii) or recover the unpaid progress payment as a debt in court. It was common ground that these two remedies are mutually exclusive alternatives. Seymour Whyte argued that Ostwald's actions in making the adjudication application precluded it from recovering the scheduled amount as a debt. This was characterized as the "fork in the road" argument.

Sackville AJA observed that Seymour Whyte's argument would mean that non-compliance with a precondition for a valid adjudication application would deprive the claimant of any means of enforcing its statutory entitlement to a progress payment. Sackville AJA looked at the statutory language ("adjudication application under section 17(1)(a)(ii)" rather than "adjudication application"[5]) and the object of the Act (to ensure recovery of progress payments[6]) to reject Seymour Whyte's argument.

Sackville AJA thus held that an invalid adjudication application is not "an adjudication application under section 17(1)(a)(ii)" within the meaning of section 16(2)(a)(ii). Ostwald had therefore not irrevocably chosen one path in the "fork in the road" and was not precluded from pursuing the statutory alternative.

1 *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq)* [2018] NSWSC 412. This decision was the subject of a detailed note in the June 2018 Construction Law Update
2 Leeming JA agreed with Sackville AJA, but gave further reasons. Payne and White JJA agreed with both Sackville AJA and Leeming JA. Emmett AJA gave a short judgment agreeing with Sackville AJA. This note thus focuses primarily on Sackville AJA's judgment
3 At [122]
4 At [124]
5 At [181]
6 At [178]

Issue 3 — whether the Act applies to claimant in liquidation

Finally, Sackville AJA turned to whether the SOPA continued to apply after Ostwald had entered into liquidation.

The Victorian Court of Appeal found in *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* that a "claimant" to progress payments under the Building and Construction Industry Security of Payment Act 2002 (Vic) was a person who had "undertaken to, and continued to, carry out construction work"[7]. It therefore followed, according to the Victorian Court of Appeal, that as a company in liquidation was unable to carry out construction work, it lost the right to rely on the Act.

The New South Wales Court of Appeal held that an entitlement to a progress payment under the SOPA does not depend on the claimant actually continuing to perform work under a contract. Accordingly, notwithstanding Ostwald's winding up, the SOPA continued to apply to its claim. The Court agreed with Stevenson J that the decision in *Façade* was "plainly wrong"[8] and not to be followed.

Sackville AJA held that there was no textual foundation for the Victorian interpretation. Even though some sections of the SOPA contemplate that a claimant must be continuing to carry out construction work, other sections suggest that a person may make a claim even though construction work is finished or the contract has expired.

Further, Sackville AJA questioned the policy considerations on which the Victorian Court of Appeal relied. First, even if it is uncommon for the liquidator to continue to perform work under an existing contract, it can do this and may be incentivised to do so. Second, a company being wound up may nevertheless be found to have a surplus of assets over liabilities, and its creditors may still ultimately recover the full amounts due to them. Third, even though the statutory entitlement is intended to be interim in nature, there are mechanisms to minimise the risk of injustice to a respondent seeking to recover money paid to a claimant in liquidation. These include a stay of execution of judgment, or set off under section 553C(1) of the Corporations Act.[9]

Practical implications

In New South Wales, the practical effects of this case may be limited. On 28 November 2018, the Parliament of New South Wales passed an Act to amend the SOPA. These amendments have not yet entered into force. Once they do, a company in liquidation in New South Wales will no longer be able to serve a payment claim or enforce a payment claim under the Act.[10]

Parties in other jurisdictions face a stark conflict between decisions of the Courts of Appeal in Victoria and New South Wales.

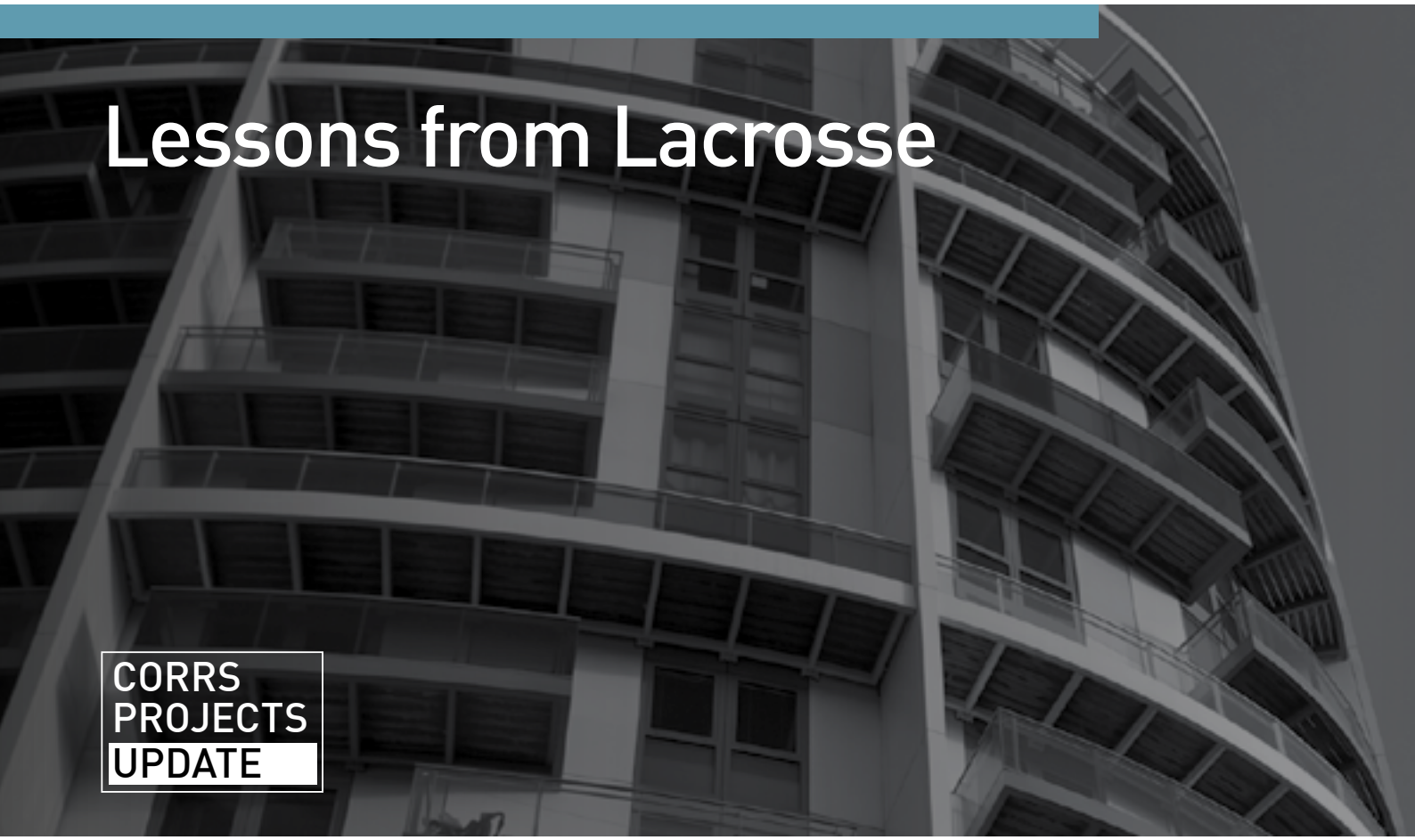
https://www.caselaw.nsw.gov.au/decision/5c5cd641e4b0196eea4041a8

7 [2016] VSCA 247 at [84] (*Façade*)

8 At [270]. The relevant aspects of the Victorian and New South Wales security of payment legislation are not materially different

9 At [253]-[255]

10 The amending Act is the Building and Construction Industry Security of Payment Amendment Act 2018. It will commence on a date to be proclaimed



Lessons from Lacrosse

CORRS PROJECTS UPDATE

The litigation

In this case, a group of over 200 owners claimed current and future losses of more than $12 million. They sued the builder for, amongst other things, breach of the warranties imposed by section 8 of the Domestic Building Contracts Act 1995 (Vic). As is now notorious, the use of Aluminium Composite Panels (**ACP**) was the central issue.

Apportionment of liability was a critical question. Along with the builder, the other respondents were: the building surveyor, the architects, the fire engineer and three other parties who were not represented at the hearing (including the person who originally left the cigarette in the food container on the balcony).

Woodward J ordered the builder to pay the owners $5,748,233. It is noted that the position has been reserved on $6,823,165.65 of damages.

His Honour ordered an apportionment of liability between several of the respondents. In Victoria, apportionment is regulated by the Wrongs Act 1958 (Vic). That Act provides that the liability of a defendant who is a concurrent wrongdoer must be limited to an amount reflecting the proportion of the loss or damage claimed that the Court considers just, having regard to the extent of the defendant's responsibility for the loss and damage.

In this case, several parties were found to be responsible and are required to reimburse the builder 100% of the damages currently awarded in the following propositions.

1 *Owners Corporation No 1 of PS613436T v L U Simon Builders Pty Ltd* [2019] VCAT 286 at [3]. See generally [1]–[12] for an overview of the events and a summary of Woodward J's findings

Key takeaways

The origins of the November 2014 Lacrosse fire were disturbingly everyday: an abandoned midnight cigarette, a makeshift ashtray in the form of a plastic food container, and a wooden table. Within 12 minutes, 14 floors of the building's external wall cladding were on fire. In 'an outcome that should not go unremarked'[1] all 400 or so occupants were safely evacuated.

However, not all escaped the fire unscathed. The owners (and the owners' corporation) suffered significant financial loss, and consequently brought a claim in the Victorian Civil and Administrative Tribunal (VCAT) against the construction professionals involved in the construction of the Lacrosse building. With VCAT's long-awaited decision now released, it is the prime time to consider the lessons learned from Lacrosse and to ask: how can construction professionals protect themselves when faced with similar claims? And what lessons can developers, owners and builders take from this case?

Keywords:

Lacrosse fire

Defendant	Successful claim	Proportionate responsibility
Builder (L U Simon Builders Pty Ltd)	Breach of statutory warranties regarding materials, compliance with law and fitness for purpose. The argument that the Builder failed to show reasonable care was not successful.	3%*
Building surveyor (Gardner Group Pty Ltd and its employee)	Breach of consultancy agreement by failing to exercise due care and skill. Misleading or deceptive conduct, to some extent.	33%
Architect (Elenberg Fraser Pty Ltd)	Breach of consultancy agreement by failing to exercise due care and skill.	25%
Fire engineer (Tanah Merah Pty Ltd trading as Thomas Nicolas)	Breach of consultancy agreement by failing to exercise due care and skill. Misleading or deceptive conduct, to some extent.	39%
* The occupant whose cigarette appeared to cause the fire did not participate in the proceedings but his proportional responsibility was assessed as 3%. Because the occupant did not participate in the proceedings, Woodward J noted that the builder remained liable to this extent.		

It can be seen that the builder has been largely absolved of responsibility for the loss. Instead, responsibility lies with the consultants who were subcontractors of the builder. Subject to the risk of insolvency of any of the respondents (which is presumably high for the individual who caused the fire) and although the builder remains primarily liable to the applicants for the judgment, the builder has received a complete indemnification from its subcontractors and other parties. Ultimately, this demonstrates a very effective risk transfer.

What are the implications of the decision?

Woodward J was at pains to point out that in relation to the use of ACPs in construction, the judgment should be considered in context, and with regard to the specific factual matrix. The decision should **not** be taken as a general statement of how and where liability will fall in similar cases (of which there are many both pending and yet to be brought).

That overarching point is both critical and apt. Given that an appeal is possible (and perhaps even likely), regulation and regulatory practices may change, and there is likely to be more litigation concerning the use of ACPs.

However, what is certain is that developers, owners, builders and consultants face increased scrutiny and potentially, increased risk. Although liability (if any) arising from use of ACPs in the past is already crystallised, the factual matrix contains important lessons for all parties involved in a development of this nature.

Lessons for developers and owners

Contractual protections

Review contracting structures

In this case, the builder was liable for breach of warranties imposed by section 8 of the Domestic Building Contracts Act 1995 (Vic) (there are similar provisions in other jurisdictions). Importantly, it was held that the builder did not fail to exercise reasonable care by installing combustible ACPs. In 2011, when the ACPs were installed, there was a poor understanding among building professionals of the fire risks associated with ACPs, and there was no reason to expect a cohort of building professionals to have a superior understanding to that of architects, building surveyors or fire engineers.

It followed from the finding that the builder did not fail to exercise reasonable care that there was no 'apportionable claim' for the purposes of proportionate liability legislation.

The effect was that the builder was liable for all loss, as between the owners and the builder. The apportionment only operated amongst the builder, building surveyor, architect, fire engineer and the other unrepresented respondents.

More complex proportionate liability questions are likely to arise in future cases, since the risks of ACPs and some other defective materials generally are now well known. This means it is more likely that builders who have installed ACPs after they gained notoriety for their combustible traits (i.e. after the Lacrosse and Grenfell fires) will be subject to claims arising from a failure to take reasonable care, triggering the proportionate liability regime.

Where it is possible to contract out of proportionate liability legislation (for example in NSW), developers may consider this.

Never cap liability at the consultant's fee

The fees paid to subcontractors, suppliers and consultants are often a poor proxy for the losses these parties can cause. In this case, the fire engineer's fee was $33,500, plus GST. Its liability exceeded $2.2 million, ignoring additional claims and interest.

Although the decision does not disclose whether the fire engineer's liability was capped, the substantial discrepancy between its fee and its liability highlights the necessity for owners to ensure that any liability cap be connected to the value of the construction work (or major repairs to it).

Any liability cap, provided it is enforceable, has obvious ramifications on the ability of a claimant to recover the full apportioned amount from that concurrent wrongdoer. In the factual matrix applicable to Lacrosse, an enforceable liability cap may also impact the overall amount recoverable from LU Simon Builders Pty Ltd (as it will have to pick up the balance of any amounts not collected from its concurrent wrongdoers).

Carefully review the characterisation of the professional's obligation.

Woodward J discussed whether the obligation imposed was absolute or qualified by the exercise of a standard of reasonable care or skill. Although the imposition of an absolute warranty may be superficially attractive, it can raise issues under PI insurance policies.

Insist on adequate professional indemnity insurance limits.

For similar reasons, owners must require adequate professional indemnity insurance, and ensure the insurance is in place. In this case, the individual liabilities of the building surveyor, architect and fire engineer all exceeded $1 million, which is a common PI limit used for smaller consultancies.

Lessons for builders

Understand you are on notice

ACPs were first proposed for the Lacrosse building in 2007. Events since then mean the industry is now well aware of the risks they pose. The Lacrosse builder avoided liability for a failure to take reasonable care, but that finding may be less likely to be made for more recent (and for future) construction.

Review contracting structures

Builders must pay renewed attention to how they contract with subcontractors, suppliers and consultants.

In particular, they should be concerned about bearing the risk of concurrent wrongdoers becoming insolvent. One approach is to contract out of proportionate liability legislation where possible. Another is to seek an indemnity from consultants extending to any losses arising from the operation of proportionate liability legislation.

Avoid 'fitness for purpose' warranties if possible

Overarching warranties are sometimes the simplest claims to sustain. In this case, the builder was found to have breached a statutory (not contractual) warranty, but the principle is the same. Woodward J accurately described the owners' claim against the builder as 'ultimately both confined and straightforward'.

Providing contractual 'fitness for purpose' warranties may also mean that the builder assumes greater liability under contract than at common law. Professional indemnity insurance policies may not fully cover the builder's loss in this situation.

Subcontract with care

It is elementary to note that, from a builder's perspective, risks should be passed down the contracting chain. The aim is to ensure the builder is not caught between a harsh risk allocation under its head contract and weak protections under its subcontracts. Of course, as the patchy nature of the consultancy agreements in this case shows, 'subsidiary' agreements are often poorly tailored. Inconsistencies can be particularly difficult to avoid – in many cases, key design consultants are engaged by the developers years before the work is put out to tender for builders (and therefore sometime before a construction contract is drafted). Under the typical D&C model the consultants agreements are presented to the builder 'as is' for execution, and it is a rare builder who will seek to negotiate wholesale amendments to the risk allocation.

Lessons for consultants

Understand the tactics owners and builders use against you

Consultants, subcontractors and suppliers often receive relatively low fees but assume substantial risks. The building surveyor and fire engineer in this case are typical examples. These consultants' fees were both less than $90,000 each, but both were ultimately liable for damages in the range of $2 million.

Liability caps and exclusions are an important protection.

Insurance and asset protection

Professional indemnity insurance may benefit other parties, but it also provides vital protection for consultants. Any consultant who may have been involved in buildings constructed with ACP cladding should, if it has not already done so, promptly notify its insurer that circumstances have arisen which may lead to a claim under its policy.

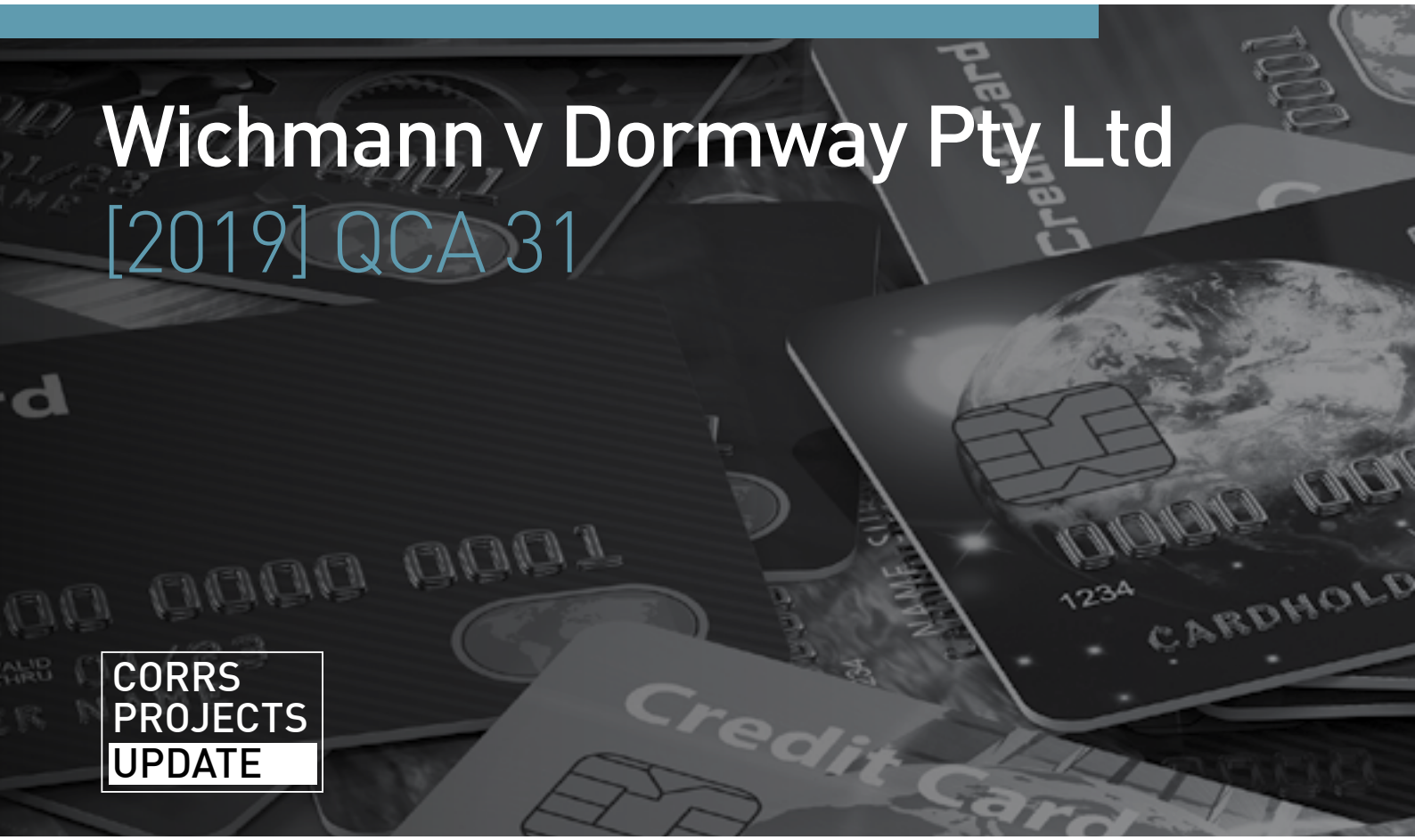
To manage the ongoing risk of potential cladding claims, where a policy is about to expire (and may not otherwise be renewed due to, for example, retirement), those insured should obtain advice about whether the policy should be renewed.

Finally, the last line of defence will typically be the use of trusts and corporate structures to protect assets.

For all involved in the construction industry, warnings are sounding. A 'business as usual' approach to risk will not do.

[Note: this article by Ben Davidson, Jane Hider, Wayne Jocic and Emily Steiner was first published online at https://corrs.com.au/thinking/insights/lessons-from-lacrosse/.]

Wichmann v Dormway Pty Ltd [2019] QCA 31



CORRS PROJECTS UPDATE

Facts

Wichmann worked as an office manager for Dormway Pty Ltd (**Dormway**) from March 2011 until April 2018.

In February 2018, Dormway discovered Wichmann had made two payments for personal expenses using a company credit card. Wichmann told her employer that she inadvertently used that card.

Although Wichmann offered to repay the money, her employer felt that the incident had led to an irreparable breakdown of trust. Accordingly, Wichmann's employment was terminated in April 2018. Both parties then entered into a deed of agreement and confidentiality (**Deed**) to settle the conditions of Wichmann's termination as a genuine voluntary redundancy.

Under the Deed:

1. The parties agreed to settle all matters relating to Wichmann's employment and termination.
2. Dormway released Wichmann from "all causes of action, action suits, arbitrations, claims, demands, costs, debts, damages, expenses and legal proceedings" arising from her employment, the termination of her employment or the circumstances surrounding the termination, and anything occurring between the date of her termination and the date of the agreement.
3. Dormway paid Wichmann $42,669 in redundancy payments, less $2,809 for the misappropriated credit card funds.

Dormway later discovered Wichmann had in fact stolen $321,593.85 from Dormway, transferring funds to herself under the guise of payments to Dormway's creditors.

Queensland Supreme Court decision

Dormway sought a summary judgment, claiming the stolen money in debt, or in the alternative, as damages arising from a breach of fiduciary duty, deceit or conversion.

Wichmann argued she was not liable because Dormway had released her from all claims under the Deed.

Atkinson J found in favour of Dormway. Atkinson J held that Wichmann's acts of theft and fraud committed as an employee were outside the lawful scope of her employment and therefore fell outside the scope and subject matter of the Deed.

Atkinson J placed significant reliance on *Grant v John Grant & Sons Pty Ltd*,[1] in which it was held that a party cannot rely on an instrument of release for an obligation that falls outside the instrument's true purpose. The true purpose is to be determined by considering the language used in the instrument, any surrounding circumstances, and — importantly in this case — the

Key takeaways

A deed will not release a party from liabilities that were not in the parties' contemplation at the time of execution unless the language makes this intention clear.

Keywords:

deed of release; general words of release

parties knowledge about the state, existence and extent of the liability in question.

Wichmann admitted Dormway was not aware of her fraudulent behaviour, and had no reason to be aware. The misappropriation therefore could not have been in Dormway's contemplation when it signed the Deed. The language of the Deed was too general, and did not establish that Dormway was surrendering rights and claims of which it was unaware.[2]

Issues on appeal

Wichmann appealed on the basis that the terms of the Deed should be read broadly to preclude the claim. She argued that Dormway had not established that it would not have entered into the Deed had it been aware of Wichmann's fraud.

Decision

The Court of Appeal unanimously rejected Wichmann's appeal. It was Wichmann that sought to rely on the release under the Deed as a defence to the claim brought by Dormway. Accordingly, it was for Wichmann to establish that the dispute relating to her fraud existed at the time of entering into the Deed and that it was in contemplation of the parties.

In finding that Wichmann had failed to establish those facts, the Court of Appeal upheld Atkinson J's decision. The Court of Appeal also identified two additional matters relevant to the scope of release under the Deed.

1. It would be unconscionable for a party to rely on the enforcement of a release when that party knew of the relevant liability but the other party did not.
2. As an employee, Wichmann owed Dormway a fiduciary duty of fidelity and loyalty. She therefore also had a duty to disclose the liability to Dormway at the time of entering into the Deed given that Dormway was acting in reliance on her silence. In light of these breaches, she was precluded from obtaining a benefit by way of deceit.

https://archive.sclqld.org.au/qjudgment/2019/QCA19-031.pdf

1 (1954) 91 CLR 112 at 129

2 *Dormway Pty Ltd v Wichmann* [2018] QSC 277 at [36], relying on *IMS Australia Pty Ltd v State of Queensland* [2015] QSC 342 at [47]

Rickard & Wilson & Active Safety Services Pty Ltd v Testel Australia Pty Ltd

[2019] SASCFC 16

CORRS PROJECTS UPDATE

Facts

Testel Australia Pty Ltd (**Testel**) was a franchisor of an electrical testing business. T&T Rickard Pty Ltd (**T&T**) was a franchisee of Testel. Mr Rickard was a former director of T&T. Mr Rickard together with Mr Wilson, set up a competing electrical testing business, Active Safety Services Pty Ltd (**Active**).

In April 2011, Active started providing electric testing to one of Testel's customers, Flinders Medical Centre (**FMC**). Mr Rickard stopped operating the T&T franchise and purported to terminate its contractual relationship with Testel. Testel did not accept the purported termination.

Testel brought proceedings in the District Court alleging that Mr Rickard breached a restraint covenant and contractual obligations of service. Testel also brought proceedings against Mr Wilson and Active in tort for inducing the breaches of contract.

Testel sought various remedies including:

- damages against all the appellants;
- an injunction against Mr Rickard in respect of confidential information; and
- exemplary damages and an account of profits against Mr Wilson and Active.

Decision at trial

The trial judge found for Testel and awarded damages of $144,812 against all the appellants. The damages were awarded for the lost opportunity to gain revenue from Testel's clients due to the appellants' wrongful conduct. His Honour enjoined Mr Rickard to prevent him from disclosing confidential information. His Honour did not award exemplary damages or an account of profits. Costs were ordered against the appellants on indemnity basis.

Issue in dispute

The appeal related to assessment of damages only.

The appellants appealed primarily on the calculation of damages. The respondent cross-appealed on the basis that the trial judge erred in declining to award exemplary damages and an account of profits against Mr Wilson and Active.

Decision

The Full Court only allowed one ground and discounted the damages for the loss of opportunity by 15%. It dismissed all other grounds of appeal. The Court also dismissed the cross-appeal.

Exemplary damages

Testel made two main arguments for the award of exemplary damages.

Key takeaways

Hospitality Group Pty Ltd v Australian Rugby Union Ltd[1] remains good law in relation to account of profits in tort cases.

An account of profits will not be awarded in tort, except where exemplary damages are available and it is proper to consider illicit profit when assessing quantum.

Keywords:

exemplary damages; account of profits

1. The day after the disclosure orders were made, Mr Rickard deleted a folder containing electronic evidence connecting Mr Rickard to Active. Testel argued that Mr Rickard's conduct ought to be attributed to Active. The trial judge disagreed with Testel.
2. Mr Wilson and Mr Rickard had acted to conceal Mr Rickard's role in Active, both knowing this was a breach of the restraint covenant. The trial judge found that the conduct was wrongful, but not so contumelious or outrageous as to justify an award of exemplary damages.

The Full Court agreed with the trial judge and noted that the award of exemplary damages is discretionary. Testel had not established any basis on which the Full Court could interfere with the trial judge's exercise of discretion.

Account of profits

Testel argued that an account of profits should be available to address the interference with its goodwill, a proprietary interest.

The trial judge stated that he was bound by the decision of Blue J in *Testel Australia Pty Ltd v KRG Electrics Pty Ltd*,[2] who followed the decision of the Full Court of the Federal Court in *Hospitality Group Ty Ltd v Australian Rugby Union Ltd*.[3] In Hospitality Group, the Court referred to the observation in *Robinson v Harman* that the:

> "injured plaintiff cannot claim a windfall to prevent a wrongdoer profiting from his wrong, except in those cases where exemplary damages are available and it is proper that illicit profits are taken into account in assessing the quantum of the award ..."[4]

In this case, exemplary damages were not available. Therefore, an account of profits was also not available. Furthermore, this case could be distinguished from Hospitality Group. The appellants in this case derived their profit by subverting Testel's goodwill, not by exploiting it.

The Court acknowledged that the majority decision in *Hospitality Group* had been criticised. However, the Court was not satisfied that the decision was plainly wrong. Therefore, Testel was not entitled to account of profits.

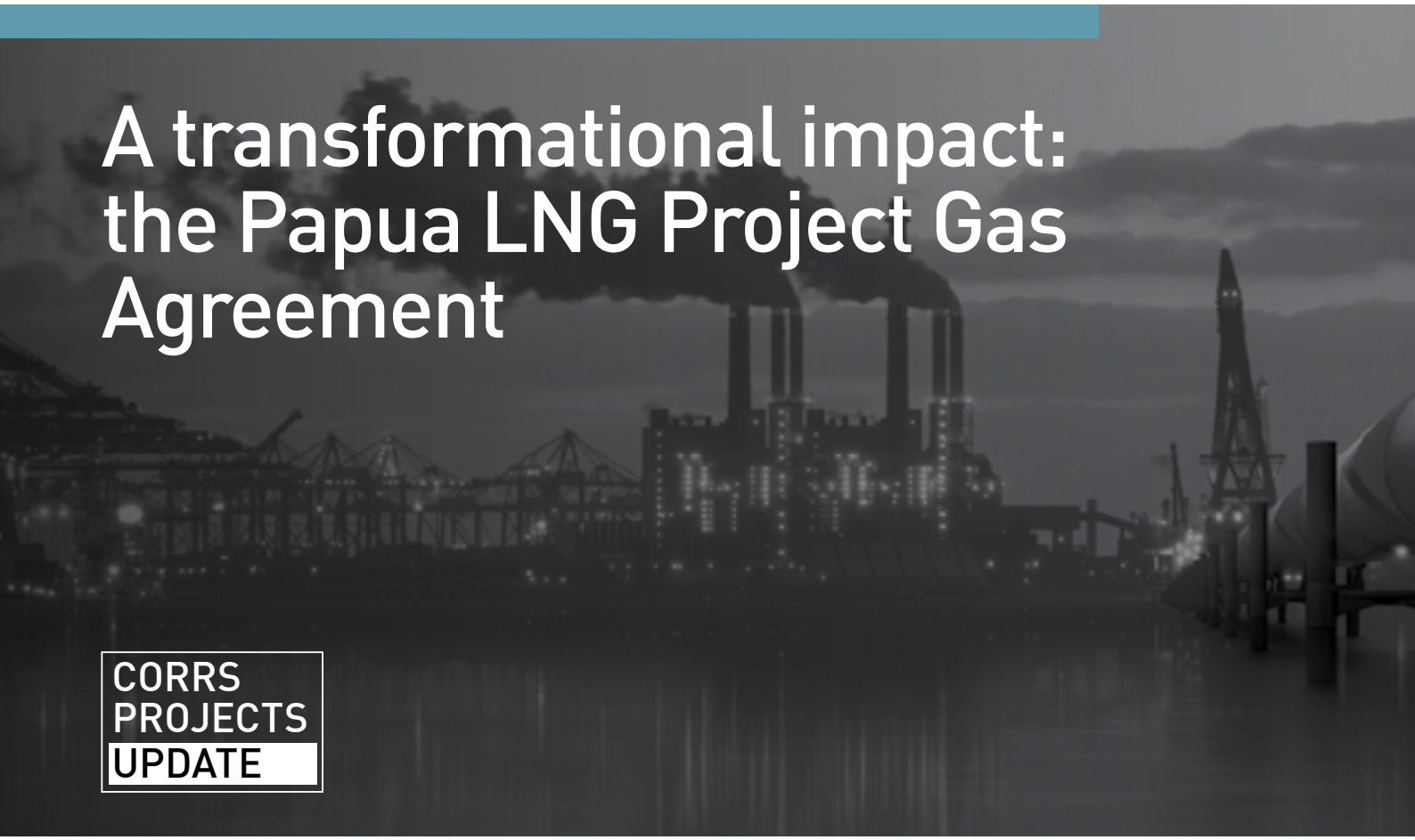
Conclusion

This decision confirms the approach in Australia in relation to exemplary damages and account of profits in tort. The Full Federal Court was not willing to contradict the decision in *Hospitality Group*. Therefore, an account of profits will not be awarded unless exemplary damages are available. Exemplary damages will only be available where the conduct is contumelious or outrageous.

http://classic.austlii.edu.au/au/cases/sa/SASCFC/2019/16.html

1 (2013) SASC 91
2 (2013) SASC 91 [109]
3 (2001) 110 FCR 157
4 [1848] 1 EX 850; 154 ER 363

A transformational impact: the Papua LNG Project Gas Agreement



CORRS PROJECTS UPDATE

The next phase of Papua New Guinea's development is well and truly upon us. Reaching a significant milestone for the country, a Gas Agreement was signed on 9 April 2019 for the USD$13 billion Total S.A. operated Papua LNG Project.

Coupled with the proposed contemporaneous expansion of the USD$19 billion PNG LNG Project that commenced production in 2014 and had its own significant impact, the Papua LNG Project will have a further transformational impact on the Papua New Guinea economy, bolstering the emerging middle class and propelling the country's development.

The Gas Agreement, made between the Government of Papua New Guinea and the Project's sponsors Total, Oil Search and ExxonMobil, defines the scope of the Papua LNG Project, outlines fiscal terms and benefits sharing arrangements and paves the way for the commencement of front-end engineering and design later this year. A final investment decision (**FID**) for the Project is scheduled for Q4 2020 ahead of the commencement of production in 2024.

The last Gas Agreement to be signed was in May 2008 for the PNG LNG Project, operated by ExxonMobil. That project went on to achieve FID in December 2009 and to transform the Papua New Guinea economy – precipitating the emergence of a Papua New Guinea middle class and a corresponding growth and maturation of domestic businesses and institutions.

The period from FID through to the early stages of production of the PNG LNG Project coincided with a period of strong global oil prices and expansionary Government budgets that were expected to be underwritten by tax revenue from the Project. However, the Government was not well prepared for the curtailment of revenue as global oil prices declined, putting significant pressure on the country's fiscal position. Foreign exchange liquidity in particular became a significant challenge for business in Papua New Guinea throughout this period, although it is now improving as tighter foreign exchange control policies take hold and the Government successfully raises foreign currency debt.

The Government has clearly learned from these experiences to be more cautious, reflected in its budgetary and policy responses and the fiscal terms agreed in the Papua LNG Project Gas Agreement. The further transformational economic impact of the Papua LNG Project and PNG LNG Project expansion can therefore be expected to be more sustained and less volatile, setting a strong platform for further maturation and development of domestic businesses and institutions.

For example, we are likely to see reform and modernisation of financial services regulation as the domestic economy grows and users of financial services become more sophisticated and demanding.

Economies of scale, generally, are likely to emerge, enhancing conditions for corporate mergers and acquisitions. Investors, and superannuation funds in particular, as their funds under management swell, will seek cross-border investment opportunities for diversification.

The signing of the Papua LNG Project Gas Agreement is a further demonstration that large scale projects can be developed in Papua New Guinea, and will encourage other project proponents such as Newcrest Mining and Harmony Gold in the development of the world class Wafi-Golpu underground copper/gold project. It also comes less than six months after the governments of Australia, Japan, New Zealand and the United States announced that they will jointly invest in a massive expansion of Papua New Guinea's electricity system with the aim of reaching 70% of the population by 2030, up from 13% currently. This too should further pump-prime the expansion and diversification of the Papua New Guinea economy.

There is a bright future ahead for Papua New Guinea and great opportunity. Papua New Guinea truly is a developing country and the next phase of that development is well and truly upon us.

Other recent developments

GPP Big Field LLP v Solar EPC Solutions SL [2018] EWHC 2866

Keywords:

penalties

Key takeaways

The penalty doctrine is applied in similar ways in Australia and England in matters involving a breach of contract — such as liquidated damages for late completion.

Facts

GPP Big Field LLP (**GPP**) engaged Prosalia UK Ltd (**Prosalia**) under five contracts. Each contract was for the construction of a solar generation plant in the UK.

Prosalia failed to commission four of the plants by the date specified in the relevant contract. As Prosalia had become insolvent, GPP brought claims for liquidated damages against Prosalia's parent company, Solar EPC Solutions SL (**Solar**).

Decision

The English High Court held that the liquidated damages clause was not a penalty. Accordingly, Solar was liable to pay delay damages. Where a contract has been terminated, liability to pay liquidated damages continues after termination.

Issue 1: Was the liquidated damages clause a penalty?

Solar argued that the liquidated damages clause could not represent a genuine pre-estimate of loss and was hence a penalty. Central to this argument was the fact that each contract stipulated the same rate of liquidated damages, even though GPP's loss depended on the prevailing electricity price and the output of each plant. Further, the contracts referred to the sum payable as a "penalty".

The Court rejected Solar's argument, noting that both parties were experienced, commercially sophisticated and able to assess the commercial implications of the liquidated damages clause. Furthermore, the sum specified was neither extravagant nor unconscionable when compared to GPP's legitimate interest in ensuring timely performance.

The Court also dismissed the reference to the sum as a "penalty", emphasising the importance of substance over form.

Issue 2: Did the liability to pay liquidated damages continue after termination?

GPP terminated one of the contracts before the plant was commissioned. Accordingly, Solar argued that its liability to pay liquidated damages ceased on termination.

The Court rejected this argument, holding that liquidated damages continued to accrue until the date of commission. Any other decision would simultaneously reward Prosalia for its default and punish GPP for its attempt to have the works completed by another contractor.

Issue 3: Could GPP claim common law damages in addition to liquidated damages?

Under the UK Renewables Obligation scheme, accredited renewable energy generators receive Renewable Obligation Certificates (**ROCs**) in return for electricity generated. ROCs may then be sold to electricity suppliers. ROCs are the equivalent of Australia's Renewable Energy Certificates.

Prosalia's delay in commissioning the plants meant that GPP qualified for a lower level of ROCs. GPP claimed additional damages to compensate for these losses. Solar argued that GPP was only entitled to liquidated damages.

The Court held that the failure to achieve the required level of ROCs was a direct result of the delay in commissioning the plant.

Under these circumstances, GPP would ordinarily be unable to claim additional damages. This is because

the loss was the consequence of a breach already compensated by liquidated damages, rather than an independent breach. However, the contracts between GPP and Prosalia treated the loss stemming from a lower level of ROCs as separate from the entitlement to delay damages. In particular, there was an express termination right if the required value of ROCs was not obtained. The contract also required parties to negotiate a revised price on termination and provided guidance as to the reduction in price. It also gave GPP an explicit right to damages if no agreement was reached.

These provisions demonstrated that the parties regarded such loss as falling outside the scope of liquidated damages. Hence, GPP was entitled to additional damages.

Issue 4: Did force majeure exempt Prosalia from its duty?

Solar argued that delays to one project had been caused by local protests that amounted to force majeure. Consequently, the argument ran, Prosalia was exempt from its duty to commission the plant by the contractual date.

The Court held that the force majeure claim was not established on the evidence. While local residents objected to the project, this did not amount to "disturbance, commotion, civil disorder" or "acts of … sabotage".[1] Rather, the delay was caused by Prosalia's own assessment that the strength of local opposition meant that it was unlikely to obtain the necessary planning permissions.

Furthermore, Prosalia failed to give sufficient notice of force majeure as required by the contract. Even if force majeure had occurred, Prosalia's claim would have been time barred.

Implications for Australia

A liquidated damages clause will not be enforced if it imposes a penalty on the breaching party.

Until *Andrews v ANZ*[2] and *Paciocco*,[3] the penalty doctrine was the same in Australia and England. However, in these two cases, the Australian High Court radically departed from the English understanding by holding that the penalty doctrine operates in both common law and equity. The equitable prohibition on penalties can operate without a breach of contract. The Supreme Court of the United Kingdom has declined to follow this reasoning.[4]

Regardless, GPP demonstrates that the differences between the two jurisdictions are largely irrelevant in most construction cases. Matters will generally involve a breach of duty, leaving us in familiar territory where the principles are consistent in the UK and Australia.

This case also reminds us not to emphasise whether a liquidated damages clause reflects a "genuine pre-estimate of loss". Both this case and *Paciocco* suggest that pre-contractual calculations, while helpful, are not strictly required. Rather, courts are more concerned with whether the fixed rate is extravagant or unconscionable when compared to a party's legitimate interests. Such interests are not limited to compensation and extend to timely performance or other more remote costs that could not be recovered in a claim for damages.

In the same way that records attempting to substantiate a genuine pre-estimate of loss at the time of contracting are helpful but not decisive, this case reminds us that:

- it is generally prudent to employ different rates of liquidated damages under different contracts; and
- liquidated damages should not be labelled penalties (if only to avoid embarrassment).

https://www.bailii.org/ew/cases/EWHC/Comm/2018/2866.pdf

1 At [73]
2 *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205
3 *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525 (**Paciocco**)
4 *Cavendish Square Holding BV v Talal El Makdessi* [2015] 3 WLR 1373

Mining, agriculture and construction equipment: A new UNIDROIT financing regime is coming

CORRS PROJECTS UPDATE

UNIDROIT (the International Institute for the Unification of Private Law) is finalising the MAC Protocol, which will establish an international legal framework for financing mining, agriculture and construction equipment. The Protocol is expected to be adopted this year. It may affect a wide range of Australian entities, especially those in the mining, agriculture, construction and banking industries. We take a preliminary look at its scope, main provisions and potential effects on Australian players.

Where does the MAC Protocol fit in?

The Cape Town Convention aims to address uncertainties involved in financing assets that can be moved between countries with vastly differing security and title reservation laws. It establishes an international regime for the creation, enforcement, registration and priority of security interests in certain categories of high-value, uniquely identifiable mobile equipment. The Protocols to the Convention set out the categories of mobile equipment to which the Convention applies.

Australia has already ratified the Cape Town Convention and the associated Protocol on Matters Specific to Aircraft Equipment (commonly known as the Aircraft Protocol). The Cape Town Convention currently has 78 other Contracting States.

The MAC Protocol will cover mining, agriculture and construction (**MAC**) equipment. Various countries have engaged in consultation in preparation for the Protocol's expected adoption in a Diplomatic Conference in November this year. UNCITRAL and UNIDROIT held Australia's first public consultations in August 2018.

How does the MAC Protocol work?

The Cape Town Convention and Protocols provide for the creation of international security interests and a range of default remedies for creditors. Key features include:

- a system for creditors to create an "international interest" or "prospective international interest" (during loan negotiations) in MAC equipment;
- an online International Registry for the registration of these international interests;
- priority of registered interests – provided the debtor is located in a Contracting State, a registered international interest will have priority over existing security interests under domestic law or any subsequently registered security interests;
- remedies that the creditor can exercise in the event of default by the debtor, largely based on contractual agreement; and
- protection of international interests in the event of a debtor's insolvency.

Contracting States can choose by way of declaration whether certain parts of the Cape Town Convention and its Protocols will apply. Australia has already made declarations in relation to the Cape Town Convention and Aircraft Protocol.

What equipment does the MAC Protocol cover?

The MAC Protocol covers certain specified categories of MAC equipment, defined using the World Customs Organization's Harmonised System codes (**HS Codes**). Some of these codes are for fixed equipment.

The categories are still under negotiation. When finalised, however, the relevant HS Codes will be set out in annexures to the MAC Protocol, with separate annexures for mining equipment, agriculture equipment and construction equipment.

Some examples of equipment currently listed in the annexures include:

- **Mining** – rock drilling tools, bulldozers, graders, road rollers, compacting machinery, concrete mixers, tractors and trailers;
- **Agriculture** – fire extinguishers, mechanical appliances for spraying liquid, sand blasting machines, bulldozers, levellers, mechanical shovels, machinery for soil preparation or cultivation and tractors; and
- **Construction** – cranes, rock drilling tools, excavators, tunnelling machinery, snow ploughs, machinery for public works, fire fighting vehicles, trailers.

What will the main effects be?

The MAC Protocol is expected to improve the predictability and enforceability of security, title reservation and leasing rights, and increase the availability of MAC equipment around the world. The Protocol is also expected to reduce credit risk, improve access to finance and open new markets to MAC equipment suppliers. The harmonisation of Australia's security laws with those of other Contracting States is also likely to make Australia more attractive to overseas investors by reducing legal risks and due diligence costs.

UNIDROIT estimates that the MAC Protocol will have a $7 billion positive impact on GDP in developed countries, and a $23 billion impact in developing countries.

How will the MAC Protocol interact with the PPSA?

Security interests in MAC equipment in Australia are currently regulated by the Personal Property Securities Act 2009 (Cth) (**PPSA**). If Australia adopts the MAC Protocol, it will prevail over the PPSA to the extent that there is any inconsistency between the regimes.

Some potential areas to consider between the regimes are:

- **Registration rules** – The Cape Town Convention requires each asset to be uniquely identified. Although using serial numbers will go some way to solving this problem, UNIDROIT is still grappling with this issue in negotiations.
- **Priority rules** – The PPSA provides for a more nuanced priority system than the system proposed in the draft MAC Protocol. The PPSA has special rules for particular security interests, such as the rules around purchase money security interests (**PMSIs**).
- **Taking-free rules** – The Cape Town Convention does not currently have a "taking-free" rule. However, the draft MAC Protocol provides that, if a person is a "dealer", the buyer takes free of security interests. The taking-free provision will not extend to second-hand dealers – buyers will still need to search the register.
- **Inventory finance** – Inventory finance, which usually relates to a significant number of assets, will be difficult to administer using the asset-based Cape Town Convention register. Contracting States will be able to choose whether their domestic law will apply instead.
- **Added complexity** – It is arguable that the MAC Protocol will add another layer of complexity to the PPSA regime. The Personal Property Securities Register could be adjusted so that it can be used as an 'entry point' to the International Registry, but it remains to be seen whether any such changes will be made.

Drawing on experience with the Aircraft Protocol, it will be best practice to register assets to which the MAC Protocol applies under both regimes.

What's next?

The draft MAC Protocol is currently being considered and negotiated by 51 countries, including Australia.

Those in the MAC and banking industries should, however, start considering how this framework will affect them.

(Andrew Chew and Jodie Burger have co-authored the sub-chapter on the **PPSA: Implications for Infrastructure and Construction Industries in CCH's** *Australian Personal Property Securities Law Reporter.*)

High Court rules on compensation for extinguishment of native title rights

CORRS PROJECTS UPDATE

On 13 March 2019 the High Court handed down its decision in what is commonly known as the 'Timber Creek' case.

Background

Timber Creek is both a tributary of the Victoria River and a town in the Northern Territory. In 2006 the Ngaliwurru and Nungali people (the **Claim group**) were determined by the Federal Court to hold native title rights in those areas. In 2011 the Claim group commenced proceedings for compensation under the Native Title Act 1993 (**NTA**), claiming that certain compensable acts in relation to the Claim group's native title rights gave rise to a right to receive compensation from the Northern Territory Government.

Earlier proceedings

At first instance and on appeal, the Court held that compensation was payable in respect of the economic loss suffered by native title holders, as well as non-economic loss occasioned by extinguishment or impairment of their native title rights.

The economic component was considered to relate to a portion of the freehold value of the area concerned, while the non-economic component was intended to reflect the loss of connection to the land that native title holders may suffer on extinguishment of their native title rights.

Principles determined to apply by the High Court

The High Court held that the Federal Court's bifurcated approach of considering economic and non-economic loss was appropriate to the assessment of compensation for the extinguishment of native title rights.

Economic loss

In determining the economic loss component of the compensation, while noting there may be some artificiality in the approach, the High Court applied the compulsory acquisition law principle in the well-known case of *Spencer v The Commonwealth*.[1] Under this approach, the freehold value of land is determined by calculating what a willing but not anxious purchaser would have been prepared to pay to a willing but not anxious vendor to secure the extinguishment of the rights and interests in the land in question.

The High Court confirmed that the value calculated by applying this approach would equate to the value attributable to exclusive native title rights and interests. It would then be necessary to discount that value according to the nature of the native title rights and interests extinguished, including in particular, if they were non-exclusive.

In the Timber Creek case, the Claim group's native title rights and interests were categorised as usufructuary, ceremonial and non-exclusive. The trial judge discounted

the freehold economic value by 20%, and the full Federal Court by 35%. The High Court determined that the percentage reduction should be 50% to account for the nature of the Claim group's native title rights and interests. The High Court observed that:

- the inalienability of native title rights and interests is irrelevant to an assessment of the freehold value of native title rights and interests; and
- the economic value of native title rights and interests in developed areas might in many cases prove to be greater than the economic value of comparable native title rights and interests in remote locations.

The Court speculated that any sense of loss of connection to country resulting from the extinguishment of native title rights in higher value developed areas is likely to prove less than the sense of loss or connection to country with respect to lower value, remote areas. This is because, depending on the facts of the case, the sense of connection to country in higher value, developed areas may have declined as the result of encroaching development before the act of extinguishment or other compensable diminishment. In this situation, the compensation for non-economic loss may be lower in respect of technically higher value land.

Non-economic loss

Compensation for non-economic loss reflects what the High Court preferred to call the "cultural" or "spiritual" impact of extinguishment (the loss of connection with the land). "Cultural loss" was held to more accurately describe the non-economic loss component of the compensation than the term "solatium", the term used in the earlier decisions.

In relation to cultural loss, the High Court noted the significant body of evidence heard by the trial judge about the Claim group's connection to their land, and the impacts of the loss of that connection. In hearing that evidence, the trial judge was attempting to determine the nature of the essentially spiritual relationship which the Claim group had with the country and to translate the spiritual hurt from the effects of the compensable acts into compensation. The High Court acknowledged the trial judge's concession that the process was complex, and to some extent intuitive.

The task for the High Court was to determine whether, having regard to all of that evidence, the amount awarded for cultural loss ($1.3 million) was so extremely high as to make it an entirely erroneous estimate of the damage. The Court decided that the amount awarded by the trial judge (upheld by the Full Court) was not excessive.

Simple interest – Significant component of award

The interest component ran from the date the compensable acts occurred (that also being the relevant date of the freehold market valuation). Simple interest was awarded on the economic loss component of the award ($320,250.00), in the amount of $910,100.00. Clearly, interest is going to be a major component of many awards for compensation under the NTA, given the time elapsing between the dates of the compensable acts and the dates of judgement.

Conclusion

This is the first High Court case that has comprehensively dealt with the interpretation of the NTA compensation provisions, and the principles to be applied in determining compensation under those provisions. The principles applied by the High Court, however, were not dramatically different to the earlier Federal Court decisions.

There are currently other compensation cases pending and there is no doubt others will follow. The Commonwealth, States and Territories will need to be making appropriate provision in their budgeting for this area of liability to traditional owners whose native title rights have been extinguished.

While not specifically dealing with compensation for the impacts of future acts on native title rights, the case will be of considerable relevance in that context as well, given that the NTA statutory future act regime allows for compensation to be claimed on the doing of a future act that involves extinguishment or, as is the case with most future act provisions of the NTA, involves impairment of native title rights by way of application of the non-extinguishment principle.

http://classic.austlii.edu.au/au/cases/cth/HCA/2019/7.html

1 (2010) 241 CLR 118

Stopping the Clock: FWC suspension orders pause time limits for taking protected industrial action

CORRS PROJECTS UPDATE

In *Transport Workers' Union of Australia v Broadspectrum (Australia) Pty Ltd* [2019] FWCFB 663, a Full Bench of the Fair Work Commission (**Full Bench**) confirmed that an order suspending specific protected industrial action will pause the time period within which all industrial action approved by a protected action ballot must commence.

The effect of this decision is that employees can commence any authorised protected industrial action after a suspension order ceases to operate. It is not necessary to obtain a further protected action ballot order.

Background

The question in dispute in this case arose in the context of negotiations for an enterprise agreement between Broadspectrum Pty Ltd (**Broadspectrum**) and the Transport Workers' Union (**TWU**).

Broadspectrum Court Security and Custodial Services is contracted by the Western Australian Department of Justice, and is responsible for the delivery of court security in all WA courthouses. Broadspectrum also provides transport services of those in custody between correctional facilities and other locations like courts and hospitals.

The TWU applied for and obtained a protected action ballot order from the Fair Work Commission (**FWC**)[1] in June 2018. In the subsequent ballot, TWU members approved the taking of the following forms of industrial action:

- bans on overtime;
- bans on the completion of paperwork;
- bans on wearing uniform shirts;
- work-to-rule periods;
- bans on performing higher duties;
- 4-hour, 8-hour, 24-hour and 48-hour bans on performing work.

In August 2018, the TWU gave notice to Broadspectrum of its members' intention to engage in the following industrial action:

- bans on overtime;
- bans on wearing uniform shirts; and
- bans on higher duties.

Broadspectrum applied to the FWC for a suspension of this proposed industrial action under section 424 of the FW Act, which provides that the FWC must make an order suspending or terminating protected action if it would threaten to 'endanger the life, the personal safety or health, or the welfare, of the population or of part of it'. Given the nature of the services provided by Broadspectrum, Deputy President Beaumont concluded that the proposed industrial action met this threshold and suspended the action for a period of two months.[2]

After the suspension order ended in October 2018, the TWU gave notice to Broadspectrum of its intention to engage in two other types of industrial action which had been approved in the earlier ballot: the paperwork ban and a 4-hour stoppage.

Broadspectrum then applied for an order under section 418 of the FW Act that these proposed forms of protected action stop or not occur. Deputy President Beaumont granted the order on the basis that the paperwork ban and 4-hour stoppage were not legally protected forms of industrial action.[3]

The legislative framework and the legal issue

Section 459 of the FW Act sets out the conditions under which industrial action is authorised by a protected action ballot approving such action. Relevantly, the action must commence within 30 days of the results of the ballot being declared, or within an extended period set by the FWC. In this case, the Deputy President had extended the period during which protected action could be taken by a further 30 days. However, as the paperwork ban and 4-hour stoppage were proposed to commence after this extended time limit had ended, Deputy President Beaumont found that these actions were unauthorised.[4]

Section 429 of the FW Act provides that if protected action in the form of employee claim action has been suspended by the FWC (e.g. under section 424), once the suspension period ends the action may be taken without the need for another ballot. In these circumstances, the section 459 time limit for commencing authorised action is calculated by disregarding the duration of the suspension period (section 429(3)). In other words, a suspension order 'stops the clock' on the authorised industrial action period under section 459, and the clock starts 'ticking' again once the suspension ends.

However, Deputy President Beaumont concluded that the section 429 'stop the clock' mechanism only applied to the industrial action which was **the subject of** the suspension order (in this case, the proposed overtime, uniform and higher duties bans).[5]

Consequently, the proposed paperwork ban and 4-hour stoppage were outside of the authorised time limit, as neither was included in the TWU's initial notice of industrial action and hence were not the subject of the suspension order.

The Full Bench's decision

The TWU lodged an appeal against Deputy President Beaumont's decision and order stopping the paperwork ban and 4-hour stoppage. The union's argument that the Deputy President incorrectly concluded these forms of industrial action were not protected was based on the following two main grounds:

1. The suspension order had the effect of suspending all forms of industrial action authorised by the ballot, not just the three types of action of which the TWU first gave notice to Broadspectrum.

2. Alternatively, section 429 permits employees (after a period of suspension has ended) to take all forms of action listed in the protected action ballot regardless of whether or not they were specifically the subject of the suspension order.[6]

The Full Bench rejected the TWU's first ground of appeal, noting there is clear Full Court of the Federal Court authority that only the form(s) of industrial action found to be threatening endangerment to life, safety, health or welfare, or the economy, could be the subject of a suspension order (under section 424(1)(c) or (d)).[7] However, the same authority confirmed that once a suspension order is made, section 413(7) will have the effect of suspending all other forms of industrial action authorised by a ballot (as well as any protected action of the other party).[8]

On the other hand, the Full Bench upheld the TWU's second ground of appeal. The Full Bench considered that section 429 should be interpreted in light of the overall context and purpose of the FW Act, which seeks to lay down 'clear rules' for the taking of protected industrial action that are 'fair, simple and democratic'.[9] The purpose of section 429 is therefore to ensure that the capacity to take employee claim action pursuant to a protected action ballot, after a suspension order ends, is not 'diminished or rendered nugatory by the period of suspension'.[10]

The Full Bench observed that this purpose would be weakened if it were only the industrial action that was suspended under section 424 that could be resumed after a suspension order ended.[11] This could not have been Parliament's intention as it would result in 'perverse' consequences, i.e. employees would have the capacity to resume or commence industrial action that has been determined under section 424 to present a serious threat to the population's health and safety, while simultaneously being prevented from engaging in industrial action that does not present such a threat.[12]

By requiring that the suspension period be disregarded, section 429(3) 'effectively 'stops the clock' on the running of the 30 or 60 day period operating pursuant to section 459(1)(d) in relation to employee claim action to which the section applies'.[13]

The Full Bench concluded that 'where there is a suspension of protected industrial action, section 429 allows employee claim action authorised by a protected action ballot to be engaged in after the suspension period without the need for a further protected action ballot, and the suspension period does not count in determining the period in which such action may be taken.'[14]

The effect of section 429(3) here was to extend the period in which employee claim action could be taken pursuant to the TWU's ballot for a further two months after 18 September 2018. The proposed paperwork ban and 4-hour stoppage notified by the union after the suspension order ended would therefore have been protected industrial action. As Deputy President Beaumont misconstrued section 429, there was no basis for her section 418 order that those forms of industrial action stop or not occur.[15]

Implications for employers

- The key take-away from this decision is that all approved forms of industrial action authorised by a protected action ballot will be back on the table once the suspension order ceases to operate.
- This consideration is not just important for businesses operating in industries where disruption of their activities may be found to endanger the lives, health and safety of the population, or an important part of the economy, as the basis for a section 424 suspension order.
- The Full Bench made clear that section 429 will also allow all authorised employee claim action to be commenced or resumed at the end of other FW Act suspension orders issued on the basis of significant economic harm to the parties involved (section 423), significant harm to a third party (section 426), or for the purposes of 'cooling off' the bargaining process (section 425).[16]
- Employers should always be aware of and prepared for all the forms of industrial action authorised by a protected action ballot that their employees and representative unions are contemplating, not just those of which formal notice has been given at a particular point in bargaining.
- Any of those types of proposed action may be taken before the applicable time limit under section 459 ends – factoring in now that a suspension order will 'stop the clock' on calculating that time limit.

https://www.fwc.gov.au/documents/decisionssigned/html/2019fwcfb663.htm

1 Under *Fair Work Act 2009* (Cth) (FW Act), Part 3-3, Division 8
2 *Broadspectrum (Australia) Pty Ltd v Transport Workers' Union of Australia* [2018] FWC 4930
3 *Broadspectrum (Australia) Pty Ltd v Transport Workers' Union of Australia* [2018] FWC 6582
4 Ibid
5 *Broadspectrum (Australia) Pty Ltd v Transport Workers' Union of Australia* [2018] FWC 6582 [67]
6 *Transport Workers' Union of Australia v Broadspectrum* (Australia) Pty Ltd [2019] FWCFB 663 [12]
7 *Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65
8 Section 413(7) relevantly states that for industrial action to be protected, no order can be in place that suspends any industrial action in relation to the proposed enterprise agreement
9 *Transport Workers' Union of Australia v Broadspectrum* (Australia) Pty Ltd [2019] FWCFB 663
10 Ibid [41]
11 Ibid
12 Ibid [42]
13 Ibid [39]
14 Ibid [44]
15 Ibid [51]
16 Ibid [43]

From 'Bricks and Mortar' to 'Bricks and Clicks': six key PropTech considerations

CORRS PROJECTS UPDATE

Originally the domain of technology start-ups, PropTech (or ConTech) has emerged as a serious player in property and construction markets.

The integration of new technologies in the property space, and the opportunity this creates, is being embraced by investors, major construction companies and property developers alike to enhance the residential, commercial and retail customer experience.

As the appetite for agile working environments, technology and automation grows, businesses will increasingly expect property developers and builders to incorporate PropTech solutions (such as AI with building information modelling, 3D printing technology and wearable tech to enhance labour productivity and safety).

While the benefits are enormous, PropTech solutions also present a number of legal and reputational risks. Explored below are six key PropTech considerations:

1. Collection of data

Data that identifies an individual, such as information collected by sensor technologies to track individual movements, is likely to be personal information in Australia and attracts different privacy obligations for recipients that access and collect this personal information.

For example, a builder that collects personal information about employees may rely on the employee records exemption under the Privacy Act 1988 if the personal information is collected for the individual's employment.

However, when personal information is collected from guests or contractors, the builder cannot rely on that exemption and will be subject to privacy legislation concerning the collection, use, disclosure and storage of personal information.

A property owner that is collecting information to understand how a space is being used for the purposes of the facility or future developments will be subject to privacy laws if the individual can be identified. The owner will need to satisfy privacy obligations including, that the collection is necessary for one or more of its functions and activities. If not, the information should be de-identified.

2. Security of data

As large repositories of valuable data grow, organisations in the property chain need to move beyond managing physical security to managing the secure storage of information. Because data is often managed by third-party cloud providers with servers globally, collectors of this information must ensure protection from cybersecurity risk operationally and contractually.

3. Intellectual property

Construction companies and property developers that embed PropTech solutions into the design or build of a development must ensure that the PropTech solution is immune from IP infringement claims and that IP is accessible should an emergency occur.

To this end, construction companies and property developers should conduct due diligence and enquiry on the IP ownership framework to ensure the IP resides with

the correct 'owner' and is appropriately licensed to enable unimpeded use while the PropTech solution is in operation.

PropTech is set to revolutionise the construction and property sectors. While it will raise a number of new and varied legal and operational risks, those organisations that can manage these risks effectively will be best placed to make the most of the enormous opportunities this exciting sector presents.

4. When things go wrong

The risk profile for owners of smart buildings that deploy AI technology to operate key functions goes beyond the physical infrastructure. Who in the PropTech supply chain bears responsibility for malfunctions and liabilities, particularly given the potential for harm where automated technology operates an essential building function such as lifts or fire detection?

The potentially catastrophic consequences of a PropTech defect requires owners to closely examine the technology chain to ensure that:

- the contractual framework with technology providers, integrators and others is robust;
- service levels are appropriately identified;
- responsibility matrixes are documented; and
- liability regimes are allocated to cover the new risk paradigm.

5. Facial recognition software

Within retail property, facial detection applications use algorithms to detect the presence of a human face. While they don't identify an individual, data is being used to collect information such as age, gender and even mood, which is then used to connect the shopper with particular retailers. This raises ethical and reputational issues for the centre operator as to the level of transparency required over what information is collected about the customer experience and how it is used.

In some countries, facial recognition software is being used as a security measure to create a digital record of individuals that pose a threat. Unlike facial detection, facial recognition uses biometric technology to recognise the human face. In the retail property context, if one retail outlet identifies a threatening individual, other outlets using the network could form the same view, resulting in the individual being automatically banned from multiple outlets.

6. Ownership of data

Multiple parties with access to the same data all seek to analyse and derive insights for their own businesses and identify new commercial opportunities. Could a property owner that operates sensor technologies set parameters in leases with tenants about what rights they have over the data?

It is important that property participants think about the value proposition created by the technologies and whether legal arrangements are properly defined to ensure that data, information and intellectual property rights are protected and revenue streams are preserved.

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