CORRS' CONSTRUCTION LAW UPDATE
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WELCOME TO THE LATEST EDITION OF **CORRS' CONSTRUCTION LAW UPDATE** AUGUST 2017

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

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

We hope that you find it interesting and stimulating.

OUR THINKING

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

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The information contained in this publication is intended as an introduction only, and should not be relied upon in place of detailed legal advice. Some information has been obtained from external sources, and Corrs cannot guarantee the accuracy or currency of any such information.

The information contained in this publication was current as at August 2017.

PROBUILD CONSTRUCTIONS (AUST) PTY LTD V SHADE SYSTEMS PTY LTD; MAXCON CONSTRUCTIONS PTY LTD V VADASZ [2017] HCATRANS 112

KEYWORDS: SECURITY OF PAYMENT; JUDICIAL REVIEW; HIGH COURT

KEY TAKEAWAYS

Later this year, the High Court will hear appeals in two cases, each of which concerns the extent to which adjudicators' determinations under security of payment legislation can be set aside on judicial review: in particular, whether they can be set aside for non-jurisdictional error of law. These are obviously cases of considerable practical importance and interest.

Background

The first instance decision in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*,[1] in which Emmett AJA held that certiorari should issue for non-jurisdictional error of law in an adjudicator's determination, was covered in the July 2016 Construction Law Update.

The appeal decision in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)*,[2] in which a five-Judge bench of the Court of Appeal allowed the appeal, was covered in our April 2017 Construction Law Update (and episode 8 of our High Vis podcast).

The appeal decision in *Maxcon Constructions Pty Ltd v Vadasz*[3] was covered in our April 2017 Construction Law Update.

Decision

A bench of Gageler, Nettle, and Edelman JJ granted special leave to appeal in both matters, on (it seems) all grounds.

The matters were heard together, and the same counsel appeared for the respondents in both matters (Michael Christie SC and David Hume). Bret Walker SC appeared with Scott Robertson (each of the Sydney Bar) for Probuild and Ben Doyle (of the Adelaide Bar) appeared for Maxcon. (The keen reader will observe that there is some commonality with the representation in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd*:[4] in that case, Michael Christie SC and David Hume appeared for the successful appellant, and Scott Robertson appeared for the respondent.)

The grant of special leave was conditional on the appellants (Probuild and Maxcon) paying the respondents' costs of the appeal and not seeking to disturb the costs orders below.

It is apparent from the transcript that the bench required no persuasion of the general importance of the underlying issue, that is, the scope of judicial review from adjudicators' determinations.

The currently appeals have not been set down in the lists for the August 2017 sittings (which, exceptionally, are being held in Brisbane) or September (which, again exceptionally,[5] are being held in Melbourne), though it seems as though the Melbourne list is not yet full. If the appeals are not heard in Melbourne in September, it is almost certain they will be heard in Canberra in October, as *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd*[6] was in 2016.

http://www.hcourt.gov.au/cases/case_s145-2017

http://www.hcourt.gov.au/cases/case_a17-2017

1 [2016] NSWSC 770
2 [2016] NSWCA 379
3 [2017] SASCFC 2
4 [2016] HCA 52, (2016) 340 ALR 193
5 See Jeremy Gans, "News: High Court Hears Appeal in... Sydney??", Opinions on High (14 June 2017) http://blogs.unimelb.edu.au/opinionsonhigh/2017/06/14/news-high-court-hears-appeal-in-sydney/ and Katy Barnett, "News: Rectification of Buildings and the High Court", Opinions on High (5 July 2017) http://blogs.unimelb.edu.au/opinionsonhigh/2017/07/05/news-rectification-of-buildings-and-the-high-court/
6 [2016] HCA 52, (2016) 91 ALJR 233, (2016) 340 ALR 193

470 ST KILDA ROAD PTY LTD V ROBINSON [2017] FCA 597

KEYWORDS: PROGRESS PAYMENTS; MISLEADING OR DECEPTIVE CONDUCT

KEY TAKEAWAYS

A Chief Operating Officer who signed a statutory declaration without making "reasonable enquiries" was personally liable for misleading or deceptive conduct. Being overworked and having perfunctory conversations to verify the accuracy of the statutory declaration was no excuse.

Facts

Reed Constructions Australia Pty Ltd (**Reed**) was a builder engaged by 470 St Kilda Road (**the Company**) to build the Leopold Development on St Kilda Road. Mr Robinson was Reed's Chief Operating Officer.

In late 2011, as the Leopold Development was nearing completion, Reed was in financial difficulty. It was in the process of laying off a third of its employees, and subcontractors around the country were complaining they had not been paid. Mr Robinson had "*a lot on his mind*".[1]

It was in this context that, on 12 December 2011, Mr Robinson signed a statutory declaration in support of Progress Payment 15 saying:

> *"correct per agreement ... all sub-contractors or suppliers of materials who are or at any time have been engaged on the work under the Contract have been paid in full all monies which have become payable ..."*

When Mr Robinson made this statement, his enquiries had been perfunctory. Though Mr Robinson knew Reed was in dire financial straits, he did not check Reed's accounting software, he did not look at any invoices or monthly reports and he did not check the terms of payment Reed had with its subcontractors. He had two brief conversations with the Victorian State Manager, and the CEO. These were inconclusive.[2] In truth, Reed Constructions owed its subcontractors hundreds of thousands of dollars.

Relying on the statutory declaration, the Company paid Progress Payment 15.[3] But by Australia Day 2012, subcontractors were packing up and leaving the site. It became apparent the Statutory Declaration was false.

Hounded by its creditors nationwide, Reed entered liquidation leaving works incomplete. Unable to recover from Reed, the Company sued Mr Robinson for misleading or deceptive conduct under section 18 of the Australian Consumer Law.[4]

Decision

In essence, the Company argued that but for the false statutory declaration, it would have known Reed's true financial position and would not have not paid the Progress Payment. Instead, it argued, it would have terminated the contract.

The Company claimed the value of Progress Payment 15 from Mr Robinson, asking to be put back in the same position it would have been in had the false declaration not been made.

O'Callaghan J of the Federal Court agreed:

> *"Mr Robinson's statement, that to the best of his knowledge and belief he had made all reasonable enquiries before making the statutory declaration, was misleading or deceptive or likely to mislead and deceive."*

In essence, the Court found Mr Robinson had claimed he had made all reasonable enquires when he had not. O'Callaghan J said this was misleading, and caused the Company to make an unrecoverable payment it otherwise would not have made.

O'Callaghan J ordered Mr Robinson personally to repay the Company the entire amount of Progress Payment 15, being $1,426,641.70. His Honour refused to apportion any of the amount to Reed, stating that the responsibility to take reasonable steps was on Mr Robinson, and *"Mr Robinson's status as an employee of Reed ... alone cannot justify apportioning liability"*.

Mr Robinson, however, will not be out of pocket. In a related proceeding, the Federal Court held that Mr Robinson was entitled be indemnified under Reed's directors' and officers' insurance policy.

Comment

Unfortunately, false and misleading statutory declarations are not uncommon in the construction industry. While signing a false statutory declaration is perjury and a criminal offence, prosecutions are rare. Other avenues of redress for a misleading statutory declaration (like attempting to invalidate a security of payment claim on this basis) have proven difficult to implement.

Whilst a claim for misleading or deceptive conduct has theoretically always been open for a misleading statutory declaration, the fact the Court found an overworked Chief Operating Officer solely liable is likely to make others reassess how seriously they take their statutory declaration obligations.

It is worth emphasising that this result was reached without any finding of dishonesty on Mr Robinson's part. But merely being overworked in a tumultuous time for his company was an insufficient excuse for a failure to take reasonable enquiries when he had signed a statutory declaration saying he had.

Even though Mr Robinson did not raise this defence, there may sometimes be an open question as to whether acting as an employee in the furtherance of an employer's interest amounts to engaging in "trade or commerce" for the purposes of section 18 of the Australian Consumer Law.[5]

However, given the Court indicated it would readily have found Mr Robinson liable for negligent misstatement (which has no such trade or commerce requirement), the failure to argue the issue may not have changed the result.

http://www.austlii.edu.au/au/cases/cth/FCA/2017/597.html

1 At [68]
2 At [70]
3 At [77]–[91]
4 A secondary claim for negligent misstatement was also made
5 Consider *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594

LAING O'ROURKE AUSTRALIA CONSTRUCTION PTY LTD V KAWASAKI HEAVY INDUSTRIES LTD [2017] NSWSC 541

KEYWORDS: PERFORMANCE BONDS; INJUNCTIONS; CONTRACTUAL INTERPRETATION

KEY TAKEAWAYS

A beneficiary may be restrained from calling on a performance bond where the call would be in breach of a contractual promise not to do so unless certain conditions are satisfied. In determining whether an interlocutory injunction should continue, a court will consider whether there is a serious question to be tried and the balance of convenience.

A court will construe the meaning of a commercial contract objectively by reference to its text, context, purpose and what a reasonable businessperson would have understood the terms of the contract to mean. Significantly, this may include considering not only the words, but also the structure of the contract.

Facts

In April 2012, JKC Australia LNG Pty Ltd (**JKC**) engaged Laing O'Rourke Australia Construction Pty Ltd (**Laing O'Rourke**) and Kawasaki Heavy Industries Ltd (**Kawasaki**) to provide project management, engineering and other services for the construction of several cryogenic tanks near Darwin (under the **JKC Subcontract**). The relationship between Laing O'Rourke and Kawasaki was governed by a Consortium Agreement.

Under the JKC Subcontract, Kawasaki and Laing O'Rourke needed to provide an unconditional and irrevocable performance bond in favour of JKC, equal to 10% of the contract price (**Kawasaki Bond**). However, under the Consortium Agreement, Kawasaki agreed to provide the Kawasaki Bond on behalf of both Kawasaki and Laing O'Rourke. Both parties agreed to contribute set proportions if JKC called on the Kawasaki Bond. Additionally, Laing O'Rourke had to provide performance bonds in favour of Kawasaki (**Laing O'Rourke Bonds**). The Laing O'Rourke Bonds were governed by clause 14 of the Consortium Agreement (**clause 14**).

The relationship between Kawasaki and Laing O'Rourke subsequently broke down. On 14 March 2017, Kawasaki called on the Laing O'Rourke Bonds. However, JKC had not called on the Kawasaki Bond. The next day, Laing O'Rourke applied for, and was granted, an ex parte interlocutory injunction restraining Kawasaki from calling on the Laing O'Rourke Bonds.

In the Supreme Court of NSW, Laing O'Rourke sought to have the injunction continued, pending the determination of an arbitral tribunal to be appointed under the Consortium Agreement.

Laing O'Rourke argued that Kawasaki should be restrained from calling on the Laing O'Rourke Bonds on the basis that:

1. there was a serious question to be tried whether, on the proper construction of the Consortium Agreement and other documents, Kawasaki had agreed to not call on the Laing O'Rourke Bonds until JKC had called on the Kawasaki Bond; and
2. the balance of convenience favoured continuing the current restraint.

On the other hand, Kawasaki argued it was entitled to call on the Laing O'Rourke Bonds before JKC had called on the Kawasaki Bond.

Decision

Stevenson J accepted the principle that a beneficiary may be restrained from calling on a bond if to do so would be a "breach of a contractual promise not to do so unless certain conditions are satisfied".[1] Ultimately, Stevenson J rejected Kawasaki's arguments and found that the injunction should continue.

Was there a serious question to be tried?

Stevenson J found that there was a serious question to be tried as to whether Kawasaki was entitled to call on the Laing O'Rourke Bonds before JKC had called on the Kawasaki Bond. Stevenson J determined this question by employing the familiar approach to contractual interpretation, namely, that the construction of a commercial contract is to be determined objectively by reference to its text, context, purpose and what a reasonable businessperson would have understood the terms of the contract to mean.

Ultimately, Stevenson J determined that the structure of clause 14 suggested that the parties had intended the Kawasaki Bond and the Laing O'Rourke Bonds to be "back to back" bonds — that is, that the parties intended that Kawasaki could only call on the Laing O'Rourke Bonds if JKC called on the Kawasaki Bond. This was because:

- Laing O'Rourke's obligation to provide the Laing O'Rourke Bonds appeared in the same clause as, and immediately after, Kawasaki's obligation to provide the Kawasaki Bond and the provision obliging both parties to share the burden of a call on the Kawasaki Bond; and
- clause 14 required the timing, duration and conditions of the Kawasaki Bond and Laing O'Rourke Bonds to mirror one other.

Further, Laing O'Rourke argued that clause 14(e)'s reference to "securing Laing O'Rourke's due performance of its obligations under the [JKC] Subcontract" indicated that the parties intended that Kawasaki would be entitled to call on the Laing O'Rourke Bonds if Laing O'Rourke was in breach of any of its obligations to Kawasaki (and not only if JKC made a call on the Kawasaki Bond). However, when viewed in the context of clause 14 as a whole, Stevenson J found that the obligations secured by clause 14(e) were instead Laing O'Rourke's joint obligation to give JKC the Kawasaki Bond, and for Laing O'Rourke to contribute its proportion if a call was made on the Kawasaki Bond. The Laing O'Rourke Bonds were intended to provide security for Kawasaki's liability under the Kawasaki Bond, and operate as "back to back" bonds.

Did the balance of convenience favour the continuation of the injunction?

Stevenson J found that the balance of convenience favoured continuing the injunction. In particular, Stevenson J noted that Kawasaki had not pointed, and could not point, to any substantial prejudice it would suffer if the existing injunction continued, given Kawasaki's large cash reserves and shareholder equity. Further, Stevenson J considered that if Kawasaki called on the Laing O'Rourke Bonds, Laing O'Rourke would:

- have no other means to restrain the call, given that the arbitral tribunal dealing with the underlying dispute had not yet been established;
- potentially have its prospects of bidding for an unrelated project prejudiced, and thus find it difficult to prove what damage it had thereby suffered in monetary terms, leading Stevenson J to conclude that damages may not be an adequate remedy;
- possibly be at risk of being in breach of minimum cash requirements under several finance facilities; and
- possibly suffer reputational damage.

https://www.caselaw.nsw.gov.au/decision/590a89e3e4b0e71e17f59462

1 *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47, (2016) 339 ALR 200 at [8] (French CJ)

EMPIRE GLASS AND ALUMINIUM PTY LTD V LIPMAN PTY LTD
[2017] NSWSC 253

KEYWORDS: DISPUTE RESOLUTION CLAUSES; APPEAL FROM EXPERT DETERMINATION; CONTRACTUAL RIGHTS TO LITIGATE

KEY TAKEAWAYS

Courts continue to interpret dispute resolution clauses by reference to commercial circumstances. When a dispute resolution clause prescribes a process that is to be final and binding unless certain steps are taken, parties must pay close attention to those preconditions. It is unwise to assume a right to commence litigation if those preconditions have not been satisfied.

Facts

In November 2014, Empire engaged Lipman for the design, supply and construction associated with the refurbishment of a building in Sydney. The dispute resolution clause provided that disputes be initially referred to senior executives to negotiate. If they failed to resolve the dispute, it could be referred to expert determination.

Under Clause 42.11, expert determination was to be:

> *"final and binding,* ***unless a party gives notice of appeal to the other party within 15 Business Days of the determination****, and is to be given effect to by the parties* ***unless and until it is reversed, overturned or otherwise changed under the procedure in the following subclauses****" (emphasis added).*

Clause 42.12 provided that:

> *"if the determination of the expert does not resolve the dispute then, subject to clause 42.11, either party may commence proceedings in relation to the dispute".*

Several disputes were ultimately referred to expert determination. The expert made two determinations on 29 November 2016. On 19 December 2016, and within the 15 business days prescribed, Empire gave notice of an appeal and commenced proceedings seeking to re-agitate the issues considered by the expert.[1] Lipman then filed a motion seeking a permanent stay or dismissal of the proceedings.

Issues

The primary issue was whether the expert determination was binding or whether Empire was entitled to have the disputes that were before the expert determined by the Court.

Lipman argued that the expert determination clause made any determination final and binding unless the determination does not resolve the dispute because it did not comply with the contract and was therefore void.[2]

Empire argued that clause 42.12 should not impose an independent condition which operates only if the dispute is not resolved. Rather, Empire argued, if the dispute is not resolved because one party triggers the appeal process, the parties must give effect to the determination until it is reversed, overturned or otherwise changed.[3]

Decision

Ball J preferred the interpretation advanced by Empire: the construction of the clauses and the interaction between them created a further dispute resolution step, in the form of a rehearing by a court.[4] Accordingly, Lipman's motion seeking a permanent stay or dismissal of the proceedings was dismissed with costs.

His Honour acknowledged the commercial reasons for a dispute resolution procedure that would prevent the re-agitation of issues already determined by an expert. However, Ball J found that in this case, the parties had clearly incorporated a substantive right of appeal into their dispute resolution process.[5]

His Honour interpreted the words "if the determination of the expert does not resolve the dispute" in clause 42.12 as connecting words referring back to clause 42.11. The words did not introduce a new condition on the exercise of a right of appeal (which right arises from the service of a valid notice of appeal). It would make less sense if the condition to commencing proceedings was contingent on a failure of the expert to comply with the requirements of the contract. That was a question to be determined as part of the court proceedings.[6]

Ball J held that even if court proceedings were commenced, Empire and Lipman had agreed to remain bound by the determination until it was reversed, overturned or otherwise changed.[7]

In Ball J's opinion, this interpretation gave effect to the parties' objective commercial intentions. When negotiating the terms of a contract, parties must carefully consider the dispute resolution procedure and the consequences of particular drafting. Importantly, if the dispute resolution procedure provides a mechanism for expert determination or alternative dispute resolution, the parties must consider whether they intend the decision to be final and binding — and must express the position clearly.

https://www.caselaw.nsw.gov.au/decision/58c71ebae4b0e71e17f57bc4

1 At [7]
2 At [14]
3 At [16]
4 At [19]–[20]
5 At [22]
6 At [26]-[27]
7 At [28]

PROCUREMENT OF GOVERNMENT INFRASTRUCTURE PROJECTS

KEYWORDS: GOVERNMENT; PROCUREMENT PROCESSES

KEY TAKEAWAYS

The New South Wales Legislative Assembly's Committee on Transport and Infrastructure, a standing, cross-party Parliamentary committee, has published a report of its inquiry into best practice in the procurement of government infrastructure. The aim was to provide a framework for future government infrastructure projects. The central focus of these findings is refining the procurement processes, reducing bid costs and increasing the use of standardised contracts.

Background

The NSW Government currently uses several approaches to delivering infrastructure projects, including traditional procurement models, public–private partnerships (**PPPs**), and unsolicited proposals. Procurement for infrastructure projects in NSW is primarily overseen by three main state government bodies — Infrastructure NSW (including Projects NSW), NSW Treasury's Infrastructure and Structured Finance Unit, and the NSW Procurement Board (including the ICT Board) — as well as the national advisory body, Infrastructure Australia.

On 19 November 2015, the Committee, then chaired by Alister Henskens SC, adopted terms of reference for the inquiry and subsequently received submissions on the procurement of government infrastructure projects.

The Committee tabled its report on 23 February 2017. The government's response is due by 23 August 2017.

Findings

The Committee made two main findings, which, in summary, were:

1 NSW Government has improved its procurement processes

The Committee commended the diligence of the NSW Government in reviewing and improving its procurement practices. The reforms have stimulated greater engagement and competition in the PPP market, including through:

- engaging in consultation both internally and with key market players to ascertain possible areas for improvement in PPP procurement;
- shifting from an input-specified approach with clearly stipulated requirements throughout the project timeline, to a more outcome-oriented approach which focuses on the overall objectives of the project, thereby affording greater flexibility and allowing tenderers to explore more innovative methods of delivery;
- the development of standard project documentation and a project 'toolbox'; and
- the recent establishment of the NSW Government Procurement Board and Projects NSW.

2 There is scope for innovation in extending the PPP model to smaller infrastructure projects

The Committee proposed applying the PPP model to smaller infrastructure projects (to be bundled together to meet the $100 million threshold) to encourage innovation. The PPP Guidelines do not currently prevent bundled projects from being assessed within the PPP framework. The Victorian Government announced reforms to this area in May 2013, extending the PPP framework to accommodate small-scale projects.

Recommendations

The Committee recommended that the NSW Government should:

1 Consider establishing a Centre for Procurement Excellence

The Committee investigated procurement skills in public sector agencies, in light of concerns that extensive outsourcing has created a skills shortage. It recommended a Centre for Procurement Excellence, which would provide skills training and development for public sector procurement to benefit the many government agencies engaged in, or affected by, procurement processes.

2 Continue to promote unsolicited proposals

The Committee found that unsolicited proposals lead to greater innovation, timeliness and cost efficiency when compared with current PPP and traditional procurement practices. To avoid confusion, a unified approach to unsolicited proposals across jurisdictions was recommended.

3 Continue to eliminate unnecessary information requirements

The Committee recommended continuing to eliminate unnecessary information requirements during bidding stages, to reduce procurement bid costs. The NSW Government currently requires more documentation than other jurisdictions, but it is thought that all Australian jurisdictions would likely benefit from this recommendation.

4 Provide a pipeline of infrastructure projects

The Committee recommended that, to minimise bid costs and increase competitiveness in procurement, the NSW Government should provide a consistent and transparent pipeline of infrastructure projects. One of the largest costs for stakeholders was uncertainty about future projects, and the Committee noted that greater transparency would help to mitigate this risk.

5 Review procurement contracts and, where practical, standardise contracts

The Committee considered that standardising contracts will improve procurement practice by:

(a) encouraging more parties to tender for projects;

(b) lowering the cost for government; and

(c) reducing bid costs for the private sector.

Standard templates do exist, but their use is not currently mandated.

6 Include clear principles for the allocation of project risk in the PPP Guidelines

The Committee determined that, to attract private sector engagement in the PPP process and provide an appropriate measure of transparency, it is essential to have clear risk allocation principles for PPPs. The current lack of clarity is deterring some private sector parties from bidding. While there is a national discussion about risk allocation, there are no clear principles in the PPP guidelines.

7 Assess whether contracting out of proportionate liability provisions should be prohibited across government contracts

The Committee took the view that the NSW Government's position on contracting out of proportionate liability may be discouraging participation, as it significantly increases the private sector's risk profile. The inquiry did not specifically investigate this issue, but the Committee recommended further assessment of its impact on infrastructure procurement.

8 Investigate how best to ensure that steel used in government projects complies with the Australian Standard

The Committee noted that steel certification processes are imprecise, and that it is critical, for safety purposes, that Australian Standard steel be used in all infrastructure projects. The Committee recommended that the NSW Government implement procedures to ensure that these requirements are consistently achieved.

The report, non-confidential submissions, and the transcript of the Committee's public hearing on 14 March 2016, are available at https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?activetab=Reports&pk=2119.

PROBUILD CONSTRUCTIONS (AUST) PTY LTD V DDI GROUP PTY LTD
[2017] NSWCA 151

KEYWORDS: EXTENSIONS OF TIME; PREVENTION PRINCIPLE; GOOD FAITH

KEY TAKEAWAYS

A duty of good faith may be applied to the discretion to extend time in construction contracts.

It is a common scenario in the Australian construction industry ...

The contractual date for completion between a head contractor and a subcontractor often comes and goes, without complaint or extension of time claim. Later, the head contractor orders variations, which are carried out. The subcontractor claims for the variations.

For one reason or another, the parties find themselves in a different commercial position and the head contractor seeks to set off liquidated damages for delay. Arguments then ensue about whether an extension of time should have been granted.

So what happens next?

The New South Wales Court of Appeal (NSWCA) recently affirmed that, in this situation, generally speaking, the head contractor is not entitled to levy liquidated damages in respect of periods of delay that the head contractor has caused. However, the head contractor was obliged to grant an extension of time for delays it had caused, despite the subcontractor not having made a timely claim.

In doing so, the NSWCA is the latest court to consider how the prevention principle applies in typical construction contracts. However, in a new development the Court said the obligation to extend time could be based on an implied duty of good faith.

The application of extension of time clauses continues to be one of the main sources of uncertainty within the industry. It is common for contracts to place restrictive conditions on the entitlement to claim extensions of time. Most construction contracts do nevertheless provide a power to unilaterally grant an extension of time.

This case continues a line of cases which require this unilateral power be exercised to extend time for delay caused by the owner (or head contractor, as they case may be), where the owner seeks to impose liquidated damages. It is suggested, though, the reference to good faith should not lead to a fundamental change to the contractual risk allocation.

The prevention principle and the typical structure of extension of time clauses

Almost all standard form contracts (and sophisticated bespoke contracts) include a clause allowing the contractor an extension of time as of right for certain causes of delay, including (but often not limited to) delay caused by the owner (or head contractor, as the case may be).

These contracts usually have a requirement to give notice of the claim within a certain period of time and often become a trigger for a claim for delay costs.

Most contracts also include a clause allowing the owner's representative or an independent certifier to extend time for completion unilaterally at their discretion. This discretion exists to account for the prevention principle.

The prevention principle states that a party cannot rely on a breach of contract where its own actions have caused the breach. Therefore, if the reason, or one of the reasons, a contractor has failed to reach completion by the date specified is that it was prevented from doing so by the owner, the owner cannot levy liquidated damages from that date.

One of the functions of extension of time clauses is to provide a contractual mechanism to avoid the operation of the prevention principle, and so preserve the owner's right to liquidated damages. That is, if the delay caused by the owner can be separated from the overall delay which has occurred, the owner can still hold the contractor responsible for the remaining delay, without offending the prevention principle.

In *Peninsula Balmain*,[1] followed by *620 Collins Street*,[2] the Courts held that, where the contractor failed to make a valid claim for an extension of time, the independent certifier (in those cases, the superintendent) was obliged to exercise the unilateral extension of time power for the period of delay caused by the owner[3]. This was a result of an express contractual obligation for the independent certifier to act honestly and fairly in the administration of the contract.

Decision

The question before the Court

DDI was a plasterboard subcontractor on a hotel redevelopment for which Probuild was head contractor.

DDI completed 144 days after the date for completion. It made a significant security of payment claim for costs on account of variations (around $2.2 million on an original contract value of around $3.4 million). DDI had not made claims for extensions of time, nor complied with strict notification procedures for variations in its subcontract. Probuild responded to the claim by setting off liquidated damages. DDI argued the contractual mechanisms had been abandoned. The parties' submissions pointed to a range of potential causes of delay.

The adjudicator decided that, in circumstances where variations had been directed after the date for completion had passed, it was "unreasonable" for Probuild not to have granted an extension of time.

Even if some delays had been caused by DDI, this meant Probuild had not established its claim for liquidated damages. The adjudicator decided Probuild was liable for around $0.5 million.

Probuild sought to quash the adjudication on the basis that the adjudicator had not afforded procedural fairness, by deciding the matter on a basis which had not been argued. While that was a relatively narrow issue before the Court, the Court's reasoning on the prevention principle is more widely applicable.

The Court's reasoning

McColl JA (with whom Beazley JA and Macfarlan JA agreed) examined the line of cases dealing with the prevention principle. The Court explained by reference to McLure P's observation (in *Spiers Earthworks*)[4], that the prevention principle may be a manifestation of the obligation to cooperate which is implied in all contracts.

The Court went on to affirm that the reasoning in *Peninsula Balmain* applied to this case. That is, in order to claim liquidated damages, Probuild was obliged to extend time for delays it had caused. Importantly, though, the contract in this case did not have a superintendent or some other independent certifier. Rather, it was Probuild itself which held the power to unilaterally extend time. There was (it seems) no express obligation on Probuild to act honestly and fairly.

The Court held that the obligation to extend time arose "having regard to the underlying rationale of the prevention principle or, if necessary, because there is an implied duty of good faith in exercising the discretion" conferred by the unilateral power.

Ultimately, the Court found the adjudicator's decision and the material before the adjudicator encompassed that underlying rationale, and so Probuild had not been denied natural justice. Probuild had not made a case about what would have been an appropriate extension of time.

The Court cautioned that Probuild's ultimate entitlement to liquidated damages depended on the proper construction of the subcontract in the events that occurred.

Probuild v DDI: the wider implications

The Court's decision in *Probuild v DDI* is aligned with the logic of *Peninsula Balmain*.

There are, however, two important matters resulting from the decision of which parties to construction contracts should be aware.

Firstly, the Court suggested that a party to a construction contract may be obliged to exercise its discretion to extend time because of an implied duty of good faith. The Court did not, however, elaborate on the extent of the duty or its content.

One can image that such an open-ended duty would give rise to practical problems. For example, a superintendent is obliged to make a decision based on his or her independent knowledge of the project and whatever material is put forth by the parties. But, a party to the contract is not independent and has its own commercial interests. So, should a party to the contract acting in good faith be obliged to make a decision based upon its own knowledge rather than only the claim of the contractor? Is a party obliged to inform the contractor of the basis of its good faith decision? If the obligation to exercise the unilateral power in good faith arises where the contractor has failed to make a timely claim, what other conditions precedent should, in good faith, be disregarded, and is there a spectrum? What if the contractor is claiming delay costs rather than the owner claiming liquidated damages?

The answer to these problems is perhaps provided by the second element of the Court's logic. That is, that the discretion is to be exercised having regard to the "underlying rationale" of the prevention principle. The underlying rationale is that a party cannot rely on a breach of contract that it has caused. The unilateral extension of time power allows the delay caused by the owner to be separated out from the overall delay to completion, so all that remains is delay that the owner has not caused. Therefore, because of the extension of time, the breach has not been caused by the owner and the prevention principle does not apply.

If the obligation to act in good faith aligns with the "underlying rationale" of the prevention principle, the owner's obligation is only to allow for the delaying effect of its own conduct, and no more. In this way, the implied duty of good faith is not open ended but harmonises with the purpose of the unilateral extension of time power. Together, they produce an interpretation of the obligations in the contract consistent with one another and long-standing principles.

One difficult question remains: what happens if there is no unilateral extension of time power or the discretion is limited so that it cannot be exercised to remove the delay caused by the owner?

On one reading of *Probuild v DDI*, the owner is better off without there being any discretion at all. On the other hand, that would be a return to the very situation which gave rise to the existence of the unilateral extension of time power: to avoid the risk of "all or nothing" on delay liability. This is not the place to analyse this complex topic in detail.

What is clear, however, is that where there is an available unilateral extension of time power, an owner is usually obliged to grant extensions of time for delays it has caused in order to preserve its right to claim liquidated damages for delay.

The prudent course, in "normal" risk allocations, would usually be to make a fair and independent assessment of the delay caused by the owner. That may include, it is suggested, taking into account any causative effect of the failure to make a timely claim by the contractor.

The content of an implied duty of good faith must not be inconsistent with the express terms of the contract. It is suggested that *Probuild v DDI* should not lead to a different risk allocation.

https://www.caselaw.nsw.gov.au/decision/594b38d9e4b058596cba7e4c

Note: Dado Hrustanpasic first published this article on 12 July 2017 at http://www.corrs.com.au/publications/corrs-in-brief/granting-extensions-of-time-in-construction-contracts-a-duty-of-good-faith-may-apply/

1 *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211

2 *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 2)* [2006] VSC 491

3 Readers of these cases will note that the terms "unilateral", "discretionary" and "reserve" tend to be used interchangeably to describe the relevant contractual power

4 *Spiers Earthworks Pty Ltd v Landtec Projects Corporation Pty Ltd (No 2)* [2012] WASCA 53

REGAL CONSULTING SERVICES PTY LTD V ALL SEASONS AIR PTY LTD [2017] NSWSC 613

KEYWORDS: SECURITY FOR PAYMENT; REFERENCE DATES; EARLY CLAIMS

KEY TAKEAWAY

This seems to be the first decision (or at least one of the first decisions) considering the effect of a "deeming" provision sometimes contained in construction contracts, providing that an early payment claim is deemed to be made on a later date.

Facts

All Seasons was a subcontractor of Regal. All Seasons undertook to perform mechanical ventilation and air conditioning work for a residential development at Waitara (a suburb of the Upper North Shore in Sydney).

The subcontract provided that:

- payment claims were to be made monthly, on the 20th day of the month; and
- a claim made before that date "shall be deemed to have been made on the date for making that claim".

On 12 July 2016, All Seasons made a payment claim under the security of payment legislation for about $44,500. Regal responded with a payment schedule, in which it contended that no amount was payable, and the payment claim was invalid because: (1) All Seasons had already made a payment claim for the 20 June 2016 reference date, and (2) the entitlement to make the claim for the 20 July 2016 reference date had not accrued.

All Seasons then made an adjudication application. The adjudicator decided that she had jurisdiction, and then decided that the adjudicated amount payable was the amount claimed by All Seasons. Regal challenged the adjudicator's decision.

Decision

McDougall J succinctly identified the relevant issue (there were other issues that can be put to one side) as:

> *"was All Seasons entitled to a progress payment as at 12 July 2016, in circumstances where it had made a payment claim for the reference date accruing (on 20 June 2016) in the previous month, and where the next reference date (20 July 2016) had not accrued at the time its progress claim was served?"*[1]

It was accepted before McDougall J that the deeming provision was effective so far as All Seasons' claim was a claim under the contract.[2]

Following an erudite discussion of case law about deeming provisions generally,[3] McDougall J held that the provision did not displace the fact that the entitlement arose under the security of payment legislation. The claimant is entitled to a progress payment, only on and from a reference date.[4] Therefore, as at 12 July 2016, there was no valid reference date supporting the payment claim, and the adjudicator lacked jurisdiction to determine an adjudicated amount.[5]

https://www.caselaw.nsw.gov.au/decision/591c020de4b058596cba6975

1 At [7]
2 At [29], [47]–[48]
3 At [30]–[34], [52]
4 At [49]–[50]
5 At [53]

ELECTRONIC TRANSACTIONS LEGISLATION AMENDMENT (GOVERNMENT TRANSACTIONS) ACT 2017 (NSW) — FAX ALTERNATIVE NEEDED

KEYWORDS: SECURITY OF PAYMENT; ELECTRONIC SERVICE

KEY TAKEAWAY

The facilitative provision in the New South Wales security of payment legislation has been amended (1) to remove fax as a method of service, and (2) to expressly to permit email service.

Background

The New South Wales Supreme Court's decision in *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd*[1] (noted in a Corrs in Brief) was one of the first times the Court considered the efficacy of the electronic provision of documents in a security of payment process. In the circumstances of that case, the electronic provision of documents was not efficacious.

Summary

The explanatory note to the Bill identifies its objectives as being:

(a) to provide for a trial of digital driver licences;

(b) to facilitate the service of documents by email;

(c) to allow for the use of approved forms in the place of statutory declarations;

(d) to provide for the online publication of public notices, announcements and advertisements;

(e) to postpone the commencement of certain provisions of the Strata Schemes Management Act 2015; and

(f) to make other minor or consequential amendments.

The legislation amended to facilitate the electronic service of documents includes the Building and Construction Industry Security of Payment Act 1999 (NSW) (the Act). The changes to section 31(1) of the Act are:

Any notice that by or under this Act is authorised or required to be served on a person may be served on the person:

(a) by delivering it to the person personally, or

(b) by lodging it during normal office hours at the person's ordinary place of business, or

(c) by sending it by post ~~or facsimile~~ addressed to the person's ordinary place of business, or

(d) by email to an email address specified by the person for the service of notices of that kind, or

(d1) ~~in such other manner as may be prescribed~~ by any other method authorised by the regulations for the service of notices of that kind, or

(e) in such other manner as may be provided under the construction contract concerned.

It remains the case that no regulations have been made in relation to the service of notices.

The amendment legislation commenced on 27 June 2017, the day on which it received assent.

At the time of writing, no other jurisdiction has proposed legislation to remove fax as a method of notice.

https://www.legislation.nsw.gov.au/acts/2017-25.pdf (Electronic Transactions Legislation Amendment (Government Transactions) Act 2017 No 25)

https://www.legislation.nsw.gov.au/#/view/act/1999/46/part3/div4/sec31 (amended section 31 of Building and Construction Industry Security of Payment Act 1999)

1 [2017] NSWSC 194

THE BUCK STOPS HERE: CHAIN OF RESPONSIBILITY FOR NON-CONFORMING BUILDING PRODUCTS IN QUEENSLAND

KEYWORDS: THE BUILDING AND CONSTRUCTION LEGISLATION BILL

KEY TAKEAWAY

Proposed new legislation in Queensland will establish a chain of responsibility, placing duties on supply chain participants to ensure building products are fit for purpose.[1]

Who will be affected?

All supply chain participants will be affected, including tradespeople, designers, manufacturers, importers, suppliers and installers.

The objectives of the new legislation

The objectives of the legislative changes include:

- making all building supply chain participants responsible to ensure that non-conforming building products are not used on building sites in Queensland;
- improving safety on building and construction sites through expanded notification requirements for licensees and new information sharing arrangements between the QBCC and other regulatory agencies; and
- extending the ambit of disciplinary action that can be taken by the QBCC.[2]

The key changes

The amending legislation will establish a "chain of responsibility" between each industry participant. Each participant will be held responsible for their respective contribution to the final product.

The accountability mechanism aims to make failures in the supply chain more easily identifiable and increase the accountability of each participant.

Two key changes in the new legislation are the imposition of duties on building supply chain participants and the creation of new offences.

1. The imposition of new duties

The Bill will implement one primary duty, applicable to all participants in the supply chain, and a range of additional duties specific to certain roles within the supply chain.

Primary duty

The primary duty is that each person involved in the chain of responsibility must ensure, insofar as reasonably practicable, that a product is not a non-conforming building product.[3]

The scope of this primary duty will be dependent upon where that duty falls in terms of the stage of the supply chain.

Additional duties

Additional duties will operate in conjunction with the overarching primary duty.

The additional duties (set out below) will provide further guidance as to how the person's primary duty is to be discharged.

1. Designers

Designers of products must ensure, so far as reasonably practicable, that if the designer gives the design to another person (who is to give effect to that design), the design is accompanied by the required information for the product.[4]

'Reasonably practicable' is not defined in the legislation, and therefore will be subject to the interpretation of the courts in each set of particular circumstances.

The definition of 'required information' is provided for in the proposed legislation and can be summarised as:

- information about the suitability of the product and if such product can only be used in particular circumstances;
- instructions about how the product must be associated with a building; and
- instructions about how the product must be used.[5]

2. Manufacturers, importers and suppliers

Manufacturers, importers or suppliers for the product must ensure that the product is accompanied by the 'required information' for that product before the product is given to another person.[6]

This provision will not just apply to persons that sell, supply or transfer the product, but also those that facilitate the sale, supply or transfer of the product.[7]

3. Installers

Installers must ensure that the owner of the building is given the information about the product prescribed by regulation.[8]

The amending legislation is silent on whether an installer will be at fault if they forward information about the product that is inherently inadequate or insufficient due to failures earlier in the supply chain.

It is unclear whether an installer would discharge their duty by passing the information from the supplier on, or whether they have a duty to consider the quality of the information before passing it on to the owner of the building.

4. Executive officers

An additional duty will be placed on executive officers of companies involved in the chain of responsibility.

Executive officers will need to exercise 'due diligence' to ensure that the company complies with the duty.[9]

If an executive officer breaches this duty, he may be convicted of an offence under the QBCC Act (whether or not the company has been proceeded against for an offence under the QBCC Act).[10]

Multiple Duties

Persons in the supply chain can have more than one duty at any one point in time.[11] Each duty held by a person will need to be discharged on its own merit.

If multiple people in the supply chain possess a duty in regard to the same matter, the following applies:

each person is responsible for the person's duty in regard to the matter;[12] and

each person must discharge the person's duty to the extent the person can influence the matter or would have the capacity to influence the matter if that capacity was not limited by an agreement or arrangement.[13]

2. New offences

The amending legislation will introduce a number of new offences into the QBCC Act. These include:

an offence, carrying a maximum of 1000 penalty points,[14] if someone breaches a duty any of the duties discussed above;[15]

an offence, carrying a maximum of 1000 penalty points, if representations are made about the intended use of the product that does not comply with requirements for representations prescribed by regulations;1[6] and

an offence, carrying a maximum of 50 penalty points, if a person in the chain of responsibility has reasonable suspicion or knowledge that a building product is a non-conforming building product for an intended use and does not give notice to the Commission.[17]

Notifiable incidents

There will be an additional duty imposed on all persons in the chain of responsibility to notify the QBCC of any 'notifiable incident'. Notifiable incidents include death, serious injury, or an incident that exposes a person to serious injury or illness.[18] Breaching this reporting obligation carries a maximum penalty of 100 penalty units.

1 Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Bill 2017
2 Explanatory notes for the Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Bill 2017, page 1
3 Proposed s 74AF
4 Proposed s 74AG (1)
5 Proposed s 74AG (6)
6 Proposed s 74AG (2)
7 Proposed s 74AC (3)
8 Proposed s 74AG (4)
9 Proposed s 74AI (1)
10 Proposed s 74AI (2)
11 Proposed s 74AD (2)
12 Proposed s 74AD (5)(a)
13 Proposed s 74AD (5)(b)
14 Current value of one penalty unit in Queensland, as of 1 July 2016, is $121.90
15 Proposed s 74AJ
16 Proposed s 74AK (2)
17 Proposed s 74AL
18 QBCC Act, Schedule 2

STONE V CHAPPEL
[2017] SASCFC 72

KEYWORDS: DAMAGES FOR DEFECTIVE BUILDING WORK

KEY TAKEAWAYS

Where there is defective work, the proper measure of damages is the cost of rectification, save in exceptional cases where that is not reasonable. How is that reasonableness determined?

The Full Court of the Supreme Court of South Australia has identified at least eight factors relevant to this question, including the nature of the breach, proportionality, and whether the plaintiff intends to rectify the defects.

Facts

Mr and Mrs Stone, a retired couple, engaged the defendants to build the shell and framework for an apartment in a retirement village. The Stones were discerning clients. Their previous home had won a design award, as had another house they owned. Unsurprisingly, the Stones were actively involved in negotiating specifications. Critically, they demanded a 2700 mm ceiling.

When built, the ceiling was on average 48 mm lower. At no point did the ceiling reach the contractually agreed height. The parties accepted this.

There was conflicting evidence about whether it was feasible to increase the height of the ceiling. At the very least, it would be a difficult exercise, costing an estimated $331,000 compared to a contract sum of $1.85 million.

At trial, the Stones were awarded damages for other defects and $30,000 in respect of the low ceiling due to loss of amenity. The Stones appealed, including on the assessment of damages.

Legal issues

The primary challenge facing the Full Court in *Stone v Chappel* was to determine damages for the breach of contract.

The High Court has authoritatively considered the proper measure of damages in defective work cases. In *Bellgrove v Eldridge*, Dixon CJ, Webb and Taylor JJ held:

> *"This loss cannot be measured by comparing the value of the building which has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract. ..."*

The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt."[1]

The High Court unambiguously confirmed this test in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*.[2]

Though the test in *Bellgrove* is clear, its application leaves room for argument. As the Court in *Bellgrove* observed in its brief consideration of what is reasonable, "what remedial work is both 'necessary' and 'reasonable' in any particular case is a question of fact."[3]

A secondary issue in *Stone v Chappel* was how loss of amenity damages are to be assessed.

There were various other issues on appeal, but these are not considered further in this article.

Decision

Kourakis CJ, Doyle J and Hinton J all agreed the Stones' appeal should fail and, accordingly, that the award of loss of amenity rectification damages should stand. Nonetheless, all three judges gave separate, substantial reasons for judgment.

All three judges agreed that *Bellgrove* squarely applied to the facts, and that it was only in exceptional circumstances that rectification damages would not be awarded. Kourakis CJ and Doyle J sought to identify factors that might determine whether a particular case was genuinely exceptional. It should be noted that Hinton J did not comment on these factors and generally laid greater emphasis on *Ruxley Electronics & Construction Ltd v Forsyth*.[4]

Kourakis CJ and Doyle J did not expressly refer to one another's lists of considerations, did not present their factors in the same language, and did not expressly identify the same number of factors. Nonetheless, careful attention to the judgments shows that they did identify very similar concepts.

A short summary is set out below.

FACTORS RELEVANT TO WHETHER RECTIFICATION DAMAGES ARE UNREASONABLE	
Kourakis CJ (extracted from [55])	**Doyle J (at [257]–[265]; rearranged to highlight common factors)**
1. The degree of departure from the contractual stipulation	The extent to which the defendant has achieved the contractual objective despite the breach
2. The adverse effect of the departure on the functional utility, amenity and aesthetic appearance of the building	
3. The reasons, objectively ascertained and commonly known, for which the innocent party made the stipulation which was breached	The performance interest, properly identified
4. The practical feasibility of rectifying the work, including the effects on third parties of attempting to do so	Safety and effect on third parties
5. Whether or not the innocent party intends to carry out the rectification work	The plaintiff's ability and intention to rectify the defects
6. The absolute cost of the rectification work and the disproportion between that cost and • the value of the building and contract price; • the diminution in commercial value of the building; • the effect of the departure on the functional utility, amenity and aesthetic appearance of the building	The degree of proportionality between the proposed work and cost, and the benefit to the plaintiff of having the work done
7. The nature of the wrongdoer's fault for the defect	The nature and quality of the defendant's breach
8. The public interest in reducing economic waste	[This is linked to proportionality]

Based on these factors, the Full Court upheld the trial judge's assessment of $30,000 in damages for loss of amenity.

The lists are open to criticism. One concern is that some of the factors have patchy support in case law (such as the plaintiff's intention to rectify, or express consideration of proportionality).

Another is that the list may not adequately emphasise the most important factors. Consider, for example, a defendant that deliberately breaches its contract because non-compliance saves more money than an award of fall in value or loss of amenity damages. Here, the principle that a party must not benefit from its own wrongdoing is surely of great force.

Finally, the factors may only be of marginal help in difficult cases, where many factors offset one another.

These criticisms, though valid, are perhaps misdirected.

The test in *Bellgrove* is easy to state but hard to apply. In *Stone v Chappel*, the Full Court has presented an invaluable summary of the case law which allowed the Court to identify factors that must be considered in any argument about whether damages for the cost of rectification are unreasonable.

Loss of amenity damages

In defective work cases, damages are ordinarily measured by reference to the cost of rectification or the building's fall in value. As the House of Lords infamously showed in *Ruxley Electronics & Construction Ltd v Forsyth*, however, damages for "loss of amenity" are an alternative.[5]

Presumably, loss of amenity damages are most likely to be awarded where rectification damages are unreasonable and there is no significant fall in market value. Where they are awarded, the assessment of quantum remains an opaque process.

Kourakis CJ admitted this in *Stone v Chappel*, but did provide some helpful guidance:

> *"The proper approach in a case like this is to commence with an evaluation of the loss of amenity in the sense of the loss of enjoyment of and diminished aesthetic appearance of the apartment. The translation of that loss into a monetary figure is incapable of precision or even substantial explanation. Measurement of the extent of the loss of amenity against the price paid for the apartment provides some guidance. The Stones paid for a luxury apartment, the premium elements of which included its location, views, architectural design, floor space and ceiling height. All but the ceiling height have been delivered."*

http://www.austlii.edu.au/au/cases/sa/SASCFC/2017/72.html

1 [1954] 90 CLR 613 (*Bellgrove*) at 618
2 [2009] 236 CLR 272
3 *Bellgrove* at 619
4 [1996] 1 AC 344
5 [1996] 1 AC 344 at 354, 360 and 374

BLANALKO PTY LTD V LYSAGHT BUILDING SOLUTIONS PTY LTD [2017] VSC 97

KEYWORDS: ARBITRATOR'S AUTHORITY; REFUSAL TO DETERMINE ISSUE; FINAL AWARD; APPLICATION FOR STAY

KEY TAKEAWAYS

Where an arbitrator has made a "conscious decision not to deal with an issue" that is within the scope of the arbitration agreement, the award is not final even if styled as such.

Croft J also made some interesting comments in *obiter* about when an arbitrator can refuse to discharge the arbitral mandate. It may amount to a failure to act for the purpose of section 14 of the Commercial Arbitration Act 2011 (Vic) (CAA) where the award is final, and not interim, in nature.[1] This is an important point for parties looking to challenge an award on this basis.

Facts

In 2012, Blanalko sued Lysaght in the Supreme Court of Victoria for breach of contract. An extensive procedural history followed,[2] with the dispute partially resolved in April 2016. All outstanding issues, including the costs for the Supreme Court proceedings (**Supreme Court Costs**), were referred to arbitration.

In June 2016, the arbitrator delivered an interim award resolving most of the issues within the scope of the arbitration agreement. The arbitrator then invited the parties to make submissions as to costs.

In the "Final" Award delivered on 09 August 2016 (**Award**), the arbitrator confirmed the parties could refer the question of costs — including the Supreme Court Costs, to arbitration — and noted he had received Blanalko's claim and supporting evidence.

However, the arbitrator found that Blanalko's submission lacked the detail needed for him to make an informed decision, and on that basis declined to determine the issue. The arbitrator noted that his decision not to decide the issue was "without prejudice to either party making an application to the Supreme Court."[3]

On 16 November 2016, Blanalko returned to the Supreme Court of Victoria, seeking to set aside the arbitrator's final award. Blanalko relied on section 34(2)(a)(iii) of the CAA to argue that the award went beyond the scope of the arbitral proceedings,[4] or alternatively, under section 8(1) of the CAA, that the arbitration agreement was "null and void, inoperative or incapable of being performed."[5]

Lysaght sought to stay the proceedings under section 8(1), on the grounds that the matter was the subject of an arbitration agreement and a final award had been reached, and so the arbitrator was now *functus officio*.

It is worth noting that sections 8(1), 33(5) and 34(2)(a)(iii) of the CAA are materially the same as the equivalent Articles of the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**). Croft J thus held the CAA should be interpreted in conformity with international norms.[6]

Decision

The question before the Court hinged on whether the arbitrator's authority had expired. If it had, the issue was whether there was a court or tribunal in which Blanalko could pursue its Supreme Court Costs claim. If it had not expired, the question was what the parties' position then was.[7]

1 Proper characterisation of the Award

The decision usefully discusses the proper characterisation of an award, and importantly, what makes an award "final".

Here, Croft J noted that, even though the award was labelled "Final Award", it did not decide all issues within the scope of the arbitral proceedings. His Honour noted that this deliberate and conscious decision by the arbitrator not to discharge his arbitral mandate could not result in a final award. Rather, this decision was of an "interim nature."[8]

As the award was not final, Blanalko's argument that the award be set aside in so far as it concerned the Supreme Court Costs was dismissed. Croft J further noted that the arbitrator had not gone beyond the scope of the arbitration agreement, and rather, the opposite had occurred: the arbitrator had not discharged his task in full.[10] Given this, Croft J expressed confusion at Blanalko's reliance on section 34(2)(a)(iii) of the CAA to challenge the Award.

Consequently, the arbitrator was found not to be *functus officio* and it was open to either party to apply to the arbitrator to seek a determination of the Supreme Court costs claim.

2 Seeking an additional award

This decision also clarifies section 33(5) of the CAA, the mechanism for seeking an additional award following a Final Award.

Under section 33(5) of the CAA (which is materially the same as Article 33(3) of the Model Law), a party may within 30 days of the award ask the arbitrator to make an additional award where claims presented by the parties were omitted from the arbitrator's decision.

Croft J held that section 33(5) only applies where the arbitrator's omission is accidental or inadvertent. Where the arbitrator has made a "conscious decision not to deal with an issue'" that is within the scope of the arbitral proceedings, the arbitrator's mandate remains undischarged and ongoing.[11]

His Honour concluded that Blanalko did not need to rely on section 33(5) of the CAA to extend the arbitrator's mandate to seek an additional award. Rather, the Supreme Court Costs claim remained "entirely open to revisitation" and within the ongoing mandate of the arbitrator.[12]

Lysaght's application for a stay of proceedings succeeded, and Croft J noted that both parties were open to apply to the arbitrator to re-engage the arbitral procedure to determination the Supreme Court Costs claim.[13]

http://www.austlii.edu.au/au/cases/vic/VSC/2017/97.html

1 At [51]
2 At [2]
3 At [4]
4 Discussion commences at [41]
5 At [13]
6 At [10]
7 At [9]
8 At [52]
9 At [42]
10 At [48]
11 At [24]
12 At [26]
13 At [67]

RASKIN V MEDITERRANEAN OLIVES ESTATE LIMITED

[2017] VSC 94

KEYWORDS: EXPERT DETERMINATION; SUBMISSION TO ARBITRATION; VOID FOR UNCERTAINTY; STAY OF PROCEEDINGS

KEY TAKEAWAYS

An expert determination clause is unlikely to be a submission to arbitration if it is not judicial in manner and there is no agreed procedure for the expert to adopt.

An expert determination clause may be uncertain and therefore unenforceable if there are no procedural directions to the expert, and no agreement as to how disputes in different but overlapping fields of discipline are to be resolved.

Facts

Background

Raskin (**Plaintiff**) brought proceedings against Mediterranean Olives Estate Limited, Anthony May, and Mediterranean Olives Land Pty Ltd (**the Defendants**) in relation to an investment in the Mediterranean Olives Project. The Plaintiff alleged that the Defendants executed agreements without authorisation; produced misleading projections of income and expenses without reasonable grounds; breached their obligations under the Corporations Act 2001 (Cth) and their fiduciary duties; and failed to perform contractual obligations under management agreements. The Plaintiff sought various forms of relief including statutory compensation, restitution and damages.

The Defendants applied to stay proceedings until the independent expert made a determination in accordance with the project documents. The Project Constitution governed the relationship between Mediterranean Olives Estate Limited (**Mediterranean Olives**) and the Plaintiff. Clause 27 of the Project Constitution governed disputes.

It stated that upon receiving a notice of dispute, the parties must first attend a settlement conference before an independent person. Where no settlement was reached, the matter could be referred to expert determination. In this case, no settlement was reached. In the referral notice from Mediterranean Olives, the defendant purported to refer the dispute to a single independent expert. The notice also stated that the expert determination would be binding on all parties to the dispute. Importantly, the notice stated that Mediterranean Olives reserved its right to seek a stay of proceedings under the Commercial Arbitration Act 2011, at general law, and under the jurisdiction of the courts.

The other defendants (Anthony May and Mediterranean Olives Land Pty Ltd) were not party to the Constitution or project documents.

Issues

The issues before Hargrave J were:

(1) Whether the expert determination clause was a submission to arbitration.

(2) Whether the expert determination clause was void for uncertainty.

(3) Whether the proceedings should be stayed.

Reasoning

Was there a submission to arbitration?

The Defendants argued the expert determination clause was an "arbitration agreement" under the Commercial Arbitration Act 2011 (Vic) (**Act**). Hargrave J found that the Act did not apply. Accordingly, there was no submission to arbitration. Section 7(1) provides:

> *"An **arbitration agreement** is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not." (emphasis added)*

If the expert determination clause does not fall within this definition, then the Commercial Arbitration Act has no application.

The Defendants contended that the expert determination clause is "in substance" a submission to arbitration because the result of the determination is final and binding, and the clause does not contain a statement that the expert is to act "as an expert and not as an arbitrator".[1] The Defendants relied on the High Court case *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (**Shoalhaven**)[2] which held that the range of issues entrusted to the expert under the contract was wide enough to "indicate proximity to an arbitral function", although that contract expressly provided that the expert was to act "as an expert and not as an arbitrator".[3] The Defendants contended that in the absence of an express provision, the expert determination clause may be understood to be an arbitration agreement.

Hargrave J did not accept the Defendants' argument, stating that it may be relevant only in borderline cases, which this case was not. Hargrave J further distinguished the present case from *Shoalhaven*, where the disputes were wide and included detailed procedures for the expert.[4] In this case *"the expert determination clause says nothing whatsoever about the procedures to be adopted"*.[5] Further, the procedures cannot be implied "to indicate an intention by the parties that the independent expert is to resolve the dispute by judicial enquiry worked out in a judicial manner".[6] This is reinforced by the fact the independent expert can be the same person as the independent person from the settlement conference, who would likely be aware of those without prejudice negotiations.[7]

Accordingly, Hargrave J concluded that the expert determination clause was not a submission to arbitration.

Was the clause void for uncertainty?

The clause was void for uncertainty. Hargrave J held that:

> *"whether an expert determination clause is uncertain will depend on the context of the clause in the contract as a whole; the nature and width of the dispute or disputes which are or may be referred to the expert; and the content of the issues he or she must consider to determine the dispute".*[8]

His Honour noted that "in a simple case", where there is only one issue in dispute and an appropriately qualified expert for that issue, an expert determination clause may not need to include agreement relating to the procedure of the expert.[9] In contrast, the disputes in this case spanned horticultural, accounting, management and legal interpretation issues. Through the definitions of "Independent Person" and "Independent Expert", the parties recognised the potential for different disputes, and the need for appropriately qualified experts in each dispute.[10]

There are "two essential matters"[11] for the expert determination to be sufficiently certain where there is a range of potential disputes that may overlap. There must be:

(1) agreed procedural directions to the expert; and

(2) agreement as to how disputes of overlapping fields of expert disciplines were to be resolved.[12]

Hargrave J found that the expert determination clause lacked both elements and hence was uncertain and unenforceable.

Should the proceeding be stayed?

In the event the expert determination clause was found to be enforceable, Hargrave J would nevertheless have refused the stay.[13]

The Defendants submitted that as a starting point, the parties should be held to resolve their dispute in the agreed manner, but noted that a stay should not be granted if it would be unjust to deprive the plaintiff of the opportunity to have the claim determined judicially.[14] The Defendants also emphasised that there is a heavy onus on the party opposing the stay to persuade the court that there is a good ground for the exercise of the court's discretion.[15] The defendants drew on *Zeke Services Pty Ltd v Traffic Technologies Ltd* (**Zeke Services**)[16] and *Mineral Resources Ltd v Pilbara Minerals Ltd* (Mineral Resources)[17] in their submissions.

Hargrave J found that the plaintiff's heavy onus in opposing the stay application had been discharged. His Honour referred to *Zeke Services*, which held that the onus can be discharged when the "*dispute is not amenable to resolution by the mechanism the parties have chosen*", by reference to the procedure the parties have agreed, and the qualifications of the expert.[18]

Hargrave J, further drew on *Mineral Resources Ltd*, which stated that a stay may be refused where:

a. it would result in a multiplicity of proceedings;

b. the dispute is inapt for determination by an expert because it does not involve the application of their special knowledge to their own observations or the area of dispute is outside of the expert's general field of expertise; or

c. the agreed procedures are inadequate for determining the dispute that has arisen.[19]

Hargrave J emphasised the prospect of multiple proceedings.[20] Even if the expert determination clause allowed a single expert to determine the various issues, the claims in the current proceeding against Anthony May and Mediterranean Olives Land Pty Ltd would continue. This would lead to a multiplicity of proceedings and could result in conflicting findings of fact and law. Additionally, the expert determination before a single expert would not accord with the expert determination clause as the dispute involved various issues which contractually were to be referred to separate experts. Failure to follow this contractual obligation would lead to further proceedings.

Hargrave J, found that it would be unjust both to the plaintiff and to all parties to stay the proceeding.

http://www.austlii.edu.au/au/cases/vic/VSC/2017/94.html

1 At [18]
2 [2011] 244 CLR 305
3 *Shoalhaven* at 314–5
4 At [25], quoting *Shoalhaven* at [15]
5 At [26]
6 At [26]
7 At [26]
8 At [34]
9 At [37]
10 At [39]
11 At [39]
12 At [40], [41]
13 At [43]
14 At [44]
15 At [44]
16 [2005] 2 Qd R 563
17 [2016] WASC 338
18 [2005] 2 Qd R 563 at 569 [22] (Chesterman J)
19 *Mineral Resources Ltd v Pilhana Minerals Ltd* [2016] WASC 338, quoting *Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd* [2009] NSWSC 332 at [54]
20 At [54]

MINESCO PTY LTD V ANDERSON SUNVAST HONG KONG LTD
[2017] VSC 299

KEYWORDS: PROCEDURAL FAIRNESS; PAYMENT CLAIMS

KEY TAKEAWAY

An adjudication determination may be quashed not only if a fair hearing was not granted, but if it appears that a fair hearing was not granted.

This may occur where one party makes submissions to which the other party is not given the opportunity to respond, even if those submissions do not form the basis of the determination and are not considered.

Facts

Minesco engaged Anderson to manufacture, supply and deliver curtain wall units. On 2 August 2016, Anderson served a final payment claim for $238,976.05.

Minesco served a payment schedule for $0.00. The parties ended up in adjudication.

Anderson requested an opportunity to respond to what it alleged were new matters not raised in the payment schedule.

That same day, the adjudicator requested further submissions from Anderson on two issues which were said not have been included in the Payment Schedule (**Submissions Request**). Anderson served further submissions and a statutory declaration (**Further Submissions**), both expressed to be "for the Adjudicator's attention". Part A of the Further Submissions addressed the Submissions Request, while Part B raised three additional issues:

- the adjudicator had jurisdiction to determine Anderson's claim for foreign exchange adjustments;
- Anderson's conduct was not an attempt to resile from the agreement between the parties; and
- Anderson and Minesco had not agreed a further deduction of $15,000.

Minesco asked the adjudicator not to read or consider Part B of the Further Submissions. It did not receive a response.

On 22 September 2016, the adjudication determination was released. The adjudicated amount was $231,608.05.

Anderson obtained judgment in the County Court against Minesco under section 28R of the Act, and informed Minesco. Minesco sought an extension of time to commence its proceeding, a declaration that determination was void, and an order that it be set aside.

Minesco relied on the grounds that:

- the adjudicator had failed to accord it procedural fairness by not giving it an opportunity to comment on Anderson's Further Submissions; and
- the adjudicator had made a jurisdictional error by taking the Further Submissions into consideration.

Decision

Was the Act contravened?

Minesco argued that section 22(5)(a) of the Act required that it be given the opportunity to comment on Part B of the Further Submissions, and that in failing to accord it this opportunity, the adjudicator did not comply with section 23(2)(a). This would have the effect of voiding the determination.

Anderson argued that as the adjudicator had not requested Part B of the Further Submissions from Anderson, there was no requirement to give Minesco an opportunity to comment on them, such that the Act was not contravened and no jurisdictional error could arise. His Honour accepted Anderson's position.

Were the submissions duly made?

Minesco argued that section 23(2)(c) of the Act restricts the adjudicator to considering submissions that have been "duly made".

His Honour concluded that there was nothing in the determination to suggest that the adjudicator had taken Part B of the Further Submissions into account in any event (at [104]).

Were the requirements of natural justice satisfied?

Minesco argued that natural justice, whether at common law or under the Act, required it be afforded an opportunity to respond to the Further Submissions and, if afforded this opportunity, it would have made further submissions. Anderson argued that this discharged any potential unfairness.

In the course of argument, Vickery J raised a question as to whether natural justice requires not only that a fair hearing be granted, but that it must also appear to be granted. Minesco adopted this proposition and it was ultimately the basis on which his Honour found for Minesco.

His Honour explained that that a determination may be set aside where a lack of appearance of natural justice can be demonstrated, as a line of authority establishes that administrative decision makers must be seen to be just in addition to being just.[1] His Honour indicated that the procedures adopted by the adjudicator did not result in justice being seen to be done (at [118]).

Minesco was left not knowing the case it had to answer, as it did not know whether the adjudicator had read or would take into account Part B of the Further Submissions. This was a result of the adjudicator's failure to answer Minesco's request. The fact that it could not be shown that the adjudicator had relied on Part B of the Further Submissions in finding against Minesco was irrelevant. The mere fact that Minesco did not know whether to respond or not gave rise to an appearance that justice was not being done.

http://www.austlii.edu.au/au/cases/vic/VSC/2017/299.html

1 [108]–[116], quoting *Kioa v West* (1985) 159 CLR 550 at 629; *NIB Health Funds Ltd v Private Health Insurance Administration Council* (2002) 115 FCR 561 at [84]; *Application of VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affaires* (2005) 225 CLR 88 at 97; *Bromby v Offenders' Review Board* (1990) 22 ALD 249 at 261, 267; *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212 at 215–16, 225, 227

CPB CONTRACTORS PTY LTD V JKC AUSTRALIA LNG PTY LTD [NO 2]
[2017] WASCA 123

KEYWORDS: PERFORMANCE BONDS

KEY TAKEAWAY

Subject to contractual drafting, a court is unlikely to interfere with a party's contractual right to call on a performance bond if it has a bona fide claim to immediate payment under a contract.

Pursuing a contractual dispute resolution processes is unlikely to prevent recourse to performance bonds.

Facts

This case is an appeal concerning a failed attempt by CPB Contractors Pty Ltd (**CPB**) at trial to restrain JKC Australia LNG Pty Ltd (**JKC**) from calling on performance bonds under a construction contract. JKC was the head contractor responsible for delivery of the Ichthys LNG Project. JKC engaged CPB under a **Subcontract** for the onshore buildings associated with the project. JKC claimed liquidated damages of $39,225,000. CPB asserted that it was entitled to extensions of time which would have brought CPB within the relevant time.

Under the Subcontract, CPB was required to provide irrevocable performance bonds "payable on first demand of contractor". Articles 35.3(a) and 35.3(b) provided, respectively:

> *Contractor may have recourse to the Bank Guarantee(s) at any time in order to recover amounts that are payable by Subcontractor to Contractor on demand.*
>
> *Subcontractor waives any right that it may have to obtain an injunction or any other remedy or right against any party in respect of Contractor having recourse to the Bank Guarantee(s).*

On 20 March 2017, CPB sought an injunction to restrain JKC from calling on these performance bonds to satisfy its claim for liquidated damages (**primary proceeding**).

At the same time, CPB applied for an interlocutory injunction on the same terms as the primary proceeding (**interlocutory proceeding**). The trial judge granted an ex parte interim injunction restraining JKC from demanding payment under the bonds.

CPB argued JKC was not entitled to call on the performance bonds until it was established that the amount demanded was "actually or objectively payable". JKC claimed the guarantees were intended to operate as a risk allocation device pending the final determination of a dispute.

Ultimately, the Court agreed with JKC. As a result, CPB had not made out a prima facie case that JKC was unable to call on the performance bonds.

Le Miere J's decision in the interlocutory proceeding was overturned on appeal. The Court of Appeal granted CPB's application for an urgent injunction. This had the effect of preventing JKC from calling on CPB's performance guarantee pending the determination of the appeal in the primary proceeding.

Primary appeal

The Court (Buss P, Murphy JA and Beech JA) upheld Le Miere J's decision in the primary proceeding. The Court dismissed CPB's appeal and held that JKC was not restrained from calling on the performance bonds.

On appeal, the issues were whether Le Miere J was correct in holding that:

- JKC was not prevented from calling on the performance bonds until the dispute had been arbitrated (**dispute resolution issue**); and
- JKC was entitled to call on the performance bonds before it was established that the amounts demanded were "actually or objectively payable" (**payable issue**).

The dispute resolution issue

The Court rejected CPB's argument that invoking the dispute resolution process under the Subcontract meant that the status quo must be preserved until the dispute was resolved, such that a party could not invoke its rights under the contract. Le Miere J was correct in holding that JKC was free to exercise its rights under the Subcontract, notwithstanding that:

- CPB had referred the underlying dispute to arbitration; and
- JKC was subject to an implied duty of cooperation under the Subcontract.

The Court held that JKC's implied duty to cooperate with CPB could not override the express provisions of the Subcontract or compel JKC to bring about a result which the Subcontract did not require.

The payable issue

CPB argued that Le Miere J erred in his construction of Article 35.3(a) of the Subcontract because JKC could not have recourse to the performance bonds until the amounts were objectively determined as due and payable (such as by court order.

The Court rejected this argument, holding that the articles entitled JKC to have recourse to the performance bonds at any time, provided it had a bona fide claim to immediate payment. The Court had particular regard to Article 35.3(b) which provided that:

> *"Subcontractor waives any right that it may have to obtain an injunction or any other remedy or right against any party in respect of Contractor having recourse to the bank guarantee(s)."*

The Court noted that CPB's construction of Article 35.3(a) would effectively render it obsolete, as there would be no need for any application for an injunction in respect of JKC having recourse to the performance bonds. The Court held that the inclusion of Article 35.3(b) confirmed that the object of Article 35 was to allocate risk in the event of a dispute between the parties. Further, the Court considered that the duration of the performance bonds was inconsistent with CPB's argument that they were provided for the sole purpose of providing security to JKC in the event of CPB's insolvency. If JKC was not permitted to have recourse to the bonds until an amount was determined to be "payable", there would be a real risk that the bonds would expire before that determination was made.

Conclusion

This decision may allay fears following the decision of the Court of Appeal in the interlocutory proceeding. The Court has indicated its reluctance to interfere with a party's right to have recourse to performance bonds, even though the underlying dispute may be subject to a separate dispute resolution process under the contract.

http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/judgment.xsp?documentId=046E5702E7B9D3144825814F00245090&action=openDocument

HAMMERSLEY IRON PTY LTD V FORGE GROUP POWER PTY LTD (IN LIQ) [2017] WASC 152

KEYWORDS: SET-OFF; INSOLVENCY

KEY TAKEAWAY

Set off may not be available where the other party to a contract grants security over its accounts and enters liquidation. The counterparty will be left with an unsecured claim and will be forced to pay out any claims it owes under the contract, without the benefit of set off. This has important implications for contracts requiring finance.

Further, attempts to claw back outstanding amounts after the expiry of the relevant period will probably fail.

Summary

This case illustrates the risk of relying on contractual and statutory rights to set off in the context of insolvency where the counterparty has granted security to lenders. The Court held that mutuality was destroyed, and that contractual and insolvency set off were unavailable under a construction contract where the other party secured its rights under the contract to a financier.

Facts

In 2012, Forge engaged Hamersley to construct the West Angelas and Cape Lambert Power Stations under the **Contracts**. Forge granted its lender, ANZ, security over all of its property, including its rights under the Contracts, under a general security agreement (**GSA**).

On 11 February 2014, both administrators and receivers and managers were appointed to Forge. On 24 February 2014, Hamersley terminated the Contracts. Liquidators were subsequently appointed to Forge.

Both Hamersley and Forge made claims against each other under the Contracts. Hamersley claimed it was owed more than $235 million for liquidated damages and the extra costs of completing the works. Forge claimed payments for work performed prior to termination.

Hamersley alleged that it owed Forge nothing under the Contracts because it was entitled to set off under the Contracts and under section 553C of the Corporations Act 2001 (Cth). Forge argued that Hamersley was not entitled to contractual or equitable set off, and was not entitled to rely on statutory set-off under section 553C because there was no mutuality of interest once Forge secured its rights under the Contracts in favour of ANZ.

Contractual set off

Clause 16.12 of the Contracts entitled Hamersley to set off against any debt or claim. Tottle J held that:

a. money certified as due in a payment certificate became a debt when that payment certificate was issued;

b. this amount certified was then subject to any amounts deducted before the date for payment under the payment certificate;

c. although the payment obligation was expressed to be "subject to" the rights of set off. The set off did not apply automatically; and

d. the right to be paid the "money due" was unaffected unless Hamersley exercised its rights.

Failure to exercise its set off rights meant that the amount certified in the payment certificate was a debt due and Hamersley was required to pay. As Hamersley did not exercise its set off rights until the administrators were appointed, Hamersley's reliance on the contractual set off was too late.

Interaction with section 553C

Tottle J held that section 553C cannot be contracted out of. This section creates a "code" that regulates set off between an insolvent company and a person asserting a claim or debt against the company, to the exclusion of contractual and equitable set off. Even if section 553C does not apply, no other type of set off may be relied on.

Issues arising under the PPSA

Section 80 of the Personal Property Securities Act 2009 (Cth) (**PPSA**) provides that a transferee of an "account" is subject to the terms of the contract (which may include a right of set-off).

Tottle J held that section 80 of the PPSA does not interfere with section 553C nor give Hamersley any right of set off in the liquidation of Forge other than that permitted by section 553C.

Section 553C requires mutuality of interest between the parties.

Tottle J held that the mutuality of interest between Hamersley and Forge was destroyed when the GSA was entered into, because a statutory proprietary interest was created in favour of ANZ.

The GSA provided that the security interest granted to ANZ was a charge over all collateral. The charge attached (see below) and conferred an equitable interest on ANZ and a proprietary interest in Forge's claims.

Attachment of the charge will occur where (i) the grantor has rights in the collateral or power to transfer the collateral to a secured party, and (ii) value is given for the security interest or the grantor does an act by which the security interest arises (section 19(2) PPSA).

Tottle J also held that the pre-PPSA concept of crystallisation and a floating charge for security over circulating assets are redundant.

Conclusion

Hamersley was unable to assert any contractual right of set off, or set off under section 553C, because of the lack of mutuality of interest. Forge was left with a claim against Hamersley (for ANZ's benefit). Hamersley could only prove in Forge's liquidation for amounts owing under the Contracts as an unsecured creditor.

http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf/judgment.xsp?documentId=0E0A55A70C216365482581370013F563&action=openDocument

GLOBALIA BUSINESS TRAVEL SAU (FORMERLY TRAVELPLAN SAU) OF SPAIN V FULTON SHIPPING INC OF PANAMA

[2017] UKSC 43

KEYWORDS: DAMAGES FOR BREACH OF CONTRACT; MITIGATION

KEY TAKEAWAY

Can a party claim that its breach of contract has done the innocent party a favour, so that no damages are payable for the breach? The UK Supreme Court was called to address a version of this question where an innocent shipowner terminated a charterparty for repudiation, then sold the ship — just before its market value tumbled.

The Supreme Court held that, for a court to reduce the damages payable, "*[t]he benefit … must have been caused either by the breach … or by a successful act of mitigation*". There was no such causation on these facts. It may be that courts are in general reluctant to identify causation, since this might provide an incentive to breach a contract.

Facts

Fulton Shipping (the **Owners**) and Globalia Business Travel (the **Charterers**) were the parties to a time charterparty for a small cruise ship, the New Flamenco (the **vessel**). In June 2007, the parties reached an oral agreement for a two-year extension to the charterparty. The agreed terms for the extension were recorded in addendum B to the charterparty, but the Charterers refused to sign, maintaining the vessel was to be redelivered on its original end date.

On 17 August 2007, the Owners treated this conduct as anticipatory repudiatory breach, and terminated the charterparty. The Owners commenced arbitration on 11 September 2007. There was no available chartering market at that time. Shortly before the original end date of the charterparty, the Owners agreed to sell the vessel to a third party for US$23,765,000. The vessel was redelivered to the Owners on the original end date and sold as agreed. Critically, the price for similar ships soon plummeted.

The arbitration

The Owners' damages claim was calculated by reference to their alleged net loss of profits over the two year extension: US$11,262,000.

The arbitration hearing did not take place until May 2013. By that time it had become apparent that the value of vessel had fallen greatly over time (largely due to the global financial crisis). The arbitrator ultimately concluded that had the vessel been sold in November 2009 (the end date of the extended term), it would have been worth US$7,000,000 — a US$16,675,000 drop from its value at the time of sale.

The Charterers argued that the Owners were required to give credit for the decrease in value over the two years. Based on the arbitrator's determination, this would have wiped out the Owners' loss of profits claim.

The arbitrator determined that the Charterers were entitled to the credit of US$16,765,000 for the benefit that accrued by selling the vessel in October 2007. This was based on a finding that the need to sell the vessel was clearly caused by the breach, and therefore was a benefit arising out of actions to mitigate loss. The Owners appealed.

High Court appeal

Popplewell J accepted that there was no single general rule applicable where a party in breach obtains credit for a benefit received by the innocent party following the breach. Popplewell J distilled 11 principles concerning the need for a direct causal link between the breach and benefit. His Honour concluded that the benefit in realising the capital value of the vessel in October 2007 "was not a benefit which was legally caused by the breach".[1]

Relevantly, the Owners had the right to sell the vessel at any point before or after the breach, as long as the charterparty continued with the new owners. Further, there were policy considerations for not allowing the Charterers to benefit from their own breach.

Court of Appeal decision

The Court of Appeal overturned Popplewell J's decision. All three judges upheld the decision of the arbitrator that the Charterers were entitled to a credit for the early sale. A key factor in the leading judgment was the absence of a charter market at the time of the breach. In such a case, while the primary measure of loss would be the difference between the contractual hire and the overheads associated with earning that hire, the sale of the vessel was a valid way of mitigating loss, instead of spot chartering the vessel during the remainder of the term. Accordingly, the benefits flowing from that mitigation needed to be taken into account.[2]

Supreme Court decision

The Supreme Court unanimously allowed the appeal, agreeing with Popplewell J's decision over that of the Court of Appeal. Lord Clarke delivered the Court's judgment with the following conclusions.

(1) Damages are generally compensatory, except where special facts mean the default rules should not apply. Here, the value of the vessel was irrelevant because the Owners' interest in its capital value had no connection with the interest lost due to the Charterers' repudiation (at [29]).

(2) It is not necessary for the benefit to be of the same kind as the loss caused by the breach: *"The essential question is whether there is a sufficiently close link between the two ... The relevant link is causation. The benefit to be brought into account must have been caused either by the breach ... or by a successful act of mitigation"* (at [30]).

(3) The alleged "benefit" obtained from selling the ship early did not arise out of the repudiation. Rather, the repudiation only resulted in a loss of future income over the two year period. The decision to sell the vessel was a commercial decision made at the Owners' own risk, which had nothing to do with the Charterers (at [31]–[32]). Had the capital value of the vessel increased after its sale instead, the Owners could not have claimed the rise in value (at [33]).

(4) Had there been an available charter market, the loss would have been the difference between the actual charterparty rate and the substitute rate. In the absence of that market, the relevant loss would have been the difference between the contract rate and what could reasonably have been earned from short-term charters. In either case, the sale price would be irrelevant (at [34]).

(5) The timing of the sale would only be relevant if there was an available charter market during the two years, and only to the extent that it would establish the period over which the Owners validly mitigated loss by entering into alternative charter arrangements (at [35]).

https://www.supremecourt.uk/cases/docs/uksc-2016-0026-judgment.pdf

1 [2014] 2 Lloyd's Rep 230 at [64]-[65]
2 [2015] EWCA Civ 1299 at [29]1[31]

ARBITRATION UPDATE

Keywords: UN Model Law; New York Convention

UN Model Law now adopted in all Australian States and Territories

The Australian Capital Territory's Commercial Arbitration Act 2017 came into effect on 4 April 2017. As a result, the UNCITRAL Model Law on International Commercial Arbitration (the **Model Law**) now applies in all Australian States and Territories. The Model Law will apply to international and domestic arbitrations seated in Australia.

New York Convention finds favour in Africa

Angola recently became the 157th contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **Convention**).[1] The Convention entered into force on 4 June 2017 and now forms part of Angola's domestic law. South Africa also recently announced a new International Arbitration Bill incorporating the Model Law "as the cornerstone of the international arbitration regime in South Africa".[2] This is a welcome step towards promoting South Africa as an arbitral seat in the region.

SCL DELAY AND DISRUPTION PROTOCOL

Keywords: delay and disruption; extensions of time

Key takeaways

In February 2017, the Society of Construction Law published the second edition of its Delay and Disruption Protocol, which supersedes the first edition of the Protocol, as well as Rider 1 to the Protocol.

Key features and changes

1. **Delay analysis methodology** — the Protocol recognises that different methods of analysis are commonly used, now without expressing a preference for any specific methodology. Rather, it explores issues to take into account when using each of the methodologies. It also recommends that the parties attempt to agree on the appropriate method of delay analysis, and suggests that the decision maker might take the failure to consult on delay analysis methodology into account in an award.
2. **Extension of time claims** — a new core principle of the Protocol is that applications for extensions of time should be made contemporaneously, or as close in time as possible to the delay event. The Protocol discourages parties from adopting a "wait and see" approach regarding the impact of delay events.
3. **Disruption** — the Protocol provides further guidance on disruption, with a broader list of methodologies for the calculation of lost productivity resulting from disruption events. The measured mile approach nonetheless remains the preferred methodology.
4. **Global claims** — the Protocol recognises a potential emerging trend in the construction industry and the courts to treat global claims more leniently, but discourages contractors from making global claims that do not attempt to substantiate cause and effect.
5. **Concurrent delay** — the Protocol's guidance has been revised in line with developments in the common law.
6. **Recordkeeping** — the Protocol gives detailed guidance on best practice in recordkeeping, on projects of all sizes and levels of complexity.
7. **Model contract clauses** — these have been removed.

https://www.scl.org.uk/sites/default/files/SCL_Delay_Protocol_2nd_Edition_Final.pdf

1 New York Arbitration Convention, *Contracting States - List of Contracting States* ‹http://www.newyorkconvention.org/list+of+contracting+states›.
2 Department of Justice and Constitutional Development, *Speeches* (14 October 2016) ‹ http://www.justice.gov.za/m_speeches/2016/20161014-Arbitration.html›.

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CONTACTS BRISBANE

ROD DANN

PARTNER

Tel +61 7 3228 9434
rod.dann@corrs.com.au

Brisbane Construction/Infrastructure Lawyer of the Year
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Best Lawyer – Alternative Dispute Resolution, Litigation and Regulatory
Best Lawyers Peer Review, 2013-2017

ANDREW MCCORMACK

PARTNER

Tel +61 7 3228 9860
andrew.mccormack@corrs.com.au

Best Lawyer – Construction/Infrastructure
Best Lawyers Peer Review, 2015-2017

MATTHEW MUIR

PARTNER

Tel +61 7 3228 9816
Matthew.muir@corrs.com.au

[Matt] provided valuable support, strategic advice, insight and good humour in a troublesome case.

Steps ahead of the opposition, commercially, legally and tactically—proves a winning formula.

PETER SCHENK

PARTNER

Tel +61 7 3228 9869
peter.schenk@corrs.com.au

Brisbane Construction/Infrastructure Lawyer of the Year
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FRANCES WILLIAMS

PARTNER

Tel +61 7 3228 9332
frances.williams@corrs.com.au

Best Lawyer – Construction/Infrastructure
Best Lawyers Peer Review, 2012-2017

Best Lawyer – Litigation
Best Lawyers Peer Review, 2012 & 2017

Best Lawyer – Alternative Dispute Resolution
Best Lawyers Peer Review, 2017

JOSHUA PAFFEY

PARTNER

Tel +61 7 3228 9490
joshua.paffey@corrs.com.au

CONTACTS SYDNEY

SIMON ASHWORTH
PARTNER

Tel +61 2 9210 6538
simon.ashworth@corrs.com.au

Best Lawyer – Project Finance and Development
Best Lawyers Peer Review, 2015–2017

SHAUN BAILEY
PARTNER

Tel +61 2 9210 6948
shaun.bailey@corrs.com.au

A high calibre, specialist practitioner

ANDREW CHEW
PARTNER

Tel +61 2 9210 6607
andrew.chew@corrs.com.au

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

Leading Lawyer – Construction
Chambers Global Guide, 2012 & 2016

Best Lawyer – Construction/Infrastructure
Best Lawyers Peer Review, 2014–2017

ROBERT REGAN
PARTNER

Tel +61 2 9210 6620
robert.regan@corrs.com.au

Best Lawyer – Construction Infrastructure
Best Lawyers Peer Review, 2009–2017

Leading Building & Construction Lawyer
Australasian Legal Business Guide to Building & Construction Law

MICHAEL EARWAKER
PARTNER

Tel +61 2 9210 6309
michael.earwaker@corrs.com.au

Best Lawyer - Construction/ Infrastructure & Litigation
Best Lawyers Peer Review, 2008-2017

AIRLIE FOX
PARTNER

Tel +61 2 9210 6287
airlie.fox@corrs.com.au

CONTACTS MELBOURNE

JOSEPH BARBARO

PARTNER

Tel +61 3 9672 3052
joseph.barbaro@corrs.com.au

Best Lawyer – Water
Best Lawyers Peer Review, 2014-2017

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BEN DAVIDSON

PARTNER

Tel +61 3 9672 3500
ben.davidson@corrs.com.au

Leading Lawyer – Construction/Infrastructure
Chambers Global Guide, 2012-2016

Best Lawyers – Construction and Infrastructure
Best Lawyers Peer Review, 2013-2017

JANE HIDER

PARTNER

Tel +61 3 9672 3218
jane.hider@corrs.com.au

Best Lawyer – Construction and Infrastructure
Best Lawyers Peer Review, 2017

Recommended Lawyer – Transport – Road, Rail and Aviation
Legal 500 Asia Pacific, 2016

ANDREW STEPHENSON

PARTNER

Tel +61 3 9672 3358
andrew.stephenson@corrs.com.au

Best Lawyer – International Arbitration
Best Lawyers Peer Review, 2015-2017

Best Lawyer - Construction/ Infrastructure & Litigation
Best Lawyers Peer Review, 2008-2017

Leading Lawyer - Construction
Chambers Asia Pacific Guide, 2011-2016

JOHN WALTER

PARTNER

Tel +61 3 9672 3501
john.walter@corrs.com.au

Melbourne Project Finance & Development Lawyer of the Year
Best Lawyers Peer Review, 2011

Best Lawyer – Construction Infrastructure, Project Finance & Development and Water
Best Lawyers Peer Review, 2009–2017

Leading Lawyer – Projects & Government
Chambers Global Guide, 2010-2017

CONTACTS MELBOURNE

DAVID WARREN
PARTNER

Tel +61 3 9672 3504
david.warren@corrs.com.au

Leading Lawyer – Construction & Projects
Chambers Global Guide, 2009–2016

Best Lawyer – Construction/ Infrastructure and Project Finance & Development
Best Lawyers Peer Review, 2010–2017

JARED HEATH
PARTNER

Tel +61 3 9672 3545
jared.heath@corrs.com.au

CONTACTS PERTH

SPENCER FLAY
PARTNER

Tel +61 8 9460 1738
spencer.flay@corrs.com.au

Best Lawyer - Construction/Infrastructure
Best Lawyers Peer Review, 2013-2017

Leading Lawyer - Construction (WA)
Doyle's Guide to the Australian Legal Profession, 2012-2014

SARAH LEONARD
PARTNER

Tel +61 8 9460 1693
sarah.leonard@corrs.com.au

Best Lawyer - Construction/Infrastructure
Best Lawyers Peer Review, 2012-2017

CHRIS RYDER
PARTNER

Tel +61 8 9460 1606
chris.ryder@corrs.com.au

Perth Construction Infrastructure Lawyer of the Year
Best Lawyers Peer Review, 2013

Leading Lawyer - Construction
Chambers Global Guide, 2008-2016

Best Lawyer - Construction Infrastructure
Best Lawyers Peer Review, 2009-2017

SYDNEY
8 Chifley
8-12 Chifley Square
Sydney NSW 2000

Tel +61 2 9210 6500
Fax +61 2 9210 6611

MELBOURNE
567 Collins
567 Collins Street
Melbourne VIC 3000

Tel +61 3 9672 3000
Fax +61 3 9672 3010

BRISBANE
ONE ONE ONE Eagle Street
111 Eagle Street
Brisbane QLD 4000

Tel +61 7 3228 9333
Fax +61 7 3228 9444

PERTH
Brookfield Place Tower 2
123 St Georges Terrace
Perth WA 6000

Tel +61 8 9460 1666
Fax +61 8 9460 1667

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