CORRS CONSTRUCTION AND PROJECTS LEGAL UPDATE

August 2018

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Welcome to the latest edition of Corrs Construction and Projects Legal Update August 2018

CORRS CONSTRUCTION AND PROJECTS LEGAL UPDATE

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

We hope that you find it interesting and stimulating.

Our thinking

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

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One security of payment regime to rule them all?

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What was the Murray Review?

The *Review of Security of Payment Laws (**Murray Review**)* was conducted by John Murray AM. Mr Murray is a lawyer and adjudicator, and a former national executive director of the Master Builders Association, among many other appointments.

Mr Murray began his review in December 2016 and consulted over 60 organisations and 20 individuals together representing much of the industry. While Mr Murray submitted his report at the end of 2017, it has only recently been publicly released.

What did it recommend?

The headline recommendation is that security of payment legislation in Australia be harmonised based on the "East Coast Model". The East Coast Model captures the legislation in the Australian Capital Territory, New South Wales, South Australia, Tasmania, Victoria and Queensland. These Acts differ sharply from those in Western Australia and the Northern Territory.

A moment's thought reveals many questions. Does the East Coast Model include Queensland's split between complex and standard claims? Victoria's "excluded amounts" regime? The New South Wales approach of not requiring payment claims to be endorsed as payment claims under the Act?

In the course of 86 recommendations, the Murray Review deals with these and many other detailed but important questions.

How will it affect contracts and contract administration?

The headline recommendation should not distract from many individually significant recommendations that would affect how contracts are drafted and how claims are made and assessed.

- There would be no concept of reference dates. Instead, there would simply be a right to make a payment claim every month (or more often if the contract provides).
- A claimant would need to identify payment claims as being made under the relevant Act (unlike in NSW, and shortly, in Queensland).
- A payment claim would, however, need an accompanying supporting statement. The supporting statement would need to include a declaration that all subcontractors had been paid.
- The Victorian concept of "excluded amounts" would not be adopted in the harmonised legislation.

Key takeaways

The Commonwealth government has released its eagerly awaited *Review of Security of Payment Laws.*

The plural is telling. It is no news to anyone in the industry that there is different legislation in each State and Territory. This legislation has been repeatedly amended. Unsurprisingly, the first and critical recommendation in the Review of Security of Payment Laws is a call for greater simplicity:

> *"Security of payment legislation should seek to promote prompt payment so as to maintain a contractor's cash flow. Such an outcome is more effectively achieved through adoption of a legislative regime broadly based on the East Coast Model."*

Keywords:

Murray Review into security of payment

- There would be a uniform definition of business days that would exclude weekends, public holidays and the period from 22 December to 10 January.
- The time for payment would be as provided for in the contract (as long as this did not exceed 25 business days after the payment claim); or if no time were provided, 10 business days after the payment claim.
- There would be a deemed statutory trust on all construction projects over $1 million. For example, when a principal paid a head contractor, the head contractor would hold any part of that money attributable to the work of subcontractors and suppliers on trust for those subcontractors and suppliers. (There would be no project bank accounts like those in Queensland and Western Australia.)
- Clauses that made a right to claim conditional on some notice being given would be void if the notice requirement was not reasonably possible to comply with, was unreasonably onerous or served no commercial purpose.

How will it affect the adjudication process?

The *Murray Review* recommends an adjudication system that amalgamates features from many jurisdictions. These are the critical aspects.

- Adjudicators would be trained by and registered with a new Regulator. While the details of the Regulator are sparse, the role would seem similar to that of the Queensland Building and Construction Commission Registrar.
- The adjudicator in a particular dispute would normally be nominated by an Authorised Nominating Authority for consideration by the Regulator. The Regulator would then appoint an adjudicator. Alternatively, at the time of the dispute, the parties could agree on an adjudicator if the amount claimed exceeded $250,000.
- There would be a one-size-fits-all approach to adjudication. For example, there would be no distinction between standard and complex claims as there is in Queensland.

- In limited situations, there would be a right to have adjudications reviewed by the Regulator. The main triggers would be that the adjudicated amount exceeded the amount in the payment schedule by $100,000 or more, or was lower than the amount in the payment claim by $100,000 or more.
- The *Murray Review* did not deal in detail with rights to seek judicial review for jurisdictional error.

When will it be implemented?

The Commonwealth government has not yet endorsed the recommendations in the *Murray Review*. If the government does decide to legislate, it might do this through Commonwealth legislation based on the corporations power (although this would not cover every industry participant).

Alternatively, the States and Territories might agree on a scheme which could then be implemented in several ways.

This raises several questions. In Queensland, is there an appetite for further change given existing reform is on foot? Tranches 2 and 3 of the Building Industry Fairness Act 2017 are expected to be implemented in the next six months, and further recommendations from a to-be-established Evaluation Committee are anticipated. There is also the question of the West Coast. Since the *Murray Review* did not recommend the framework in place in Western Australia and the Northern Territory, there might be concern about the position of those jurisdictions. On 23 February 2018, however, the McGowan Government in Western Australia launched an Industry Advisory Group chaired by prominent barrister John Fiocco to improve security of payments for subcontractors. Importantly, the terms of reference explicitly ask the Industry Advisory Group to consider further issues raised by the *Murray Review*.

Murray Review: https://www.jobs.gov.au/review-security-payment-laws

This article by Andrew McCormack, Sam Woff and Wayne Jocic was previously published on the Corrs website and is available here: http://www.corrs.com.au/publications/corrs-in-brief/one-security-of-payment-regime-to-rule-them-all/

These and other issues are also the subject of discussion in the *Corrs High Vis* podcast on the *Murray Review*: http://www.corrs.com.au/thinking/insights/corrs-high-vis-episode-26-murray-report-reviewing-the-national-security-of-payment-laws/

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Contract rights excluded from the stay on the exercise of "ipso facto" provisions

CORRS CONSTRUCTION AND PROJECTS LEGAL UPDATE

Background

On 1 July 2018, amendments to the Corporations Act 2001 (Cth) came into effect which stay the enforcement of ipso facto clauses in a contract.

Unless one of the exclusions applies, these provisions will have wide ranging effect on all contracts, agreement, or arrangements entered into on or after 1 July 2018.

The Corporations Amendment (Stay on Enforcing Certain Rights) Declaration 2018 (**Declaration**) specifies types of rights which will be excluded from the ipso facto stay provisions.

What are ipso facto clauses?

The term "ipso facto" is generally used to describe a clause in a contract which allows one party to terminate a contract on the basis of a prescribed insolvency event occurring, such as the company entering into voluntary administration or receivership.

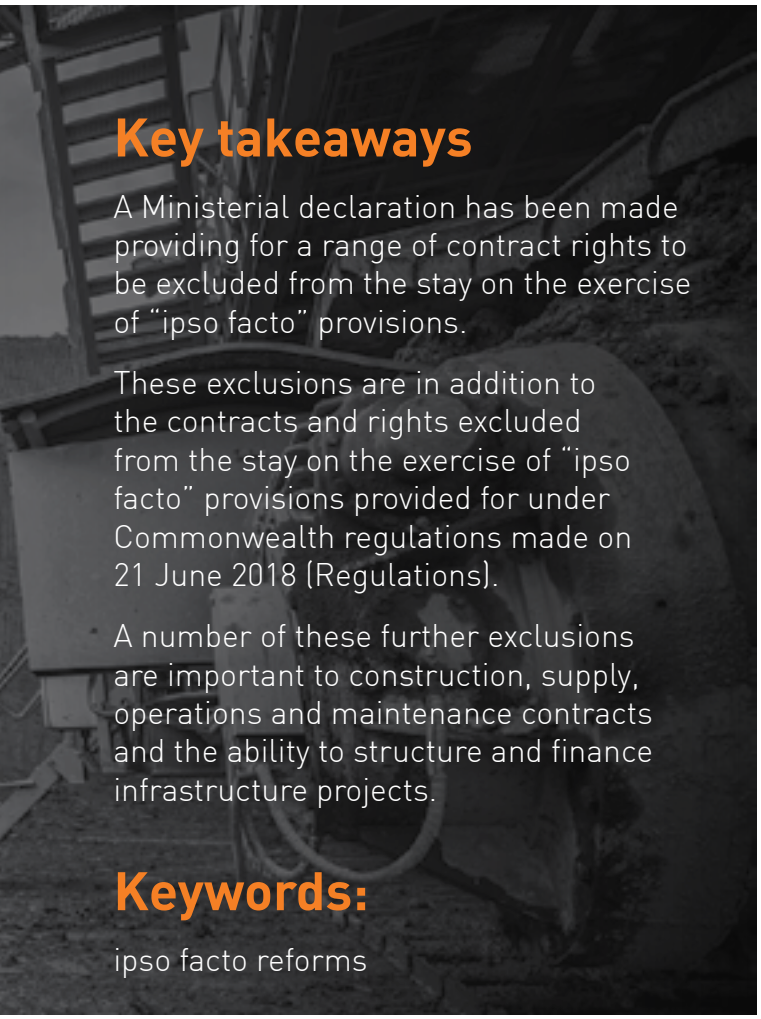
Numerous types of contracts contain clauses of this nature, but construction, supply, operation and maintenance contracts are among the most common examples.

The amendments impose a stay on the exercise of a right to terminate a contract merely as a consequence of:

- the appointment of a voluntary administrator;
- the appointment of a receiver or controller over the whole or substantially the whole of the property of the company; or
- the proposal of a scheme of arrangement.

Other termination rights which may exist are not disrupted and parties will continue to be able to terminate contracts on other grounds, such as default in payment or non-performance. The insolvent counterparty must be able to continue to perform the contract regardless of the insolvency event.

The period covered by the stay will vary depending on the type of insolvency process, but will generally commence on the date the company comes under external administration and end on the date when the administration or receivership ends, in accordance with a court order or when the company is wound up.



Key takeaways

A Ministerial declaration has been made providing for a range of contract rights to be excluded from the stay on the exercise of "ipso facto" provisions.

These exclusions are in addition to the contracts and rights excluded from the stay on the exercise of "ipso facto" provisions provided for under Commonwealth regulations made on 21 June 2018 (Regulations).

A number of these further exclusions are important to construction, supply, operations and maintenance contracts and the ability to structure and finance infrastructure projects.

Keywords:

ipso facto reforms

What are the exclusions most relevant to infrastructure projects?

As with the exclusions in the Regulations, most of the exclusions are targeted at finance arrangements. However, there are important exclusions which are relevant to infrastructure projects. These include:

- a right of set-off;
- a right to assign, novate or otherwise transfer rights or obligations; and
- "step-in" rights.

Impact for project and construction contracts

The exclusion for set-off rights is important in preserving this key component of the security packages provided for in project and construction contracts.

The exclusions for a right to assign, novate or otherwise transfer rights or obligations are aimed at limiting disruption to the debt trading market, according to the Declaration's explanatory statement. However, the exclusions would appear equally applicable to project and construction contracts. If counterparties can negotiate appropriate rights for themselves, the exclusion could allow counterparties to novate contracts to new contractors if they are prevented from terminating because the original contractor becomes insolvent.

The "step-in" rights exclusion is squarely targeted at construction and long-term services contracts and even contemplates stepping into the place of an insolvent head contractor to enforce rights under one or more of its subcontracts. However, "step-in" rights are always complex remedies to exercise and come with increased risk to the party taking the "step-in" action. Added to this will be the complications of stepping into a contractor who is undertaking a number of different projects for different counterparties. There will be practical difficulties identifying all those aspects of a contractor's business necessary for the continuation of your project. There may also be competition with other counterparties for control of resources which the contractor may have allocated across several of its projects. Time will tell whether this exclusion is of real commercial value.

What should you do?

When entering into contracts and agreements after 1 July 2018, you should consider whether they are captured by the ipso facto stay provisions or whether particular contract rights fall within an exclusion. This applies to governments, principals and financiers with exposure to the credit risk of contractors and suppliers as much as it does to contractors exposed to the credit risk of subcontractors or principals.

If relying on an exclusion, careful consideration will be needed of the detailed wording of each exclusion to make sure you fall within its ambit. As with the Regulations, the language of the exclusions in the Declaration is open to interpretation and, as they are new, we do not yet have the benefit of any judicial guidance on their meaning — nor should any be expected for some time.

This article by Airlie Fox, Andrew McCormack, David Warren and Jen Wiggins was previously published on the Corrs website: http://www.corrs.com.au/publications/corrs-in-brief/contract-rights-excluded-from-the-stay-on-the-exercise-of-ipso-facto-provisions/

CPB Contractors Pty Ltd v Rizzani de Eccher Australia Pty Ltd [2017] NSWSC 1798

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Facts

CPB Contractors (**CPB**) and Rizzani de Eccher (**Rizzani**) entered into a Joint Venture Agreement (**JVA**) to design and construct the widening of the M4 motorway in Sydney.

A dispute arose in relation to a payment of $8,500,000 (the **Called Sum**) under clause 5.4 of the JVA to maintain a positive cash flow. CPB asserted, and Rizzani denied, that the parties agreed in a teleconference that each party would pay the Called Sum into the Joint Venture Account. CPB commenced proceedings in the Supreme Court of New South Wales to resolve the dispute.

In response, Rizzani sought a stay of the proceedings in accordance with clause 13.5 of the JVA, which required any dispute to be resolved by arbitration. Clause 13.6, however, provided that a party may seek "urgent injunctive or declaratory relief" from a court. CBP's main argument was that the word "urgent" did not apply to the term "declaratory relief".

The Supreme Court was required to interpret clause 13.6 before analysing whether Rizzani was obliged to pay the Called Sum.

While this dispute arose on the terms of a bespoke joint venture agreement, the formulation "urgent or injunctive declaratory relief" is often used to provide an exception to a contractual dispute resolution regime. The formulation is used, for example, in clause 42.4 of AS 4000–1997.

Decision

Urgent ... declaratory relief?

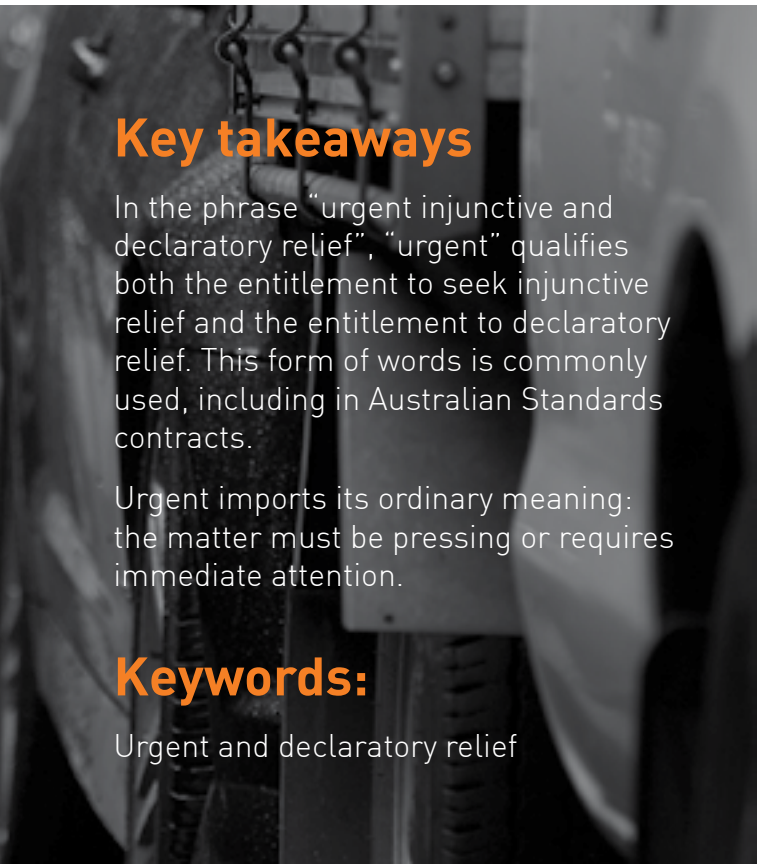
Ward CJ in Eq held that the word "urgent" should be read distributively so as to qualify both the terms "injunctive relief" and "declaratory relief". The clause should be read holistically.

Her Honour's reasoning was twofold:

1. the interpretation was grammatically correct; and
2. clause 13.6 was drawn from a standard form commercial agreement.

On the second reason her Honour held that there was an "understandable reluctance" to depart from the established construction of clauses drawn from standard forms of commercial agreement. Therefore, because an intermediate appellate court case had previously accepted that "urgent" was to be read distributively,[1] her Honour applied this interpretation.

Ward CJ in Eq accepted that it may make commercial sense for parties to include a carve-out clause pertaining to "declaratory relief" without limiting it by reference to a notion of urgency. However, the language used in this clause did not allow for that option and her Honour held that there is "no licence for 'judicial rewriting' of an agreement".[2]



Key takeaways

In the phrase "urgent injunctive and declaratory relief", "urgent" qualifies both the entitlement to seek injunctive relief and the entitlement to declaratory relief. This form of words is commonly used, including in Australian Standards contracts.

Urgent imports its ordinary meaning: the matter must be pressing or requires immediate attention.

Keywords:

Urgent and declaratory relief

Were the circumstances "urgent"?

Her Honour held "urgent" should be given its ordinary meaning, described in previous cases as:

1. "the quality of requiring immediate attention"; and
2. "pressing; compelling or requiring immediate action or attention."[3]

With this in mind, her Honour found there was sufficient "urgency" for the purposes of the relief CPB sought because:

- there were outstanding claims by subcontractors and other creditors;
- the Project Director could not certify that all subcontractors had been paid; and
- there was an urgent need for cash injection to the Joint Venture for cash flow purposes.

Was Rizzani obliged to pay the Called Sum?

As to what occurred during the controversial teleconference, Ward CJ in Eq held that there was no binding resolution between the parties pursuant to clause 5.4 of the JVA that would compel Rizzani to pay the Called Sum. Although her Honour found that a formal voting system was not necessary, Ward CJ in Eq was not convinced a binding vote occurred due to sufficient doubt surrounding who exactly had voted "yes" over the teleconference call.

Her Honour did find that Rizzani's behaviour amounted to a promise to sign the resolution to pay the Called Sum. Ward CJ in Eq found that Rizzani's subsequent conduct satisfied the elements of promissory estoppel:

1. CPB assumed that there was a particular legal relationship between CPB and Rizzani as the execution of the resolution would give rise to the obligations under the JVA;
2. Rizzani induced CPB to adopt that assumption through its subsequent conduct, such as affirming (via email) that they would follow the minutes from the teleconference meeting and then remaining silent for a period of time;
3. CPB relied to its detriment on the representations and promises made by Rizzani by paying its $8,500,000 contribution to the Called Sum;
4. Rizzani knew that CPB was proceeding on the basis of an understanding that there had been agreement to pay the Called Sum due to the communications exchanged after the meeting;
5. CPB's contribution to the Called Sum would cause detriment to CPB if Rizzani did not contribute its share, not simply because of reputational damage, but also because of risk to the ultimate completion of the principal contract; and
6. Rizzani failed to avoid that detriment, whether by paying the Called Sum or otherwise.

As to relief, her Honour agreed with CPB's submissions that damages were an inadequate remedy and found that the appropriate relief was to preclude Rizzani from acting inconsistently with its promise, and to compel it to sign the resolution to pay the Called Sum.

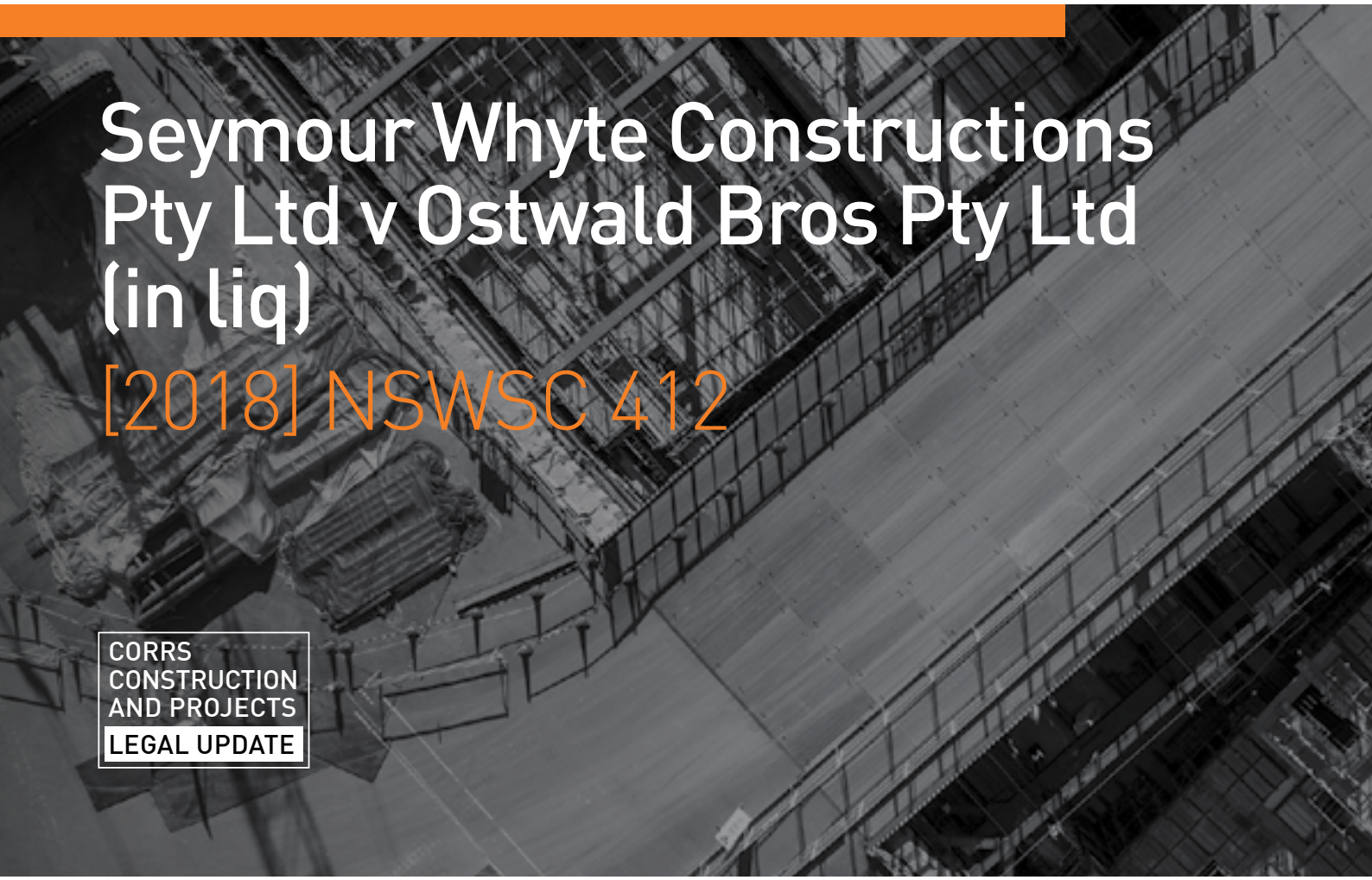
Why is this decision significant?

Although there is generally a broad and favourable approach to interpretation of arbitration agreements in Australia, this case affirms that there is no particular rule of construction requiring a liberal approach to be applied. Rather, any such approach remains subject to the language used in the clause itself.

It is a reminder that parties should be careful when drafting carve-out clauses and should consider whether, or when, they might want to seek relief from the courts. Including a clause that allows the court to intervene when relief was not "urgent" would seem contrary to an intention to have disputes determined by arbitration. However, an arbitration agreement which provides for an exception for some "urgent" disputes may inevitably lead to arguments about whether a dispute is in fact "urgent" under Ward CJ in Eq's broad definition. Some parties may prefer their arbitration agreements to be comprehensive and to not permit recourse to litigation at all for declaratory or injunctive relief.

https://www.caselaw.nsw.gov.au/decision/5a375d70e4b058596cbad318

1 *AED Oil Ltd & AED Services v Puffin FPSO Ltd* (2010) 27 VR 22
2 [2017] NSWSC 1798 at [117]
3 At [105]



Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq) [2018] NSWSC 412

CORRS CONSTRUCTION AND PROJECTS LEGAL UPDATE

Facts

In September 2016, Seymour Whyte Constructions Limited (**SWC**) subcontracted Ostwald Bros Pty Ltd (**Ostwald**) to perform road works on the Pacific Highway north of Grafton. The head contractor was Roads and Maritime Services.

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

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

In November 2017, Ostwald's administrators reported to creditors that the company was insolvent and recommended that it be placed into liquidation. Shortly after, Ostwald's creditors resolved that it should be wound up.

Decision

Dispute

Ball J granted SWC leave to commence proceedings in the Supreme Court, but Stevenson J heard the matter. The issues to be determined were:

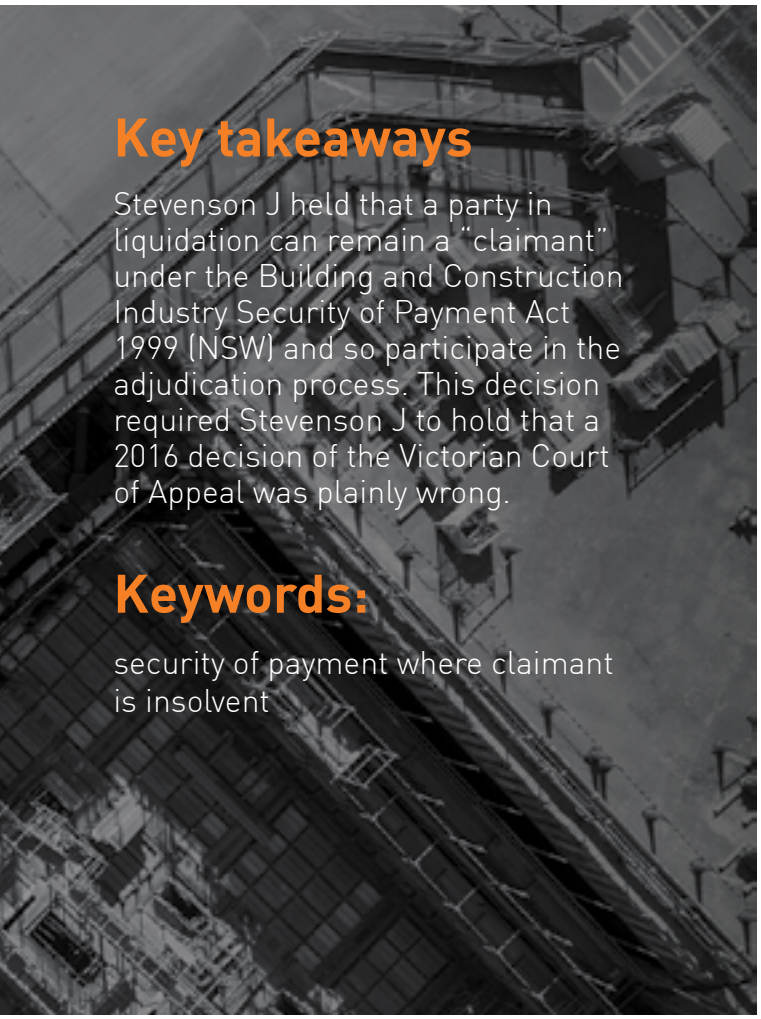
1 Whether the contract should be rectified as Ostwald sought. Due to an inconsistency, the subcontract provided two possible payment due dates.

2 If the contract was rectified, whether Ostwald made its adjudication application in time, considering sections 16 and 17 of the SOPA.

3 The implications for Ostwald given it had entered into liquidation. SWC argued that:

   a. Ostwald had lost the right to rely on the provisions of the SOPA once it entered into liquidation; and

   b. Ostwald's enforcement of its adjudication determination should be stayed in accordance with section 553C of the Corporations Act 2001 (Cth).



Key takeaways

Stevenson J held that a party in liquidation can remain a "claimant" under the Building and Construction Industry Security of Payment Act 1999 (NSW) and so participate in the adjudication process. This decision required Stevenson J to hold that a 2016 decision of the Victorian Court of Appeal was plainly wrong.

Keywords:

security of payment where claimant is insolvent

Rectification of the subcontract

In addition to the Formal Instrument, the subcontract incorporated Special Conditions and Subcontract Conditions which were inconsistent in relation to the prescribed payment due date. The former provided that payment was due "within 15 Business Days after the Contractor receives the payment claim", and the latter provided that payment was due "within 30 days of the end of month of claim".

Stevenson J reiterated the principles of rectification outlined by the High Court in *Simic v New South Wales Land and Housing Corporation*[1] and was satisfied on the basis of pre-contractual evidence of negotiations that the contract should be rectified. His Honour held that the actual and common intention of the parties was that payment be made 30 days from the end of the month. It was by common mistake that the Special Conditions said otherwise. The Contract was rectified as Ostwald sought, by deleting the inconsistent Special Condition.

Validity of adjudication application

As the subcontract was rectified, section 16 of the SOPA was enlivened and entitled Ostwald to make an adjudication application under section 17(1)(a)(ii). The Court found that the application was made in time.

Implications of liquidation

Finally, the Court turned to whether the SOPA continued to apply after Ostwald had entered into liquidation. In particular, the question was whether the subcontractor was still a "claimant" for the purposes of Part 3 of the SOPA. Ultimately, the Court found that it was.

The Victorian Court of Appeal found in *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* that a "claimant" under the Building and Construction Industry Security of Payment Act 2002 (Vic) was a person who had "undertaken to, and continued to, carry out construction work."[2] It therefore followed that as a company in liquidation was unable to carry out construction work, it could be regarded as only continuing to exist for the purpose of being wound up. Accordingly, the Victorian Court of Appeal concluded that a construction company in liquidation was no longer a "claimant" for the purposes of Part 3 of the Victorian Act. It thus lost the right to issue payment claims. Stevenson J was bound by that decision unless it was "plainly wrong."[3]

His Honour saw nothing within the provisions of the SOPA that would "compel the conclusion that 'undertake' means not only to undertake to carry out construction work, but to 'continue to perform such activities.' "[4] Furthermore, his Honour considered that the Victorian Court of Appeal failed to consider the term "the claimant" in the context of its statutory definition in section 4 of the Victorian Act. That definition dictates that a claimant is a company which "serves a payment claim."

Stevenson J held that status as a claimant depends only on whether the company legitimately served a payment claim. It did not imply an additional requirement that it undertook construction work. Stevenson J noted that nothing in the text of the SOPA indicated that a claimant by that definition would

1 [2016] HCA 47 at [103]–[104]

2 *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 at [84] ***(Façade)***

3 At [150], referencing *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485; and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89

4 [138]

somehow lose that status if wound up. His Honour therefore held that the decision of the Victorian Court of Appeal in *Façade* was "plainly wrong" and that Ostwald remained a "claimant" for the purpose of the SOPA.

The final issue was whether Ostwald could enforce the adjudication determination, or whether the mandatory "set-off" procedure in section 553C of the Corporations Act would apply. Section 553C is a mechanism which dictates that where a company is in liquidation, account must be taken of what is due from one party to the other in respect of any mutual dealings.

Stevenson J accepted the correctness of *Façade* in relation to the application of section 553C and reiterated that its effect was automatic on the winding up of a party. The Court ordered that any judgment obtained by Ostwald arising from the filing of an adjudication certificate be stayed until an account of the parties' liabilities to each other was determined under the mandatory set-off procedure specified in section 553C.

Conclusion

Where a company enters into liquidation after receiving an adjudication determination, but before that determination is enforced, it appears it will remain a claimant under the NSW legislation. However, a respondent can seek to stay statutory enforcement proceedings under the mandatory set off procedure under section 553C of the Corporations Act.

The decision diverges sharply from that of the Victorian Court of Appeal in *Façade*. It remains to be seen how this divergence will be resolved.

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Primelime (NSW) Pty Ltd v BAEC Contracting Pty Ltd [2018] NSWSC 372

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Facts

In July 2016, Primelime engaged either BAEC Contracting or BAEC Electrical to carry out electrical works at Cudal quarry. (Where "BAEC" is used, it refers to either BAEC Contracting or BAEC Electrical). BAEC Contracting sent Primelime a schedule of rates prepared by BAEC Electrical. Works began soon after.

It was not clear which BAEC company Primelime had engaged. The contract simply stated that "BAEC" could make payment claims every 14 days during the performance of work, and Primelime would make payment 14 days later.

A dispute arose and the contract was ended some time near 20–23 January 2017. On 23 January 2017, BAEC Contracting sent a letter to Primelime stating that the termination was consensual and that, as part of that consensual arrangement, BAEC Contracting would be entitled to be paid for works carried out up to the date of demobilisation. BAEC Contracting then made a payment claim which became the subject of an adjudication application under the SOPA.

BAEC Contracting obtained a favourable adjudication determination. Primelime challenged the determination in the Supreme Court on the ground that the adjudicator lacked jurisdiction to hear and determine the application because:

1. BAEC Contracting was not party to the contract; and
2. there was no reference date from which the payment claim could be made.

Decision

McDougall J granted Primelime the relief it sought, quashing the adjudication determination, and ordered that costs follow the event. His Honour's judgment addressed two issues:

1 who were the parties to the contract; and

2 whether there was a reference date on which the payment claim could be made.

Key takeaways

Where a construction contract is terminated and its payment terms do not survive termination, a party cannot make a payment claim under section 8(2)(a) of the Building and Construction Industry Security of Payments Act 1999 (NSW) (**SOPA**). Termination deprives the claimant of a reference date on which the claim can be made (unless a pre-termination reference date has not yet been utilised).

Nevertheless, where works are carried out after termination under a subsequent, new contract, the claimant may be entitled to make a payment claim under s 8(2)(b) of the SOPA.

Keywords:

reference dates after termination

Issue 1 — who were the parties to the contract?

Primelime said that it had a contract with BAEC Electrical, as the offer Primelime accepted was made by BAEC Electrical. Conversely, BAEC Contracting argued that it and not BAEC Electrical had the contract with Primelime. It relied on the fact that BAEC Contracting had invoiced Primelime for work carried out, and Primelime had paid many of those invoices.

McDougall J found that the contract existed was between BAEC Electrical and Primelime. The schedule of rates given to Primelime clearly belonged to BAEC Electrical, and the drawings in evidence indicated that BAEC Electrical performed the works.

McDougall J also noted that the fact BAEC Contracting invoiced Primelime for payment was not relevant where there was no evidence that the contract had been novated to BAEC Contracting. Nonetheless, McDougall J did not express a final conclusion on this issue, because in any event, Primelime was to succeed on the second issue.

Issue 2 — was there a reference date from which the payment claim could be made?

Leaving aside which BAEC company was party to the contract, McDougall J had to decide whether BAEC was entitled to make the payment claim for works carried out up until demobilisation. This was complicated because the contractual reference date on which the payment claim could be made fell after termination.

McDougall J found that BAEC had no right to make the payment claim under section 8(2)(a) of the SOPA, as there was no evidence to suggest that the contractually determined reference dates would survive termination.

The decision in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd*[1] stands for the proposition that where a contract does not provide for the survival of contractual reference dates after termination, the right to make a progress claim comes to an end on termination, unless there is a pre-termination reference date that has not yet been utilised for a payment claim.

BAEC tried to argue that it was entitled to make the payment claim. It said that the letter it sent on 23 January 2017 created a fresh contract under which the works were performed. Although the new contract did not specify a reference date, BAEC had the right to make a payment claim on the last day of the month in which the works were performed.

This is the position under section 8(2)(b) of the SOPA, which provides that where a contract does not stipulate a reference date, the reference date will be the last day of the month in which the construction work was carried out.

McDougall J disagreed with BAEC and found that the letter simply confirmed that the original contract had been terminated, and had not created a new contract. Accordingly, BAEC could not rely on section 8(2)(b) of the SOPA to make the payment claim.

McDougall J concluded that termination of the contract had the effect of terminating BAEC's right *"to make a payment claim ... based on a reference date that but for termination, would have occurred after 20 or 23 January 2017."*[2]

Conclusion

McDougall J quashed the adjudication determination, having concluded that there was no reference date for a payment claim where the payment terms did not survive termination of the construction contract.

https://www.caselaw.nsw.gov.au/decision/5ab4579ee4b087b8baa87d34

1 [2016] HCA 52 at [30]; (2016) 91 ALJR 233 at [30]
2 At [23]

Fulton Hogan Construction Pty Ltd v Cockram Construction Ltd [2018] NSWSCA 107

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Facts

Fulton Hogan Construction Pty Ltd (**Fulton**), as head contractor, entered into a major works subcontract with Cockram Construction Ltd (**Cockram**) for the design and construction of three car parks in the Northern Beaches.

Cockram served a payment claim on Fulton. In response, Fulton issued a payment schedule which set off liquidated damages against the amount Cockram asserted was due.

Cockram then sought adjudication under the Building and Construction Industry Security of Payment Act 1999 (NSW), claiming that it was entitled to extensions of time. In its adjudication response, Fulton disputed Cockram's extension of time claims, relying on clause 22.2(1)(e) of the subcontract, which made Cockram's entitlement to an extension of time conditional on Fulton receiving an equivalent extension under the head contract.

The adjudicator found in Cockram's favour, stating "I do not consider that [clause 22.2(1)(e) of the subcontract] is a legitimate condition precedent as it relies on a contract relationship ... to which [Cockram] is not a party".

Decision at first instance

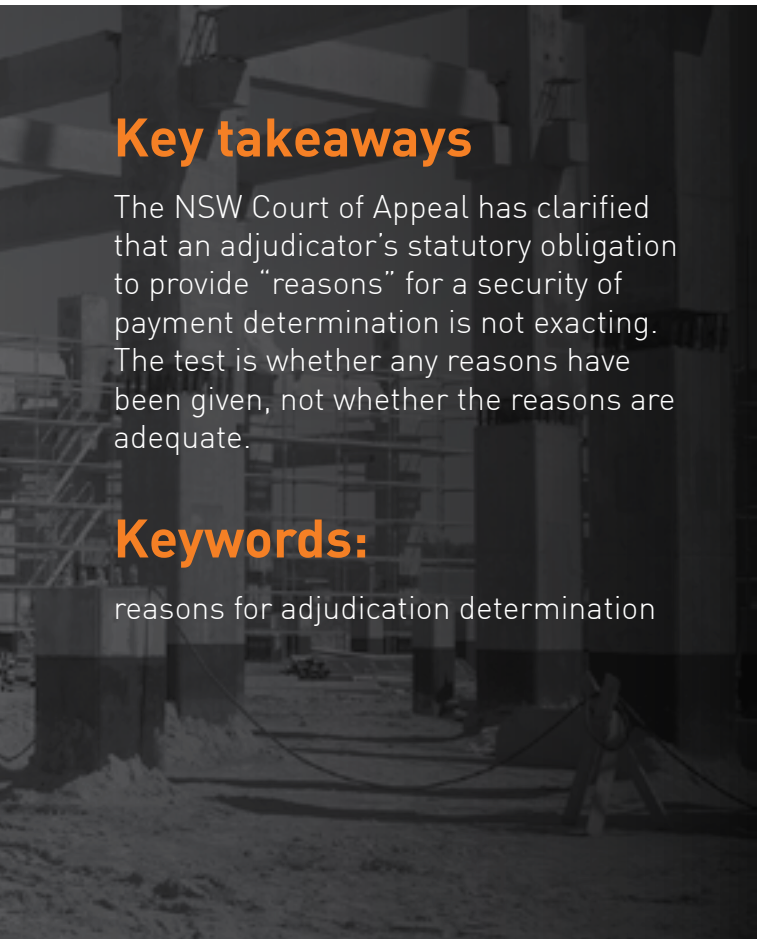
Fulton sought judicial review of the adjudicator's determination in the Supreme Court of NSW. Ball J set aside the determination for jurisdictional error, on the basis it did not comply with section 22(3)(b) of the Act, which requires an adjudicator to "include the reasons for the determination". Ball J found that the adjudicator's reasons were inadequate as:

> *"on the face of it, [the Adjudicator] appears to be saying that cl 22.2(1)(e) should not be applied because she did not consider it to be legitimate or workable, which, without more, is not a proper basis for refusing to apply the clause."*

Court of Appeal decision

Cockram successfully appealed to the NSW Court of Appeal. Meagher JA, with Basten JA and Barrett AJA agreeing, considered whether the adjudicator:

1. satisfied section 22(3)(b) of the Act; and
2. failed to perform her statutory duty in her treatment of clause 22.2(1)(e) of the subcontract.



Key takeaways

The NSW Court of Appeal has clarified that an adjudicator's statutory obligation to provide "reasons" for a security of payment determination is not exacting. The test is whether any reasons have been given, not whether the reasons are adequate.

Keywords:

reasons for adjudication determination

1. Did the adjudicator provide "reasons" for her decision?

In relation to the first issue, Meagher JA held that what section 22(3)(b) of the Act requires is an *"explanation for the outcome"*. This explanation does not have to be *"adequate according to any objective criterion"*. His Honour emphasised that not all adjudicators are lawyers and therefore determinations should not *"be viewed through the prism of legal concepts"*. The adjudicator had therefore complied with section 22(3)(b) of the Act.

In light of this finding, Meagher JA noted that the facts did not raise the question whether the omission of any reason or reasons from an adjudication determination would constitute jurisdictional error. It was thus unnecessary to resolve that hypothetical question of law.

2. Did the Adjudicator fail to perform her statutory duty in refusing to apply the condition precedent in clause 22.2(1)(e) of the subcontract?

In relation to the second issue, Meagher JA considered section 22(2) of the Act, which is the source of an adjudicator's authority and function:

"(2) In determining an adjudication application, the adjudicator is to consider the following matters only:

(a) the provisions of this Act,

(b) the provisions of the construction contract from which the application arose

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,

(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates."

Meagher JA stated that an adjudicator's ultimate statutory function is *"to determine the amount and timing of a progress payment"*.[1] The adjudicator must therefore consider the matters in section 22(2) of the Act, and them alone.[2] Meagher JA went on to note that the adjudicator's obligation under section 22(2) of the Act requires *"a process of evaluation, sufficient to warrant the description"*, and not mere *"formalistic reference"* to those matters.[3]

Meagher JA ultimately held that the adjudicator's process did not fall short of this standard simply because it *"included a conclusion that one provision of the contract was not to be applied"*, regardless of whether the adjudicator's conclusion was based on an *"error in construction or wrong understanding of the applicable law"*. On this basis, Meagher JA held that the adjudication determination was valid.

https://www.caselaw.nsw.gov.au/decision/5afe44eae4b074a7c6e1f56b

1 At [40], citing *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* 92 ALJR 248 at [80] (Gageler J)

2 At [40], citing *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 at [65] (Basten JA)

3 At [41], citing *Weal v Bathurst City Council* (2000) 11 LGERA 181 at [80] (Giles JA, Priestley JA agreeing) and *Azriel v NSW Land & Housing Corporation* (2006) 67 NSWLR 256 (Basten JA, Santow and Ipp JJA agreeing)

Broken Hill City Council v Unique Urban Built Pty Ltd [2018] NSWSC 825

CORRS CONSTRUCTION AND PROJECTS LEGAL UPDATE

Facts

In April 2016, Broken Hill City Council (**Council**) retained Unique Urban Built Pty Ltd (**Urban**) to upgrade the Broken Hill Civic Centre under an AS 4000–1997 contract. Clause 42.2 provided:

> *"42.2 Conference*
>
> *... If the dispute has not been resolved within 28 days of service of the notice of dispute, that dispute shall be and is hereby referred to arbitration."*

Clause 42.3 provided that if the parties failed to agree on an arbitrator, *"the person to nominate an arbitrator is, if no one is stated, the President of the Australasian Dispute Centre"*. No such person was stated. The Australasian Dispute Centre ceased to exist in February 2011. Thus, the President did not exist at the time of the Contract.

In February 2018, the Council sued, alleging Urban had breached the Contract. Pursuant to section 8(1) of the Act, Urban requested that it and the Council be referred to arbitration. Section 8(1) of the Act provides that a court must not refer the parties to arbitration where an arbitration agreement *"is null and void, inoperative or incapable of being performed"*.

The Council argued the arbitration agreement was "inoperative" due to the non-existence of the President. The Council further argued the parties contemplated a single appointment mechanism and, where the appointment mechanism did not operate, there was no arbitration agreement.

Urban argued clause 42.2 was an arbitration agreement within the meaning of section 7(1) of the Act and was capable of standing alone. If clause 42.3 was ineffective as an appointment mechanism due to the President's non existence, it argued, section 11(3)(b) of the Act empowered the Court to appoint an arbitrator.

The issues for determination were:

- the meaning of the term "inoperative" in section 8(1) of the Act; and
- whether the non-existence of the person named in clause 42.3 to nominate an arbitrator rendered the arbitration agreement inoperative.

Key takeaways

An arbitration agreement is "inoperative" under section 8(1) of the Commercial Arbitration Act 2010 (NSW) (Act) where it has "no field of operation" or is "without effect".

The fact the person appointed to nominate an arbitrator does not exist will not render the arbitration agreement inoperative where:

- the agreement on a procedure to appoint an arbitrator is a stand-alone provision capable of severance from the arbitration agreement;
- the status, identity or qualifications of the non existent appointer are not fundamental to the parties' submission to arbitration; and
- the Act empowers the Court to appoint an arbitrator absent the parties' agreement and therefore, remedies any defects in the appointment procedure.

Keywords:

reference to arbitration

Decision

Issue 1 — the meaning of the term "inoperative"

Hammerschlag J held the term "inoperative" for the purpose of section 8(1) of the Act means "having no field of operation or to be without effect".[1] In reaching this decision, his Honour relied on the decision of Kaplan J in *Lucky-Goldstar International (HK) Ltd v NG Moo Kee Engineering Ltd (**Lucky-Goldstar**)*. [2]

In *Lucky-Goldstar*, Kaplan J held the term "inoperative" covers "those cases where the arbitration agreement has ceased to have effect", for example, where:

- "the parties have implicitly or explicitly revoked the agreement to arbitrate";
- "the same dispute between the same parties has already been decided in an arbitration or court proceedings";
- "the award has been set aside";
- "there is a stalemate in the voting of the arbitrators"; or
- "the award has not been rendered within the prescribed time limit".[3]

Kaplan J further noted an arbitration agreement may be inoperative where settlement has been reached before the commencement of the arbitration. However, an American decision left this to be determined by the arbitrators.[4]

Issue 2 — whether the non-existence of the nominator rendered the arbitration agreement inoperative

Hammerschlag J held the non-existence of the President did not render the arbitration agreement inoperative because:

- clause 42.2 was the arbitration agreement, whereas clause 42.3 was an agreement on procedure and therefore a stand-alone provision capable of severance from clause 42.2 — and thus, section 8(1) of the Act did not apply to clause 42.3;[5]
- it would nonetheless not be inappropriate to sever clause 42.3, as it did not suggest the status, identity or qualifications of the non-existent appointer were fundamental to the parties' submission to arbitration;[6] and

1 At [31]
2 [1993] HKCFI 14
3 See [2018] NSWSC 825 at [33]
4 At [33]
5 At [46], [51]
6 At [51], [54]

- in any event, section 11 of the Act cured any defects in the appointment procedure in clause 42.3.[7]

In determining whether an arbitration agreement is inoperative, regard must be had to the sections of the Act which may make it operative. His Honour observed the Act distinguished between an arbitration agreement under section 7(1) and an agreement on a procedure to appoint an arbitrator as contemplated by section 11(2).[8] Section 7(1) of the Act provides:

> *"7 Definition and form of arbitration agreement*
>
> *(1) 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."*

Section 11(2) provides the parties were "free to agree on a procedure of appointing the arbitrator". His Honour observed clause 42.3 provided two possible appointment procedures:

- agreement by the parties; or
- failing agreement, nomination by the President.

Although the second appointment procedure had no application, the first appointment procedure was alive. His Honour observed section 11 of the Act seeks to ensure the operation of an arbitration agreement "where the procedure for the appointment of an arbitrator fails".[9] Thus, any defect in the appointment procedure in clause 42.3 was remedied by the Court's power to appoint an arbitrator under section 11 of the Act.

In reaching this conclusion, his Honour distinguished the present case from *Leighton Contractors Pty Ltd v Hooker Corp Ltd*.[10]

Hammerschlag J referred the Council and Urban to arbitration pursuant to section 8(1) of the Act, and stood the matter over to enable the Court to deal with the remaining issues, including the appointment of an arbitrator and costs.

https://www.caselaw.nsw.gov.au/decision/5b14d924e4b087b8baa899bf

7 At [48]
8 At [44]–[45]
9 At [45]
10 Unreported, Full Federal Court of Australia, 10 August 1989 – G10 of 1989

Low v MCC Pty Ltd [2018] QSC 6

CORRS CONSTRUCTION AND PROJECTS LEGAL UPDATE

Facts

Alvin Low engaged MCC Pty Ltd to build two homes on adjoining lots in The Gap, Brisbane.

The parties entered into separate contracts for each home. Both contracts provided for a progress payment to be made on reaching the "Frame Stage", which was defined.

On 4 August 2017, MCC served a payment claim for $422,650, representing, amongst other things, the milestone payment for the Frame Stage for both homes. On 15 September 2017, MCC made an adjudication application. The adjudicator decided that:

- the Frame Stage had been achieved on 4 August 2017; and
- Low owed MCC $293,296.

MCC lodged a caveat over Low's property. Later, MCC filed the adjudication certificates in the District Court of Queensland. This enabled MCC to obtain enforcement warrants to enforce the certificates as a judgment.

On 8 November 2017, Low commenced proceedings in the Supreme Court of Queensland seeking declarations that the adjudication decisions were void. MCC resisted the application and cross applied to enforce an equitable charge and the right to sell the subject property granted under each of the contracts. The parties' underlying dispute was whether the Frame Stage had been reached.

On 1 December 2017, Low filed an application seeking:

- an interlocutory injunction retraining MCC from enforcing the adjudication decisions pending determination of the substantive proceeding; and
- a final injunction compelling MCC to withdraw the enforcement warrants and caveat in respect of the subject land, (the **application**).

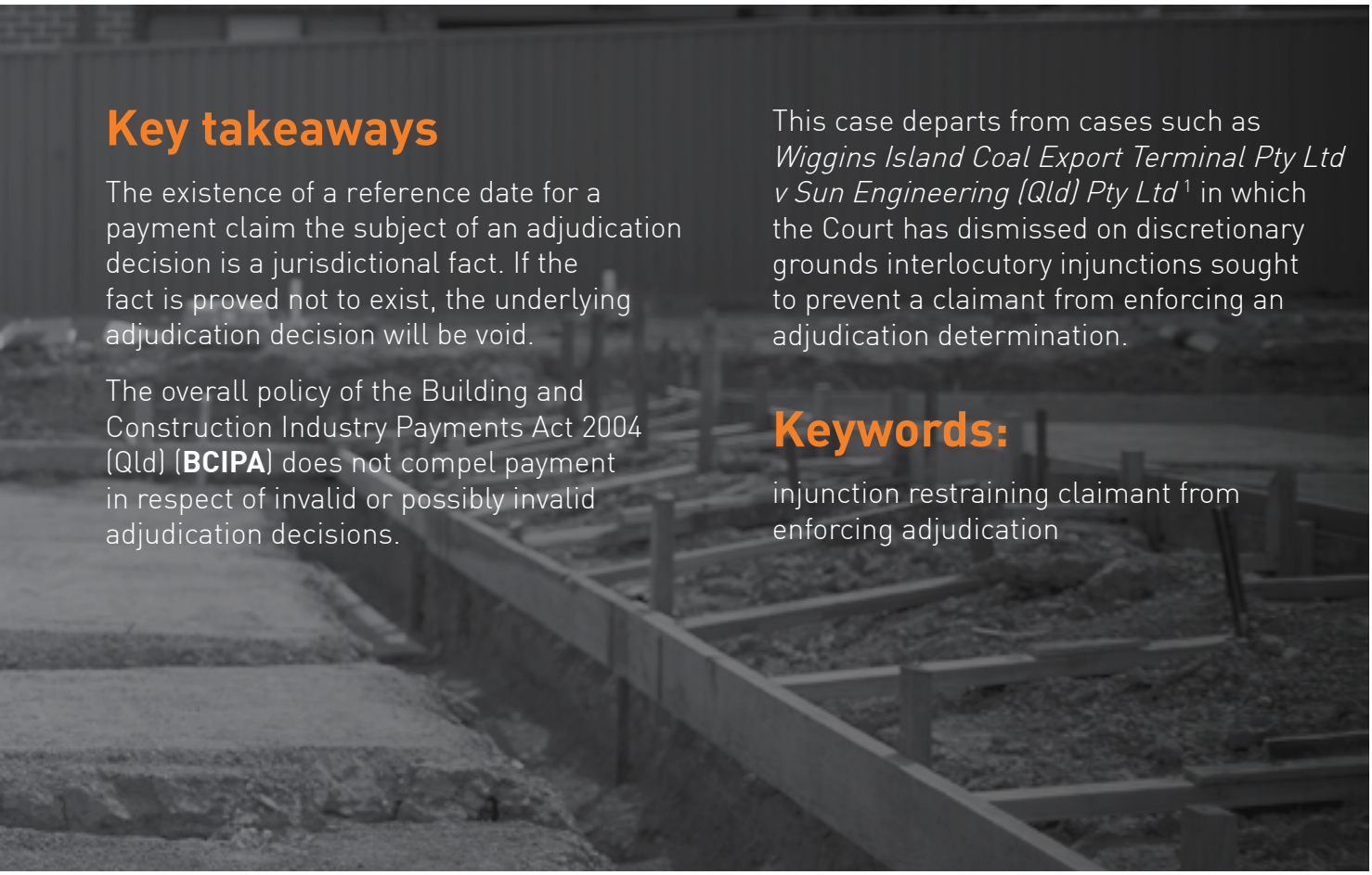
Issues

The issues before the Court were whether:

1. the balance of convenience favoured granting an interlocutory injunction pending determination of the substantive proceeding; and
2. Low could demonstrate that there was a serious question to be tried as to the validity of the adjudication decisions.

Decision

The Court granted Low's injunction and adjourned MCC's application until after a decision was reached in the substantive proceedings.



Key takeaways

The existence of a reference date for a payment claim the subject of an adjudication decision is a jurisdictional fact. If the fact is proved not to exist, the underlying adjudication decision will be void.

The overall policy of the Building and Construction Industry Payments Act 2004 (Qld) (**BCIPA**) does not compel payment in respect of invalid or possibly invalid adjudication decisions.

This case departs from cases such as *Wiggins Island Coal Export Terminal Pty Ltd v Sun Engineering (Qld) Pty Ltd*[1] in which the Court has dismissed on discretionary grounds interlocutory injunctions sought to prevent a claimant from enforcing an adjudication determination.

Keywords:

injunction restraining claimant from enforcing adjudication

Balance of convenience

Jackson J was satisfied that the balance of convenience favoured the injunction because:

- Low would have suffered irreparable damage if MCC's cross-application was granted;
- there was no evidence the respondent would likely suffer loss beyond the cost of being kept out of the money payable under the adjudication certificates and enforcement warrants;
- Low offered to give to the Court a bank guarantee in the amount of the adjudication decision; and
- nothing suggested the proceeding would not be held promptly.

Jackson J concluded that notwithstanding the exception in section 31(4) of BCIPA, there is no express policy that there must be a payment in respect of an invalid or possibly invalid adjudication decision. The intention of BCIPA, to ensure prompt payment to contractors, can only apply in its full force to valid adjudication decisions.[2]

Jackson J further held that section 31(4) of BCIPA requires the challenger of an adjudication decision to maintain the status quo by paying into court the amount in dispute, so that if the challenge is unsuccessful, the claimant is assured payment. His Honour accepted that Low's to provide a bank guarantee in lieu of payment into Court was no less acceptable under section 31(4).

Serious question to be tried

The Court accepted Low's submission that the existence of a "reference date" for each of the progress payment claims made is a jurisdictional fact.

Jackson J was satisfied on the evidence that there was a sufficient question to be decided whether on a proper construction of the contracts the "Frame Stage" had been reached. Jackson J dismissed MCC's alternative basis for a reference date being reached, being the assertion that practical completion occurred on 4 August 2017. This argument had not been put before the adjudicator and there was insufficient evidence before the Court.

https://www.sclqld.org.au/caselaw/QSC/2018/006

1 [2014] QSC 170
2 *BRB Modular Pty Ltd v AWX Constructions Pty Ltd* [2015] QSC 222

John Holland Pty Ltd v Adani Abbot Point Terminal Pty Ltd (No 2) [2018] QSC 48

CORRS CONSTRUCTION AND PROJECTS LEGAL UPDATE

Facts

In 2009, John Holland Pty Ltd entered into two contracts with Ports Corporation of Queensland Ltd for the supply, construction and commissioning of certain works at the Abbot Point Coal Terminal. The contracts were for the upgrading of the wharf and ship loading facilities as part of the expansion of the terminal.

The Ports Corporation's rights and obligations under each of the contracts were later transferred to Adani Abbot Point Terminal Pty Ltd.

In February 2012, a dispute arose between John Holland and Adani and the matter was referred to arbitration (with The Honourable D M Byrne QC as arbitrator). After three arbitral awards had been made, John Holland claimed that Adani had repudiated the original contracts, and sought to terminate. The arbitrator found, however, that John Holland had not properly terminated the original contracts.

John Holland applied for leave to appeal the arbitrator's award on a question of law arising from the fourth award. The trial judge, Jackson J, dismissed the appeal on two grounds.

1. Section 380 (2) of the Commercial Arbitration Act 1990 (Qld) requires that an appeal to the Court be "on any question of law arising out of [an] Award". In this case, John Holland had failed to specify a question of law the subject of the appeal.
2. John Holland's written submissions were so wide and broad that they were a "snow storm".[1]

After dismissing John Holland's appeal, Jackson J then heard submissions on costs.

Adani argued that John Holland should have had to pay its costs on an indemnity basis. John Holland submitted that it should only have had to pay Adani's costs on the usual party-party basis. The practical difference is important. Where indemnity costs are ordered, a successful party will usually be able to recover approximately 90% of its legal costs. This is opposed to a costs order that is awarded on a party-party basis, in which the successful party may only be able to recover around 50–60% of its legal costs.

Key takeaways

This case serves as a warning: supplying excessive material in court proceedings may be oppressive. In some circumstances, it may result in the court making an indemnity costs order. Material must be relevant and presented in a logical and articulate way.

To be awarded indemnity costs, a party does not need to have warned the other party it will seek those costs (although this may be advantageous)

Keywords:

indemnity costs; excessive material in litigation

Decision

Jackson J granted the order that costs be assessed on an indemnity basis.

His Honour relied on well-established authority in *Colgate-Palmolive Co v Cussons Pty Ltd*[2] that the circumstances of the case warrant departing from the usual award of party-party costs. This normally requires some special or unusual feature. Jackson J relied on *Hammercall Pty Ltd v Robertson*[3] as authority for the proposition that abuse of process by oppression is a sufficient ground for an indemnity costs order. Jackson J found that John Holland's actions in conducting the appeal were so oppressive that they were an abuse of process.

In forming this decision, his Honour discussed several issues including the length of the application and the range of the grounds of appeal included within it.

Jackson J found that John Holland's application was so drawn-out that its oppressive nature extended not just between the parties, but also to court administration. There were 35 principal pages, 97 further pages of annexure material and 2,000-plus pages of affidavit material included in the written submissions. Jackson J deemed that much of this was unnecessary, and could have been omitted or simplified.

John Holland's application also required the Court to consider such "extensive and wide ranging" proposed grounds of appeal that it was not possible to determine the questions of law which were the subject of the appeal.

Warning not a precondition

Jackson J also found that providing a warning (as to an intention to seek indemnity costs against the other side in a dispute) is preferable, but not necessarily essential for the Court to decide that a special costs order be made. John Holland argued that an order against it for indemnity costs was not appropriate, given Adani's failure to put John Holland on notice that it would seek a special costs order. However, Jackson J stated that a *"lack of warning is a relevant consideration … but a warning is not a precondition to making an order for indemnity costs".*[4]

https://www.sclqld.org.au/caselaw/QSC/2018/048

1 *John Holland Pty Ltd v Adani Abbot Point Terminal Pty Ltd* [2016] QSC 292 at [24]
2 (1993) 46 FCR 225
3 [2011] QCA 380
4 At [16]

Mann v Paterson Constructions Pty Ltd [2018] VSC 119

CORRS CONSTRUCTION AND PROJECTS LEGAL UPDATE

Facts

In March 2014, Peter and Angela Mann engaged Paterson Construction Pty Ltd (**PCPL**) to build two units. The contract, a "major domestic building contract", was subject to the DBCA.

In March 2015, the units were close to completion when a dispute arose over payments, among other things. The Manns purported to terminate, and both parties accused the other of wrongful repudiation. PCPL subsequently commenced proceedings in VCAT to recover payment on a quantum meruit basis for the works completed.

VCAT decision

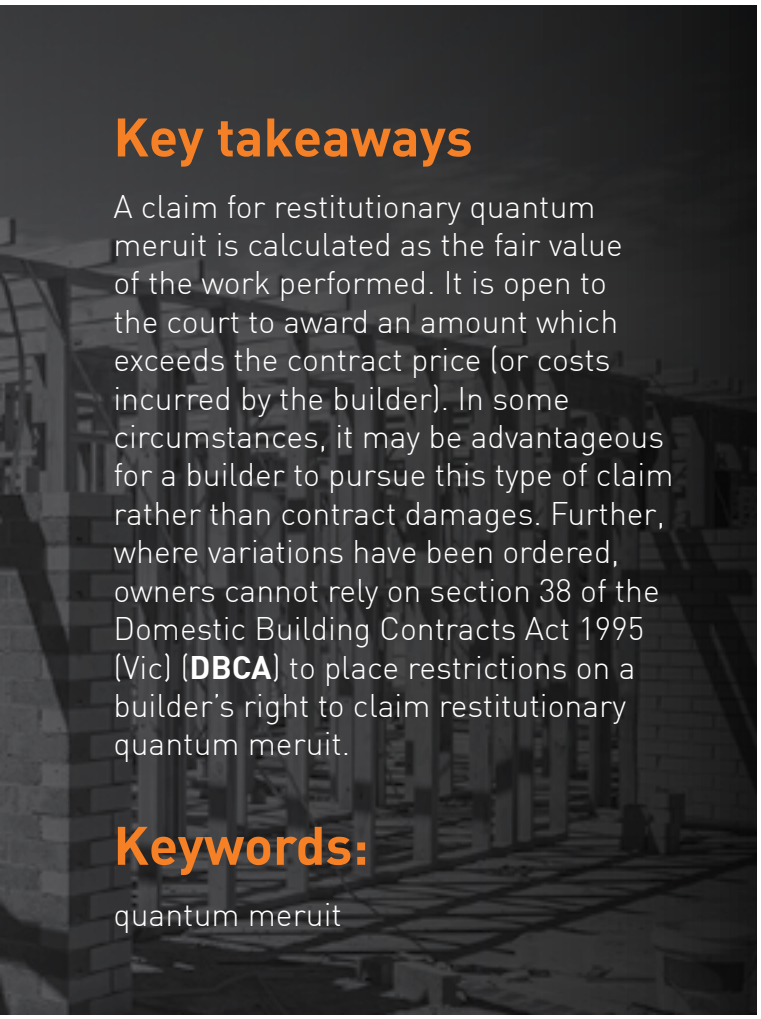
The Senior Member found that the Manns had wrongfully repudiated the contract and that PCPL was entitled to recover payment for the works completed, on a quantum meruit basis. The Senior Member relied on expert evidence given by a quantity surveyor and registered builder called by PCPL to determine the value of the building works.

Supreme Court decision

The Manns sought leave to appeal on two questions of law (a prerequisite given it was an appeal from VCAT). These were whether the senior member had:

1. *"misunderstood or misapplied the test or principles that should be applied to work out the value of a quantum meruit claim"*;[1] and
2. *"erred in allowing the builder to recover on a quantum meruit basis in relation to items that amounted to variations of the original scope of work"*.[2]

Cavanough J granted leave to appeal but ultimately held that the Senior Member had not erred.



Key takeaways

A claim for restitutionary quantum meruit is calculated as the fair value of the work performed. It is open to the court to award an amount which exceeds the contract price (or costs incurred by the builder). In some circumstances, it may be advantageous for a builder to pursue this type of claim rather than contract damages. Further, where variations have been ordered, owners cannot rely on section 38 of the Domestic Building Contracts Act 1995 (Vic) (**DBCA**) to place restrictions on a builder's right to claim restitutionary quantum meruit.

Keywords:

quantum meruit

Issue 1 — The test for quantum meruit

The prevailing Victorian authority, where the builder has accepted the owner's wrongful repudiation of the contract and elected to claim restitutionary quantum meruit, is *Sopov v Kane Constructions Pty Ltd (No 2)*.[3] Consistent with *Sopov (No 2),* Cavanough J confirmed that the test to be applied for the calculation of quantum meruit was *"the value of the benefit conferred on the party which received it"*.[4] This means the *"fair and reasonable value"* of the work.[5]

While the actual costs incurred and the contract price may be permissible considerations in the assessment of restitutionary quantum meruit, they are not ones which the court is bound to take into account.[6] Nor are they determinative, and a quantum meruit claim may exceed each of these amounts.

In this case, the competent evidence of the properly qualified quantity surveyor was *"an appropriate index"* to determine *"what it would have cost … to have had these tasks carried out by another builder in comparable circumstances"*.[7]

Issue 2 — The effect of section 38 on variations

The second issue was how the claim for quantum meruit applied to variations in work outside the initial contract scope. The question raised by this ground of appeal was whether the work that involved a *"departure from the plans and specifications set out in the contract"* was affected by section 38 of the DBCA.[8] Section 38 provides that for variations worth more than 2% of the contract price, the builder cannot recover for the variation unless it gave notice in advance of performing the variation, in accordance with the section. In this case, the Manns ordered 42 variations across the two units.

Cavanough J concluded that, on its proper statutory interpretation, section 38 of the DBCA did not apply to the assessment of quantum meruit claims. His Honour reached this conclusion based upon contextual indications in the language of the DBCA, the section's physical placement within the DBCA, and by reference to other provisions in the DBCA.[9]

In addition to this, his Honour referred to the principle of legality, which operates such that there is a *"presumption of statutory interpretation against abrogation or curtailment of common law rights"*.[10]

As a result it was not necessary to determine whether the variations fell outside the scope of the original contract due to any lack of compliance with section 38. The present claim was for quantum meruit, and the overriding consideration was the "value of the benefit conferred" on the Manns as a result of the works completed by PCPL. This entitled PCPL to claim in restitution for the value of any variations outside the original contract scope and specifications, without considering whether section 38 had been observed.

http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2018/119.html

1 At [12]
2 At [14]
3 At [20], quoting *Sopov v Kane Constructions Pty Ltd (No 2) (Sopov (No 2)* at [25]
4 At [20]
5 At [18]
6 At [27]. See also [20] quoting *Sopov (No 2)* at [26], [35]
7 At [21]
8 Mann at [47]
9 DBCA sections 16(2) and 53(2)(b)(iii)
10 *Mann* at [68] citing *CMF Projects Pty Ltd v Riggall* [2016] 1 Qd R 187, 197–198 [34]–[35]

Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd [2018] VSC 246

CORRS CONSTRUCTION AND PROJECTS LEGAL UPDATE

Facts

Brighton pleaded several claims, including that it entered into two subcontracts for the construction of a building at 700 Bourke Street, Docklands, in reliance on representations made by Multiplex that were misleading or deceptive in contravention of section 18 of the Australian Consumer Law (**ACL**).

All questions of liability and quantum were referred to Mr Richard Manly QC, whom the Court had appointed as a Special Referee. The Special Referee found that the ACL claim should fail for several reasons, including that Brighton was precluded from bringing the ACL claim because of its failure to give notice of the claim within the seven-day period prescribed under the subcontracts.

Brighton alleged that the Special Referee's findings were an error and it submitted that the Special Referee's report ought not be adopted by the Court.

Decision

Much of the argument before Riordan J focused on whether the Special Referee's findings relating to the pleaded representations were correct.

However, one of the principal issues for determination by the Court was whether a contractual clause which purported to impose a temporal limitation on the bringing of claim under section 18 of the ACL was enforceable.

Clause 46 of each subcontract required Brighton to give a prescribed notice of any claim within 7 days of the earlier of:

(a) Brighton becoming aware of any act on which the claim would be based; and

(b) when Brighton could reasonably have been aware of the entitlement to make the claim.

Multiplex submitted that clause 46 of each subcontract did not exclude the operation of the ACL and that it merely regulated it.

It was common ground that a clause in the subcontracts excluding liability would not be effective in preventing a claim under section 18 of the ACL (that is, a claim for misleading or deceptive conduct). The courts had long held that liability under section 52 of the Trade Practices Act (the precursor to section 18 of the ACL) cannot be excluded by contract (no exclusion principle). The no exclusion principle has been held to apply equally to section 18 of the ACL.

Riordan J relied on *Commonwealth v Verwayen*,[1] where the High Court held that the no exclusion principle is an application of the policy of the common law that where a statute embraces public rather than private rights and the legislative purpose will not be fulfilled if the court enforces private contractual arrangements, then the court will refuse to enforce the private contractual arrangements on the grounds of public policy.

Key takeaways

1. Liability under section 18 of the Australian Consumer Law cannot be excluded by contract.
2. Contractual clauses seeking to impose a timeframe less than the six-year limitation period for bringing a claim under section 18 of the ACL are unenforceable as they are contrary to public policy.

Keywords:

Contractual bars to claims under the Australian Consumer Law

Riordan J also referred to the Explanatory Memorandum to the Trade Practices Amendments Bill (No 1) 2000 (Cth) and the Second Reading Speech to demonstrate the public purpose of the remedy available under section 236(2) of the ACL. Riordan J stated that the Explanatory Memorandum and the Second Reading Speech underline the public purpose of the compensation remedy enforcing statutory norms established by the Trade Practices Act (including the section 52 prohibition) and, in particular, the availability of the remedy for six years.

Further, Riordan J held that:

(a) it would be absurd if a court were to enforce a clause to the effect that any claim under section 18 of the ACL must be brought within (for example) one hour of the cause of action arising;

(b) extreme provisions, of which clause 46 of the subcontracts was an example, could effectively preclude any claim under section 18 of the ACL except by the most punctilious of claimants; and

(c) any attempt to restrict the remedy by limiting the time in which an action can be brought is an unacceptable interference with the public policy underpinning the provisions.

Riordan J also distinguished his decision from the earlier decisions in *Owners SP 62930 v Kell & Rigby Pty Ltd*,[2] *Lane Cove Council v Michael Davies & Associates*[3] and *Firstmac Fiduciary Services Pty Ltd v HSBC Bank of Australia Ltd*.[4] However, Riordan J stated that his conclusions were consistent with *Omega Air Inc v CAE Australia Pty Ltd*,[5] where Ball J held that it is reasonably arguable that the parties cannot contract out of the six-year limitation period.

Riordan J expressed some support for Sackar J's approach in *Firstmac*, where it was held that, as a general proposition, parties may by contract fix a shorter limitation period and may exclude some statutory rights unless that is contrary to public policy. However, Riordan J held in the present case that the temporal restriction on a claimant's right to claim within the period applicable to section 236 of the ACL was contrary to public policy.

Further, his Honour held that to permit claims under the ACL to be defeated by provisions such as clause 46 of the subcontracts would be inconsistent with the public policy of protecting people from being misled in trade or commerce and with the width of the powers under the ACL.

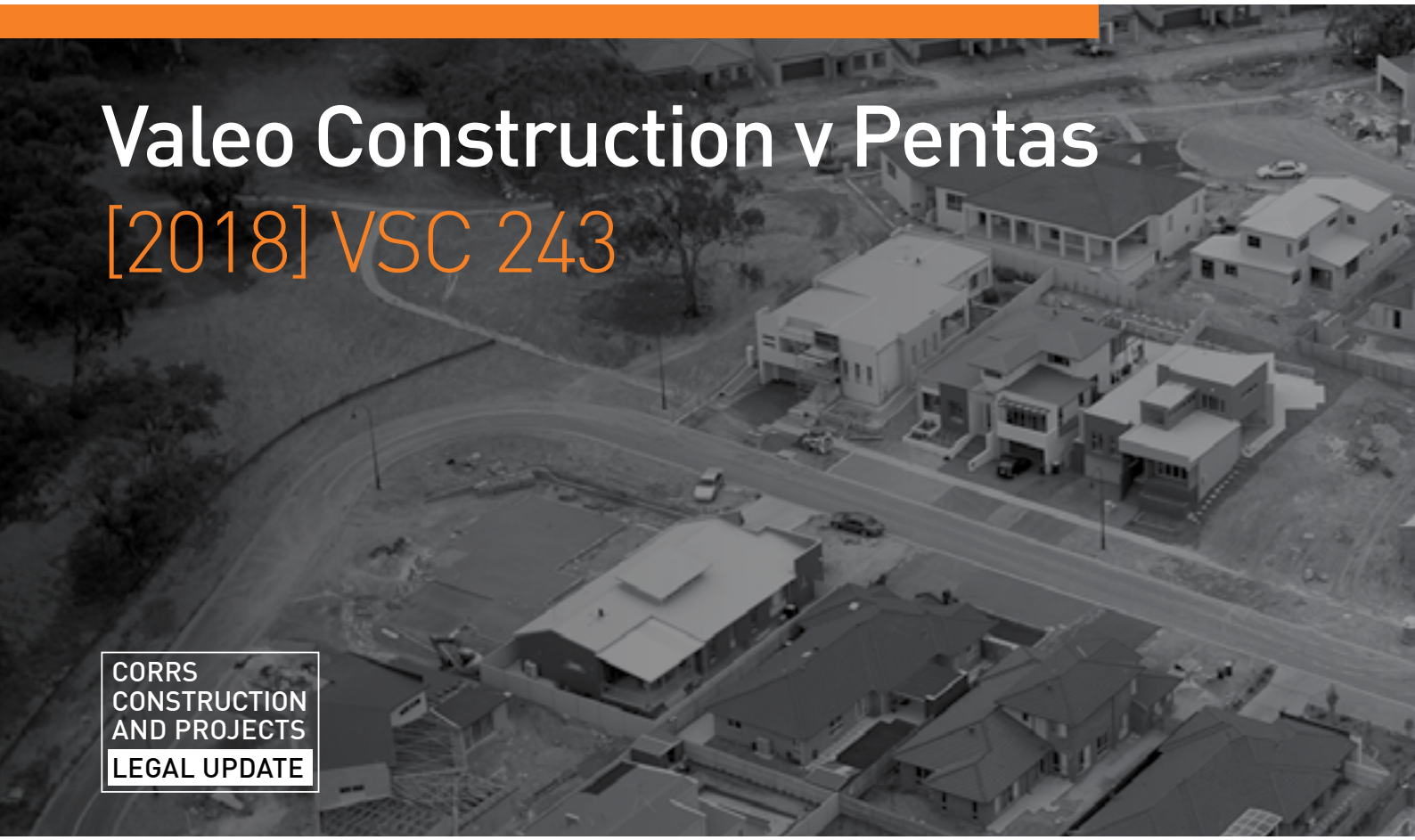
Riordan J therefore held that the Special Referee erred in finding that Brighton was precluded from bringing the ACL claim because it had failed to give notice of the claim within the seven-day period prescribed under the subcontracts.

Practical implications of the decision

Construction contracts commonly contain clauses that seek to impose time restrictions on when claims can be brought. Riordan J's judgment suggests these contractual provisions cannot be interpreted so as to deprive a claimant from bringing a claim under section 18 of the ACL in a period less than the six-year limitation period applicable to such claims. This case is the best available authority on these restrictions, but there may be further developments in the area.

http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2018/246.html

1 (1990) 170 CLR 394
2 [2009] NSWSC 1342
3 [2002] NSWSC 727
4 [2012] NSWSC 1122 (*Firstmac*)
5 [2015] NSWSC 802



Valeo Construction v Pentas [2018] VSC 243

CORRS CONSTRUCTION AND PROJECTS LEGAL UPDATE

Facts

On 28 February 2018, Valeo served a payment claim for $2,215,150. On 1 March 2018, Valeo served a revised payment claim for $2,240,160. The covering email accompanying the revised payment claim referred to the payment claim as "Rev 1" and stated that the amount claimed had been updated to include a builder's margin for a pool.

Both the 28 February and 1 March payment claims were for the same reference date under the contract.

On 6 March 2018, Valeo sent Pentas a further email stating that it had withdrawn the 28 February payment claim and that it relied on the 1 March payment claim instead.

The principal issue in the proceedings was the validity of the 1 March payment claim. Pentas argued the 1 March payment claim was invalid because it amounted to a second payment claim for the same reference date, contravening section 14(8) of the Building and Construction Industry Security of Payment Act 2002 (Vic) (**SOPA**).

A secondary issue was whether a 22 March 2018 payment schedule was valid, and so whether Valeo was entitled to judgment under section 16(2)(a)(ii).

Decision

Valeo argued it did not serve more than one payment claim for the same reference date. Further, Valeo argued the revision, withdrawal or replacement of a payment claim was consistent with the SOPA and that the subsequent rectification of a claim is permissible (to a degree) and does not infringe section 14.

Pentas argued Valeo had not revised its claim, but had in fact made two payment claims for the same reference date. Further, Pentas submitted that the higher amount in the 1 March payment claim precluded a finding that the 1 March payment claim was a mere revision of the earlier one.

Pentas also argued that if payment claims can be withdrawn and reissued, Valeo's conduct was neither express nor sufficiently clear to found an express communication or the implication that the 28 February payment claim was withdrawn.

It was common ground that both payment claims complied with the SOPA requirements in all critical respects.

Digby J held that the covering email and the 1 March payment claim did not *"clearly and unequivocally convey to the defendant and the Superintendent that the 28 February payment claim was withdrawn or*

Key takeaways

1. A payment claim amending or revising the amount claimed in an earlier payment claim for the same reference date is a new payment claim.
2. If a payment claim is to be withdrawn and replaced with a new one for the same reference date, this must be clearly and unequivocally communicated.
3. If there are multiple payment claims for the same reference date, the later payment claim(s) will be invalid.

Keywords:

revision of payment claims; multiple payment claims

abandoned by the Plaintiff and replaced by the 1 March payment claim".[1] His Honour observed that it was not until Valeo's email of 6 March 2018 that it clearly and unequivocally communicated its position, namely, that Valeo had withdrawn the 28 February payment claim and no longer relied on it.

As a result, by 1 March 2018, Valeo had served two payment claims for the same reference date, contravening the prohibition on this in section 14(8) of the SOPA. The later payment claim was held to be invalid and not capable of supporting an adjudication claim under the SOPA.

Digby J referred to Vickery J's judgment in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd (No 2)*.[2] In that case, the contractor re-sent the relevant payment claim with additional trade invoices attached but, critically, did not amend the amount claimed. Vickery J held that *"the re-sending of the same payment claim, even if reasonably supplemented with additional material and information, does not offend these objectives of the Act"*.[3] These factors were held to be sufficient to distinguish *Amasya* from the present case.

Practical implications of the decision

Digby J left open the door for payment claims to be withdrawn or abandoned. However, if a payment claim is to be withdrawn or abandoned, this must be clearly and adequately communicated to the respondent. If this were not the case, difficulties and uncertainty could arise in relation to the time by which a payment schedule had to be served.

http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2018/243.html

1 At [36]; see also [38] and [44]
2 [2015] VSC 500 (*Amasya*)
3 Amaysa at [86]

Clough Projects Australia Pty Ltd v Floreani [2018] WASC 101

CORRS CONSTRUCTION AND PROJECTS LEGAL UPDATE

Facts

Clough Projects Australia Pty Ltd (**Clough**) subcontracted Oceanic Offshore Pty Ltd (**Oceanic**) to provide diving services as part of an upgrade of Mundaring Weir.

Clause 22 of the subcontract provided that Oceanic could not vary the work without a written direction from Clough. Oceanic submitted fifteen separate invoices: eight on May 2017 and seven on 30 June 2017. Oceanic's invoices were based on variations it claimed Clough had ordered. Clough disputed that variations had been made as it had issued no written directions for the work claimed in Oceanic's invoices.

Oceanic applied for adjudication in relation to its fifteen invoices. Oceanic argued that the May invoices constituted one payment claim and the June invoices constituted a second. Clough argued that there were fifteen separate claims and that nine of these had been disputed.

The adjudicator, Floreani, agreed with Clough's approach, finding that there were fifteen separate payment claims and nine payment disputes. He went on to award Oceanic a sum based on seven of the payment disputes on the basis that implied contracts had been formed, circumventing the need to comply with clause 22 of the subcontract.

Key issues

Clough applied to the Supreme Court for a writ of certiorari to quash Floreani's determination. Clough raised three concerns.

- First, whether the adjudicator had the power to adjudicate more than one payment dispute between the parties simultaneously without the consent of both parties.
- Second, whether the adjudicator could determine the dispute on a ground not argued by the parties, an approach Clough argued denied it procedural fairness.
- Third, whether the adjudicator had jurisdiction to determine payment disputes on the basis that one or more implied contracts had been made between the parties.

Simultaneous resolution of multiple disputes

Section 32(3)(c) of the CCA provides that an adjudicator may adjudicate a payment dispute simultaneously with one or more other payment disputes if doing so will not adversely affect the adjudicator's ability to resolve disputes fairly, quickly, informally and as inexpensively as possible.

Key takeaways

- Section 32(3)(c) of the Construction Contracts Act 2004 (WA) (**CCA**) permits an adjudicator to adjudicate multiple disputes between the same parties simultaneously, even without the consent of both parties.
- Adjudicators risk procedural unfairness if they do not give a party an opportunity to make submissions on an adverse conclusion which the adjudicator has arrived at but for which neither party has argued.
- Adjudicators lack jurisdiction under the CCA to adjudicate implied contracts separate from the construction contract from which payment disputes arise.

Keywords:

payment claims; multiple disputes; implied contracts

Clough contended that:

- section 32(3)(c), which did not require the consent of the parties, only applied to payment disputes involving different parties; and
- section 32(3)(b), which did require the consent of both parties, was the CCA provision that applied where the relevant payment disputes to be determined simultaneously were between the same parties — as in the current circumstances.

Tottle J held that section 32(3)(c) applied. First, there was no textual basis for limiting the application of section 32(3)(c) to different parties. Second, this interpretation did not render the power in section 32(3)(b) obsolete. Section 32(3)(b) applied where consent between the parties was forthcoming while section 32(3)(c) simply allowed the adjudicator to proceed to determine adjudications between the same parties simultaneously where consent was withheld. Third, this interpretation accorded with the general objective of the CCA to resolve disputes 'quickly, informally and inexpensively' and to keep money flowing down the contractual chain.[1] Finally, extrinsic material including the explanatory memorandum to the CCA also supported this interpretation.

Adjudicator's reliance on a ground not argued by one party

The adjudicator reasoned that some of Oceanic's payment claims for variations could be supported on the basis that an implied contract was formed, as in *Liebe v Molloy*.[2] Clough argued that this reasoning was not evident in either party's case and that the adjudicator had reached his conclusion based on reasons which had not been subject to submissions.

The Court affirmed that the applicable standard of procedural fairness is whether the decision maker has advised of any adverse conclusion which has been arrived at which would not obviously be open on the known material. A person likely to be affected by the decision is entitled to put information and submissions to the decision maker in support of an outcome that supports its interests.[3]

The Court applied the principle in *John Holland Pty Ltd v Chidambara* that a writ of certiorari is not available where the breach of procedural fairness would not have affected the adjudicator's decision.[4] Tottle J found the adjudicator failed to afford Clough procedural fairness by not giving Clough the opportunity to make

1 *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* (2011) 43 WAR 319 at [87] (Murphy JA, Martin CJ agreeing)
2 (1906) 4 CLR 347
3 *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591–2
4 *John Holland Pty Ltd v Chidambara* [2017] WASC 179 at [53]

submissions in respect of the adjudicator's conclusion that some of Oceanic's claims could be determined by reference to an implied contract. His Honour considered that submissions by Clough may have affected the adjudicator's decision.

This breach of procedural fairness constituted sufficient grounds for a writ of certiorari quashing the determination.

Implied contracts

Clough argued that the adjudicator's jurisdiction was limited to determining claims which arose under the subcontract, and therefore, if implied contracts arose at all, they would have been outside the ambit of the adjudicator's jurisdiction.

Tottle J noted that the reference to an "implied contract" was ambiguous because it could have either meant a contract which arose by inference rather than express declaration or it may have referred to the fiction that had historically grounded restitutionary claims.

Tottle J found that the adjudicator appeared to have decided that implied contracts had arisen between the parties by inference. These implied contracts were outside the ambit of the adjudicator's jurisdiction, which was limited to adjudicating payment disputes arising from the subcontract. Therefore, the adjudicator had made a jurisdictional error.

Alternatively, even if the adjudicator had meant to refer to an implied contract in the context of restitution, this would also be outside the ambit of the adjudicator's jurisdiction under the principles set down by Kenneth Martin J in *Delmere Holdings Pty Ltd v Green*.[5]

http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASC/2018/101.html

5 *Delmere Holdings Pty Ltd v Green* [2015] WASC 148 at [38]–[39], [118]

Other recent developments

Contractual requirements for writing: ink that cannot be erased?

Rock Advertising Limited v MWB Business Exchange Centres Limited [2018] UKSC 24

Keywords:

"no oral modification" clauses

Key takeaways

Clauses that requires contractual amendments to be in writing are common. Such clauses will be given full effect in English law. Under Australian law, such clauses are probably not effective to defeat a later oral amendment.

This conflict of authority is directly relevant to oral variations and other directions on site.

Background

Lord Sumption's opening paragraph pithily states the issues to be decided:

> *"Modern litigation rarely raises truly fundamental issues in the law of contract. This appeal is exceptional. It raises two of them. The first is whether a contractual term prescribing that an agreement may not be amended save in writing signed on behalf of the parties (commonly called a "No Oral Modification" clause) is legally effective. The second is whether an agreement whose sole effect is to vary a contract to pay money by substituting an obligation to pay less money or the same money later, is supported by consideration."*

How did these questions arise? Stripped of all detail, the essential facts were simple. A licensor and a licensee entered into a licence containing this clause:

> *"This Licence sets out all of the terms as agreed between [the licensor] and Licensee. No other representations or terms shall apply or form part of this Licence. All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect."*

The licensee claimed the licensor had orally agreed that unpaid late rent could be repaid over the remaining term of the licence. The licensor, which disputed these facts, ultimately terminated the licence and sued for the unpaid rent.

The English position

Are "no oral modification" clauses effective? — Yes

The original contract required that any amendments to it be in writing. The alleged amendment regarding the timing of payment was strictly oral. If the "no oral modification" clause was legally effective, the licensee's case would fail.

The Court gave the express written clause its full force. The position in the principal judgment was unambiguous:

> *"the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation."*[1]

The Court's reasoning for this conclusion was expressly commercial. After explaining why parties might include such clauses, Lord Sumption concluded:

> *"These are all legitimate commercial reasons for agreeing a clause like clause 7.6. I make these points because the law of contract does not normally obstruct the legitimate intentions of businessmen, except for overriding reasons of public policy. Yet there is no mischief in No Oral Modification clauses, nor do they frustrate or contravene any policy of the law."*[2]

Lord Sumption held that all reasons to the contrary were "entirely conceptual". These conceptual objections do of course have some foundation: in principle, whatever parties lawfully agree by contract, they can later change. In general, parties cannot take away their ability to agree on something else later on. Considerations like this are important in understanding the Australian law, which is discussed below.

Was there good consideration in a promise to perform less than the original contract required? — Not decided

Every simple contract (not in the form of a deed) requires consideration. So too does any amendment of a contract. Here, the licensee was seeking to enforce an alleged promise that the licensor would accept late rent being repaid over the term of the licence (without interest).

Some cases suggest that where the promisee (the licensor on these facts) receives a practical benefit — for example, by having a promise reiterated — this may be good consideration. There is differing authority,[3] and the scope of the "practical benefit" idea has not been resolved by the Supreme Court of the United Kingdom or the High Court of Australia.

This issue is far from academic as it commonly arises where one party is struggling to perform a contract and the other makes commercial concessions to try to ensure the contract is substantially performed.

Regrettably, the Court did not need to decide this issue because it had already determined that the contract could not have been amended because the alleged amendment was not in writing.

The Australian position

Are "no oral modification" clauses effective? — Probably not

As Lord Sumption acknowledged,[4] the position in Australian law seems to be different. A later oral amendment to a contract may be contractually enforceable, even though the same parties had earlier agreed that such amendments had to be written.

Finn J considered this issue carefully in *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*:

> *"The principal cases in this country dealing with non-compliance with contractually imposed written modification clauses are those dealing with claims to be paid for extra work or services rendered under contracts which require written orders or written agreements for such works or services:* Liebe v Molloy *(1906) 4 CLR 347 ... The conclusions to be drawn from the cases in this category are that (i) notwithstanding the writing requirement, it is open to the parties by express oral agreement or by contract implied from conduct to impose further or different rights and obligations on each other from those contained in the original contract".*[5]

The best view, thus, is that a "no oral modification" clause will not be legally effective in Australia. Against this, it must be noted that recent authority is sparse and *Liebe v Molloy*, the High Court case Finn J cites, is difficult to interpret in the modern framework of contract and quantum meruit.

Implications for construction law

The legal issues in the *Rock Advertising* case play out on site every day. Construction contracts frequently require any amendment of the terms to be in writing, and typically impose special processes for variations and other directions by the superintendent. The effectiveness of these requirements largely depends on the precise drafting.

Notwithstanding these requirements, it is common for the parties to agree orally on some change in the scope of works. Where the contractor performs additional work in this situation and the principal declines to pay, the express terms of the contract pose a difficulty for the contractor. Claims in estoppel or quantum meruit (especially since *Lumbers v W Cook Builders Pty Ltd (in liq)*[6]) are troublesome at best where there is a subsisting contract. If Australian courts were to follow the approach taken in the *Rock Advertising* case, the contractor's situation would be even more perilous.

https://www.supremecourt.uk/cases/docs/uksc-2016-0152-judgment.pdf

1 At [10]. Lord Sumption gave the principal judgment, with Lady Hale, Lord Wilson and Lord Lloyd-Jones agreeing. Lord Briggs gave a separate judgment agreeing on the result, but relied on narrower reasoning

2 At [12]

3 Compare *Williams v Roffey Bros & Nicholls (Contractors) Ltd* 1 [1991] 1 QB 1 and *In re Selectmove Ltd* [1995] 1 WLR 474. In Australia, the most commonly cited authority on point is Santow J's judgment in *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723

4 At [8]

5 (2003) 128 FCR 1 at [217]

6 (2008) 232 CLR 635

Other recent developments

North Midland Building Limited v Cyden Homes Limited [2018] EWCA Civ 1744

Keywords:

prevention principle; concurrent delays

Key takeaways

An express term is likely to be enforced where it provides that the contractor is not entitled to an extension of time to the extent there is concurrent delay. Such a clause does not enliven the prevention principle.

In short parties may contract out of the prevention principle.

The contractual context

The employer engaged a contractor to build a large house and outbuildings on a farm. The contract was an amended 2005 JCT Design and Build contract. The extension of time clause included the following relevant amendment:

> *"2.25.1 If on receiving a notice and particulars under clause 2.24:*
>
> *1 any of the events which are stated to be a cause of delay is a Relevant Event; and*
>
> *2 completion of the Works or of any Section has been or is likely to be delayed thereby beyond the relevant Completion Date;*
>
> *3 and provided that*
>
> *(a) the Contractor has made reasonable and proper efforts to mitigate such delay; and*
>
> *(b) any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account;*
>
> *then, save where these Conditions expressly provide otherwise, the Employer shall give an extension of time by fixing such later date as the Completion Date for the Works or Section as he then estimates as to be fair and reasonable."*

A dispute about an extension of time arose. On appeal, the central question was whether the employer could rely on clause 2.25.3(b) to reduce an extension of time.

Why this decision matters

This decision about a farm in Lincolnshire raised two fundamental questions in construction law.

This first is whether a concurrent delay clause giving no right to an extension of time for the period of the concurrency is enforceable. This generates follow-up questions about what concurrent delay is, and ultimately turns on the nature of the prevention principle.

The second question may be expressed in five words: what is the prevention principle? This is a question that courts have often evaded, but the Court of Appeal gives further insight. Coulson LJ gave judgment, with the Master of the Rolls and the Senior President of Tribunals agreeing.

Concurrent delay

Isn't concurrent delay really tricky? — Yes, where the contract does not properly deal with it

What if the contract says nothing about concurrent delay and it arises? This is a notoriously troublesome question on which the case law is divided.[1] Akenhead J held in *Walter Lilly and Co Ltd v Giles Mackay* that the contractor was entitled to an extension of time despite the concurrency.[2] On the unusual facts of *City Inn Ltd v Shepherd Construction Ltd*, the Scottish Court of Appeal took an apportionment approach.[3] *Keating on Construction Contracts* suggests no extension of time is required to the extent of any concurrency.[4]

The Court of Appeal was able to evade this question because the parties' contract dealt with the matter directly. This is common in Australia.

Australian standard forms of construction contract

In Australia, standard forms of construction contract take different approaches to concurrent delay. Clause 34.4 of AS 4000–1997, for example, takes the view that "overlapping delays" should be apportioned:

> *"When both non-qualifying and qualifying causes of delay overlap, the Superintendent shall apportion the resulting delay to WUC according to the respective causes' contribution."*

Whatever the starting point, of course, standard forms are commonly amended to effect a risk allocation like that in question in this case, where the contractor is not entitled to an extension of time where there is "concurrent delay".

What is concurrent delay?

The clause in question used the undefined phrase "concurrent with another delay", so it was necessary to consider its meaning (at least in passing). The Court of Appeal provided further support for Hamblen J's approach in *Adyard Abu Dhabi v SD Marine Services*:

> *"A useful working definition of concurrent delay in this context is 'a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency' — see the article Concurrent Delay by John Marrin QC (2002) 18(6) Const. L.J. 436."*[5]

The clause was given its plain and ordinary meaning

In short, the Court of Appeal was asked whether an unambiguous[6] express term was enforceable. It was:

> *"The consequence of this clear provision is that the parties have agreed that, where a delay is due to the appellant, even if there is an equally effective cause of that delay which is the responsibility of the respondent, liability for the concurrent delay rests with the appellant, so that it will not be taken into account in the calculation of any extension of time.*
>
> *In the light of that conclusion, the only remaining issue is whether there is any reason in law why effect should not should be given to that clear provision."*[7]

This last point required considered analysis of the prevention principle. For the reasons below, the Court of Appeal held that the prevention principle did not interfere with simple enforcement of the parties' bargain as expressed in the unambiguous clause.

The prevention principle is an implied term and parties can contract out of it

The appellant contractor argued that the prevention principle was "a matter of legal policy which would operate to rescue the appellant from the clause to which it had freely agreed."[8] The Court of Appeal resoundingly rejected that argument for five reasons. Those reasons reveal much about the prevention principle.[9]

1. Not a matter of legal policy

> *"[T]he prevention principle is not an overriding rule of public or legal policy. There is no authority for such a proposition".*[10]

This statement seems anodyne but is penetrating. Rules of public policy are uncommon, but the prohibition on contractual penalties is one obvious example. Parties cannot contract out of the rule against penalties precisely because it is an overriding policy rule.

2. The prevention principle was not automatically enlivened because the extension of time regime dealt with acts of prevention

> *"[T]ime was not set at large because the contract provided for an extension of time on the occurrence of those events".*[11]

Here, the Court of Appeal seems to be making the point that the prevention principle cannot be automatically enlivened where the contract provides a mechanism for time to be extended for acts of prevention. (Naturally, the prevention principle may arise where the mechanism is improperly applied.)

3 & 4. The prevention principle and concurrent delay are different issues

> *"Thirdly, the prevention principle has no obvious connection with the separate issues that may arise from concurrent delay. There is no mention of concurrent delay in any of the authorities on which the prevention principle is based".*[12]

The third and fourth reasons for rejecting the contractor's claim seem to have arisen from a confused argument that may have conflated the prevention principle and the concept of concurrent delay. The Court of Appeal seized the opportunity to confine the concept of concurrent delay, observing that the clause was simply designed to deal with the confusing case law on concurrent delay.

This allowed the Court to treat the enforceability of the concurrent delay clause narrowly: it was an unambiguous clause and vague references to the prevention principle did not suffice to invalidate it.

1 See Andrew Stephenson, 'Concurrency, Causation, Commonsense and Compensation': https://www.corrs.com.au/assets/thinking/downloads/Concurrency-Causation-Commonsense-Compensation.pdf
2 [2012] EWHC 1773 (TCC)
3 [2010] BLR 473
4 10th ed, para 8-014
5 At [16], citing Hamblen J's judgment reported in [2011] EWHC 848 (Comm)
6 At least in English law, the lack of ambiguity is important; Jackson J held in *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] BLR 195 at [56]: 'Insofar as the extension of time clause is ambiguous, it should be construed in favour of the contractor'. Whether this goes further than the *contra proferentem* principle is unclear
7 At [23]–[24]
8 At [30]
9 Australian case law is broadly consistent (see, eg, *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391) and this case provides a useful compendium of statements
10 At [30]
11 At [31]
12 At [32]

5. Parties can contract out of the prevention principle

> *"There is no suggestion in the authorities noted above that the parties cannot contract out of some or all of the effects of the prevention principle: indeed, the contrary is plain."*[13]

This is the vital practical conclusion: parties can contract out of the prevention principle; it does not operate as an overriding rule of policy.

If the prevention principle is not a policy of law, the curious may ask: what is it? Without reaching any conclusion, the Court of Appeal suggests the prevention principle would arise as an implied term.[14] Provided the prevention principle is not an overriding rule of policy, the question is probably of little practical importance. As Brooking J observed:

> *"Of course, to deal with the matter in terms of a rule or principle of law is not to say that that rule or principle will not yield to the contractual intention of the parties. It is clear that, whatever the correct theory may be as to the basis of the doctrine of prevention in relation to liquidated damages, the parties can effectively manifest by their contract an intention that the contractor shall be liable notwithstanding the prevention".*[15]

Conclusion

The judgment in this case repays close study, but the headlines are clear. Parties may contract out of the prevention principle. As a consequence, an express term providing that the contractor is not entitled to an extension of time to the extent there is concurrent delay is likely to be enforced.

http://www.bailii.org/ew/cases/EWCA/Civ/2018/1744.html

13 At [36]
14 At [28]. The method of implication is not discussed
15 *SMK Cabinets v Hili Modern Electric Pty Ltd* [1984] VR 391

Operators of critical port assets to provide information under new national security legislation

By **Michael MacGinley** (Partner) and **Caitlin McPhee** (Graduate Lawyer)

In the most recent attempt to respond to the increased risk associated with foreign investment in critical infrastructure, the Commonwealth Parliament has passed the Security of Critical Infrastructure Act 2018 (Cth) (**the Act**). The Act commenced on 11 July 2018.

Under the Act, the Minister is given the power to direct a reporting entity of a designated critical infrastructure asset to do or refrain from doing a particular thing, if the Minister is satisfied there is a risk prejudicial to national security that cannot otherwise be mitigated.

A "reporting entity" is defined under the Act as:

1. the responsible entity for the asset, being:
    a. the licence or approval holder of the relevant critical electricity, water or gas asset; or
    b. the operator in relation to a critical port asset; or
2. a direct interest holder in relation to the asset.

The Act identifies particular ports that will be initially captured under the new legislation. These include (amongst others) the Port of Brisbane, Port of Cairns, Port of Darwin, Port of Gladstone, Port of Newcastle and Port of Townsville.

The Act requires that the responsible entity provide information regarding:

- the location of the asset;
- a description of the area the asset services;
- details of the responsible entity, including incorporation details;
- details of the Chief Executive Officer;
- a description of arrangements under which the asset is operated by the operator;
- a description of data maintenance arrangements; and
- any other information prescribed by the rules.

Operators of critical port assets will be required to provide an initial report within six months of commencement of the Act.

Direct interest holders, being persons or entities with an interest in the asset of 10% or more, or with an ability to directly influence or control the asset, are to provide information regarding:

- details of the direct interest holder;
- information about the influence or control of the direct interest holder;
- information about the ability of any person to directly access the networks or systems necessary for the operation or control of the asset;
- details of entities with direct or indirect influence or control over the direct interest holder;
- information about the influence or control of that entity over the direct interest holder; and
- any other information prescribed by the rules.

Operators of critical port assets will be required to provide an initial report containing the information set out above within six months of commencement of the Act. If a port asset is declared a critical infrastructure asset after the Act commences, the port operator will similarly have six months to provide its initial report. This information will be recorded in the Register of Critical Infrastructure Assets monitored by the Secretary of the Department of Home Affairs.

Corporate environmental management systems – a must

By **Leanne O'Brien**, Special Counsel

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Banking Inquiry[1] and the Australian Prudential Authority's Prudential Inquiry into the Commonwealth Bank of Australia earlier this year are a timely reminder for large corporate entities and governments to review their governance, culture and accountability frameworks to ensure in respect of environmental matters that:

a) a sense of complacency does not develop which may lead to non-compliances with the law, particularly when making assumptions when a regulator is likely to act or not act;

b) a culture of reactivity does not develop when dealing with environmental risks;

c) an insular culture does not develop between various operational groups otherwise all other staff will not learn from experiences and mistakes made by one group; and

d) counter intuitively, colleagues who are collegial and collaborative are not reluctant to constructively criticise their peers' decision-making in a timely fashion (and, where appropriate, at an executive level) to change behaviours before they become entrenched.

Corporate environmental management system

Under planning and environmental legislation in most States, the operation of an effective corporate environmental management system (**CEMS**) may go some way to establishing an environmental due diligence defence to a development or planning offence. The Court's decision in *Environment Protection Authority v Great Southern Energy*[2] provides guidance as to the standard of a CEMS expected by the courts. Great Southern Energy was charged with a water pollution offence under the Clean Waters Act 1970 (NSW) and claimed in its defence that it had in place a detailed CEMS certified under ISO 14001. The cost of obtaining such certification was estimated at over $1,000,000. The Court held that, while the preparation of a CEMS is relevant to establishing a due diligence defence and ensuring sound environmental practice, the CEMS will be insufficient in establishing due diligence unless it is regularly updated and implemented effectively.

Effective CEMS

In short, large corporate entities and governments should review their CEMS to safeguard against any legislative breaches, reputational loss and environmental damage. Many factors are relevant to the effectiveness of a CEMS:

a) Regular legislative and case-law updates relevant to your business. Whilst updates produced by industry, legal bodies and regulators are helpful, it is important that someone tailor the information to your business needs and distil it into easily explained concepts.

b) Regular training of both executives and operational staff.

c) Proper understanding of the applicable obligations under relevant legislation and approvals. It is important not to repeat "urban" operational myths in these sessions – double-check references.

d) Clear channels of oversight and accountabilities – how are risks identified and how are they escalated? Are changes ever made to protocols or practices upon the escalation of the issue? If not, that may be an indicator the CEMS is not functioning as it ought.

e) Regular review of risks – if the risk ratings remain static from year to year, that is a flag that the CEMS may not be effective.

f) A balanced response to the identification of risk and to mistakes. How are mistakes responded to? Finger-pointing may foster non-communication or a reluctance to make timely and vital decisions: whereas, decision-making that encourages undue collaboration over timely and effective outcomes may slow the detection of risk failings and hinder improvements to any relevant practice/work method.

g) An appreciation that reliance upon "budgetary restraints and competing priorities" will afford only limited protection/excuse for public authorities.[3] The resources involved in carrying out due diligence, obtaining approvals and complying with approvals ought to be built into the project's budget.

Some practical examples of the issues raised above are set out below.

Regular training to dispel myths

It is not uncommon, particularly for low-risk works, that certain documents must be complied with, relieving the need for, say, a development approval.[4] However, practices may develop where regard is not actually had to those documents (which, also, from time to time may be amended) but earlier practices are relied on instead. It is important that the training be accurate and not repeat incorrect cultural practices.

Understanding the implications of complying with an approval

It is important that an approval holder fully understand the application of conditions. In the last few years there have been a number of legal arguments about when an offence is a "continuing" or a "complete" offence. Before the case of *Montrose Creek Pty Ltd v Brisbane City Council* (***Montrose***)[5], it was largely presumed/argued (although this issue has always turned on the language of the legislation) that if a condition required something to be done by a specified date, that created a complete offence. This meant that limitation periods applied in respect of when a regulator could take enforcement action against the entity responsible for the non-compliance.

1 Interim report due on 30 September 2018
2 [1999] NSWLEC 192
3 *Circelli v The Corporation of the City of Adelaide* [2017] SAERDC 42
4 For example, *Accepted development requirements for operational work that is constructing or raising waterway barrier works* (July 3, 2017) or *General Exemption Certificate Queensland Heritage Places* (valid until 31 Dec 2019)
5 [2012] QPEC 65

However, since *Montrose*, a specified date in a development condition (and we suggest an environmental authority) is likely to indicate when the offence crystallises and not that it is a complete offence. This means that the operator of a landfill may have ongoing responsibilities for, say, a project with ongoing remediation measures years past when it was initially required. In some instances, events may, arguably, have overtaken that obligation. It may have ramifications for entities that have accepted contaminated land for which there may be conditions that are not satisfied. Due diligence enquiries are becoming ever more essential in the environmental sphere.

Check approvals for ability to practically comply

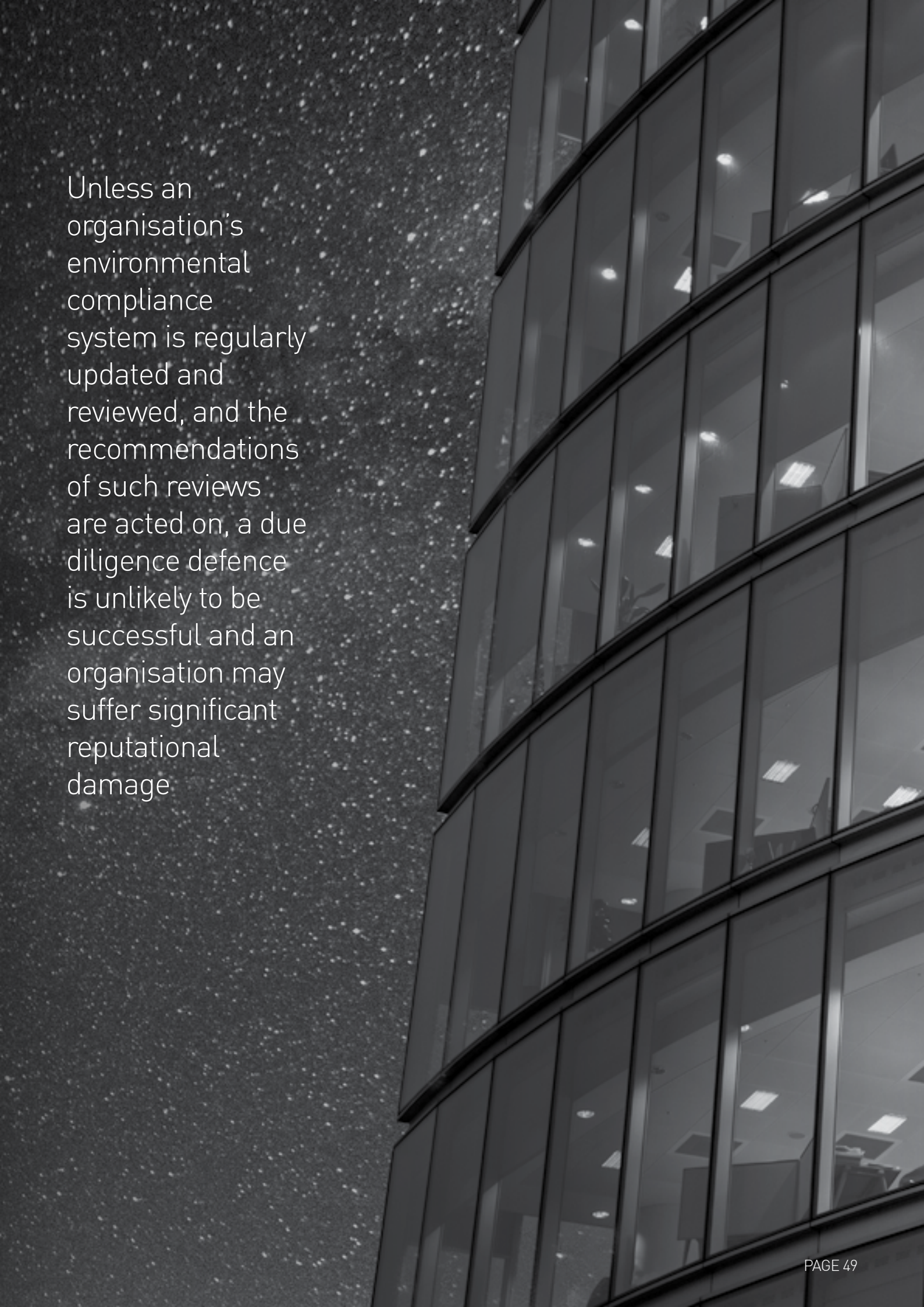
It has become increasingly important that within an appeal period, approval holders carefully review all the conditions attached to an approval. Should the approval holder be concerned about the requirements of a condition, it should exercise its review/appeal rights. Later, or in circumstances where land is acquired or inherited, if it becomes clear that a condition cannot operationally be complied with, the approval holder should consider legal avenues that may be open to it such as seeking to change the condition or using a statutory process that may be employed whilst steps are taken to achieve compliance.

Precautionary measures

We suggest that cross-checking approvals against practical delivery is particularly important when dealing with significant environmental infrastructure such as landfills. This is vital when dealing with inherited landfills or landfills that are earmarked to close. With the close of industrial, manufacturing and extractive activities, including landfills, comes management of how those activities are down-sized and eventually ceased, with implications for remediation and reporting. In this context, other issues not identified in the approval documentation (or the wording of the condition may be broad enough to capture a newly identified risk) may require consideration, such as the management of Perfluorinated Alkylated Substances, better known as PFAS, contained in, say, leachate. How will that be safely disposed of? Are there any practical changes, or given the PFAS environment and how the legislature sees this issue, are there likely to be changes in how this may be dealt with? This is an obvious example why a review of a CEMS and its legal impact on your business is a must.

Conclusion

The frequent (and often subtle, complex but significant) amendment of planning and environmental legislation and associated case law can quickly render a CEMS ineffective. Unless an organisation's environmental compliance system is regularly updated and reviewed, and the recommendations of such reviews are acted on, a due diligence defence is unlikely to be successful and an organisation may suffer significant reputational damage.



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Recent changes in the property sector

CORRS CONSTRUCTION AND PROJECTS LEGAL UPDATE

As the property market shifts, we explore some of the key changes in the market, including the emerging opportunity for build-to-rent, our transition to a digital future and recent changes in relation to disability access in Victoria.

Build it and they will come: Australia on its way to build-to-rent

Build-to-rent is about to kick off in the Australian property sector. Until now, institutional investment in residential housing has been unviable in Australia. Its treatment in respect of land tax and Managed Investment Trusts (**MITs**) (to name a few barriers) has made build-to-rent assets hard to stack up financially.

However, in a recent media release from the Treasury, the Hon Scott Morrison MP announced that MITs will soon be able to invest in residential real estate. Until now, MITs have been prohibited from holding assets in this space. Build-to-rent assets will become eligible for the 15% MIT withholding tax rate where the investment is in affordable rental housing. The current available information suggests that there will still be an imbalance for international investment in build-to-rent with an MIT compared with investments in office buildings or shopping centres which could dampen the appetite of some institutional investors.

It's clear that build-to-rent remains an untapped asset class in Australia. In 2015, institutional real estate portfolios in Australia comprised 0% residential compared with 12% in Germany and 25% in the USA. However, it has been estimated that a mature build-to-rent market in Australia could be worth $40 billion.[1] For this reason it's no surprise that large industry players have begun to enter this space, with Mirvac announcing its first purpose-built build-to-rent asset in Australia at Sydney Olympic Park.

Build-to-rent offers:

1. **to investors**, an opportunity to diversify their portfolios due to the potentially counter-cyclical nature of build-to-rent performance (consider the Australian experience following the GFC, where rental vacancy fell and rental growth accelerated);
2. **to developers**, a chance to increase returns by vertically integrating their business models (building, owning long-term and managing facilities);
3. **to builders**, an alternative asset class for construction when the traditional built-to-sell residential market is experiencing a downturn;
4. **to builders**, an opportunity to implement innovative or new approaches to construction to help developers / investors make a build-to-rent scheme economically feasible; and

5. t**o residential tenants**, high levels of tenant amenities and services, access to affordable housing, and the stability of an institutional landlord favouring long-term tenancies.

While a number of barriers to the adoption of build-to-rent remain, time will tell how this emerging market will unfold.

E-conveyancing is coming: what does it mean for you?

The era of e-conveyancing is well and truly upon us, and as Victoria makes the transition to a 100% digital future (with all States to follow), new requirements will come into effect that will forever change the way property-related transactions are conducted.

As a part of this major transition, the online platform PEXA has been developed. PEXA is used to electronically lodge property instruments (such as transfers, mortgages and caveats) and carry out property settlements. In Victoria, PEXA is currently mandated for all standalone mortgages, discharges of mortgages, caveats, withdrawals of caveats and transfers (where parties are represented by a lawyer or conveyancer). This means a settlement involving an outgoing or incoming mortgagee is not required to settle on PEXA.

However, as of 1 October 2018, all available combinations of transactions must be lodged on PEXA, which is estimated to capture over 90% of transactions. By 1 August 2019, all transactions affecting title must be lodged electronically. This means that any transaction that includes a property element will be reliant on the functionality and capability of the online platform. Based on our experiences to date, we expect that delays and costs implications will be felt across the industry in the short to medium term as the platform catches up with the demand of the market. As the requirement will relate to all combinations of transactions, this will impact infrastructure projects, commercial developments, PPPs and the traditional residential market.

This shift to e-conveyancing is playing out in an environment where:

(a) PEXA is on track to be sold (which may result in private ownership);

(b) members of the Property Council of Australia, developers and conveyancers have expressed concerns about the October 2018 deadline in light of current vulnerabilities of PEXA's online platform;

(c) developers are cautioning that PEXA cannot adequately handle high volumes of transactions and that larger numbers of transactions being carried out electronically will result in delays for lodgements and property settlements; and

(d) other players are potentially entering the market such as the Australian Stock Exchange and InfoTrack collaboration, *Sympli*, and the most recent announcement, *LEXTECH*.

Equal access: is your building project discriminatory?

The recent Victorian decision of *Owners Corporation v Anne Black* [2] has determined that all Victorian owners corporations hold responsibilities under equal opportunity legislation to ensure their services are non-discriminatory to tenants and visitors with disabilities. The effects of this decision may not be limited to owners corporations.

Considered a win for equal opportunity, owners corporations will now be required to make *"reasonable adjustments"* to buildings for tenants and visitors with a disability or risk being discriminatory – with owners corporations footing the bill for these adjustments.

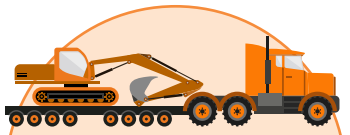
To determine whether an adjustment is reasonable, all relevant facts and circumstances must be considered including the nature of a person's disability, the type of adjustment required as well as the financial circumstances and financial impact on the owners corporation. Reasonable adjustments to be made by owners' corporations will include installing sensor doors, additional lighting or signage to provide access to common ground entrances, hallways, meeting rooms, car parks or other facilities. The decision applies to all apartment buildings in Victoria, including those that were built before current disability standards were introduced.

This decision is not limited to the residential market, with owners corporations concerning commercial premises and retail premises will also be held to the same standard.

This decision may also have flow on effects to projects more generally which may require modifications or refurbishments to ensure strict compliance with disability access legislation.

1 JLL, *Build to Rent Residential: Australia's Missing Sector* (September 2017)
2 [2018] VSC 337

AMENDMENTS TO THE *HEAVY VEHICLE NATIONAL LAW* - IMPACT ON THE CONSTRUCTION INDUSTRY



Amendments to HVNL

On 1 October 2018, the *Heavy Vehicle National Law* (HVNL) will be amended to introduce the principle of shared responsibility for each party in the chain of responsibility for transport activities relating to a heavy vehicle (4.5 tn +).

- Consignees of any goods in a vehicle are a party in the chain of responsibility. So, construction companies ordering goods (steel, etc) to construction sites are consignees.
- An unloader of goods in a vehicle is a party in the chain of responsibility. This may be the construction company through the operation of cranes etc.
- A scheduler of the transport of goods is a party in the chain of responsibility. This may be part of the activities on site.

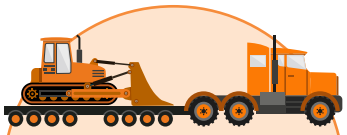
Primary Duty

Each party will have a Primary Duty imposed on it – it must ensure so far as is reasonably practicable the safety of the party's transport activities relating to the vehicle.

Reasonably practicable is a defined term. It requires the party to weigh up all relevant matters including:

- the **likelihood** of the safety risk;
- the **harm** that could result from the risk;
- what the person **knows** or ought reasonably to know about the risk;
- what the person knows about **controls** to remove or minimise the risk;
- the availability of controls; and
- the **costs** associated with the available controls and whether they are proportionate to the likelihood of the risk.

Observe, Record & Report – At a minimum, construction companies should be requiring their staff to Observe, Record & Report instances of observable driver fatigue, unsafe loading of vehicles or observable defects in a vehicle.



Nature of Responsibility

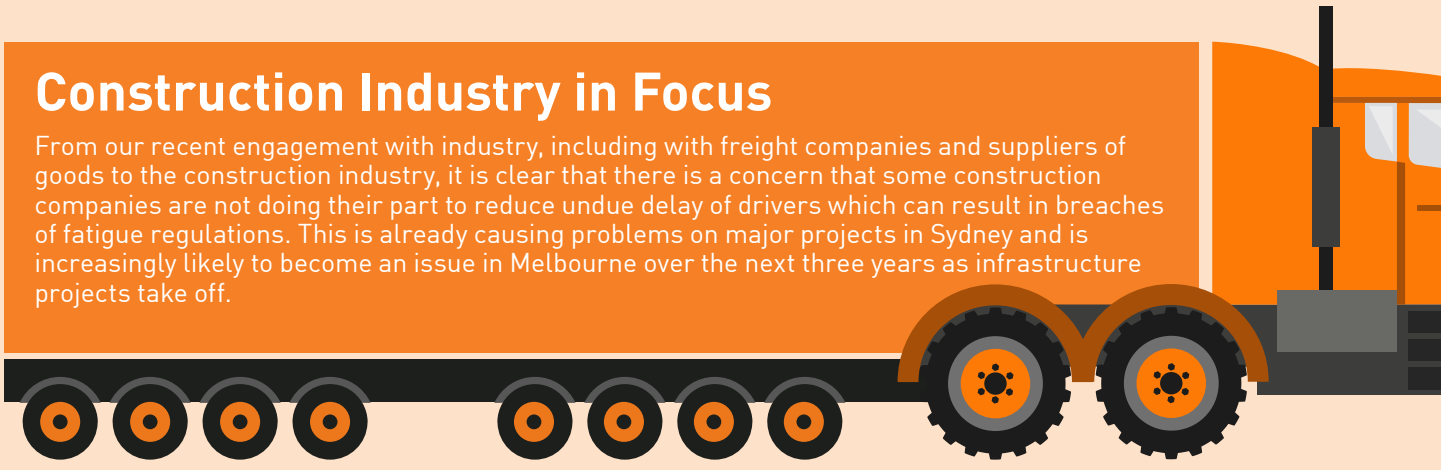
The nature of your responsibility depends in part on the function you perform and your capacity to control, eliminate or minimise the risk.

One key risk that construction companies can influence is driver fatigue.

- A construction company can potentially control or minimise the risk of delays on their sites so that drivers are not parked on the road for lengthy periods, potentially exceeding their hours and being fatigued.
- Better information to schedulers at freight companies and more realistic information on timing could minimise these delays. If the company is not careful with its instructions to freight companies, it may mislead them as to times and mean drivers are banked up on the side of the road, as has apparently happened regularly on major projects in Sydney.
- If a fatigued driver has an incident on the road, the construction company may share responsibility. The penalties are significant.

Construction Industry in Focus

From our recent engagement with industry, including with freight companies and suppliers of goods to the construction industry, it is clear that there is a concern that some construction companies are not doing their part to reduce undue delay of drivers which can result in breaches of fatigue regulations. This is already causing problems on major projects in Sydney and is increasingly likely to become an issue in Melbourne over the next three years as infrastructure projects take off.



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Causing a Contravention

Each party must also not cause or encourage another person to contravene the HVNL and their duty. This includes asking, directing or requiring another person to do or not do something. It also includes a party entering into a contract to do or not do something or that purports to annul, vary, exclude, restrict or change the effect of the HVNL.

You should be:

- reviewing your contracts to ensure compliance;
- ensuring you are not imposing unrealistic deadlines; and
- ensuring that you are not causing delays in the supply chain.

Executive Duties

To ensure companies discharge their Primary Duty – a duty is also placed on executives of the company.

Executives must exercise due diligence to ensure the company complies with its Primary Duty.

Due diligence includes:

- acquiring and keeping up to date knowledge of the safe conduct of transport activities;
- understanding your company's transport activities (consignee, unloading) and how your activities influence other parties in the supply chain;
- using appropriate resources to eliminate or minimise the hazards and risks; and
- implementing processes to eliminate or minimise risk and to receive information about a hazard or risk and verifying action.

Offences

A failure to comply with the Primary Duty is an offence. There are three categories of offence, with category one being an indictable offence:

CATEGORY 1

Conduct that exposes an individual to a risk of death or serious injury, and the person is reckless as to the risk.

Individual (includes an executive who breaches the Executive duty) – $300,000 or 5 years imprisonment or both

Corporation - $3,000,000

CATEGORY 2

Conduct that exposes an individual to a risk of death or serious injury.

Individual (includes an executive who breaches the Executive duty) - $150,000

Corporation - $1,500,000

CATEGORY 3

Conduct that contravenes the duty

Individual (includes an executive who breaches the Executive duty) - $50,000

Corporation - $500,000

There does not have to be an incident to breach the Primary Duty, particularly with regard to category 3 – not having procedures in place will be a breach. Not exercising due diligence will be a breach.

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