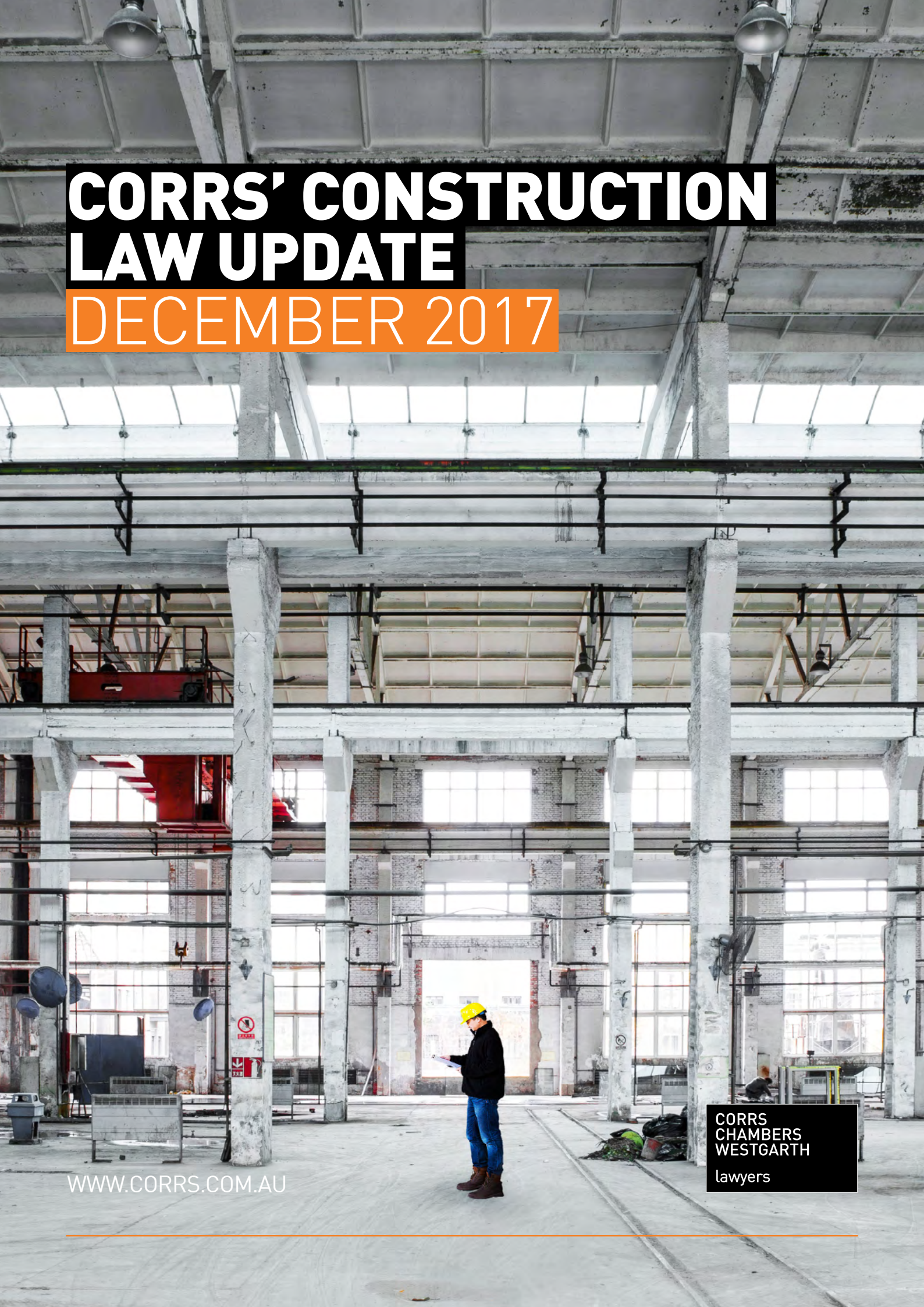
CORRS' CONSTRUCTION LAW UPDATE

DECEMBER 2017



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

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

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

We hope that you find it interesting and stimulating.

OUR THINKING

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

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AUSTRALIAN COMPETITION AND CONSUMER COMMISSION V JJ RICHARDS & SONS PTY LTD [2017] FCA 1224

KEYWORDS: UNFAIR CONTRACT TERMS

KEY TAKEAWAYS

The ACCC is actively enforcing the unfair contract terms regime, which now applies to standard form small business contracts.

A contracting party may seek a declaration that unfair contract terms in that type of contract are void. The ACCC may also pursue declarations and injunctions affecting all contracts with the same terms.

Background

Since 2010, the *Australian Consumer Law* (**ACL**) has protected consumers against unfair contract terms. Since 12 November 2016, these protections have extended to apply to standard form contracts with small businesses.[1] Onerous terms in subcontracts, supply agreements and consultancy agreements may be subject to challenge, so it is vital to understand the regime.

The prohibition on unfair contract terms only applies to "standard form contracts". A contract is presumed to be a standard form contract unless proved otherwise.[2] Standard form small business contracts will fall within the regime if, at the time of entering into the contract:

- the counterparty is a business employing fewer than 20 people; and
- the price payable under the contract is no more than $300,000 (or $1 million if the contract is for more than 12 months).[3]

A term in such a contract will be deemed unfair if:

- it would cause significant imbalance in the parties' rights and obligations;
- it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment to a party if it were relied on.[4]

Under the regime, unfair terms are void and so therefore unenforceable.

Facts

Prior to the extension of the regime to standard form small business contracts, the ACCC undertook a review of various industries, including the waste management industry in which JJ Richards & Sons Pty Ltd (**JJ Richards**) operates. The ACCC produced a report which specified common terms that might be found to be unfair under the regime.[5]

After the extension, JJ Richards entered into or renewed at least 26,000 standard form contracts for waste management services. The ACCC commenced proceedings against JJ Richards seeking declaratory and injunctive relief, alleging that some of the standard form small business contracts contained unfair contract terms.

The following eight terms were alleged to be unfair:

- automatic renewal of contracts unless they are cancelled 30 days before the end of the term;
- the right for JJ Richards to vary prices unilaterally;
- exclusions of liability for JJ Richard when its performance has been "prevented or hindered in any way";
- a right to charge customers for services not rendered for reasons beyond the customer's control and potentially even for reasons within JJ Richards' control;
- a requirement that customers obtain all of their waste management services from JJ Richards;
- a right for JJ Richards to continue charging the customer after services had been suspended following late or non-payment;
- an unlimited indemnity in favour of JJ Richards; and
- a prohibition on customers terminating their contracts if they had payments outstanding and a clause allowing JJ Richards to continue charging customers equipment rental after termination of their contract.[6]

Decision

This is the first case the ACCC has brought under the extended unfair contract terms regime. The parties put forward agreed minutes of proposed declarations and orders. The Court substantially granted these, but also provided some useful commentary.

Moshinksy J held that whether a term promotes a significant imbalance must be considered in light of the whole contract and any other rights and obligations it gives to the parties.[7]

A term would be less likely to promote a significant imbalance if it was incorporated to protect one party's legitimate interests.[8] JJ Richards did not argue that any of the impugned terms were necessary to protect its legitimate interests.

Even though it is not an essential element, the ACL requires courts to consider the extent to which a term is transparent. Moshinksy J found that that the impugned terms were not transparent because:

- they were drafted in legal language;
- the font size was very small; and
- they were not presented in a way that drew them to a customer's attention.

As a result, his Honour agreed with the parties that the impugned terms were unfair under section 24 of the ACL and deemed them void where they were contained within a small business contract.

Consistent with the minutes of the consent orders, the Court granted declarations and remedies, requiring JJ Richards:

- not to rely on those particular terms and to agree not to use them in any future contract with a small business;
- to publish a correction notice;
- to provide a copy of the court order to every small business customer who was a party to a contract with those terms; and
- to implement an ACL compliance program.[9]

http://classic.austlii.edu.au/au/cases/cth/FCA/2017/1224.html

1 Competition and Consumer Act 2010 (Cth) Schedule 2 (Australian Consumer Law) section 23(1)
2 ACL section 27(1)
3 ACL section 23(4)
4 ACL section 24(1)
5 Australian Competition and Consumer Commission, *Unfair Terms in Small Business Contracts: A Review of Selected Industries* (2016)
6 At [36]
7 At [28]
8 At [31]
9 At [2]–[7]

THE OWNERS — STRATA PLAN 84741 V NAZERO CONSTRUCTIONS PTY LTD [2017] NSWSC 1134

KEYWORDS: QUANTIFICATION OF DEFECT RECTIFICATION COSTS; EXPERT REPORTS

KEY TAKEAWAYS

When costs of rectifying defective work are unclear, a court will not necessarily adopt a midpoint between the parties' experts. The presumption is against the wrongdoer. This means a finding at the upper end of a range of loss is possible.

Despite this, liable parties will benefit from tendering their own expert evidence. The production of multiple opinions creates a range which can guide a court's assessment. In that sense, the existence of a range in and of itself prevents complete deference to one (namely the plaintiff's) expert opinion.

Facts

In July 2011, Iris Diversified Property Pty Ltd (**Iris**) engaged Nazero Constructions Pty Ltd (**Nazero**) to build a residential block of units in Clovelly. A director of Nazero, Mr Wardy Younan, executed the contract as guarantor. Upon completion in 2012, the property was vested in the Owners Corporation — Strata Plan 84741 (**the Owners**).

Following handover, the Owners discovered numerous defects in the building and, consequently, instituted separate proceedings against Iris and Nazero. In October 2015, the Owners obtained judgment against Nazero for approximately $1.45 million.

By the time of these proceedings, Iris had admitted that defects requiring rectification existed, and that this constituted a breach of the statutory warranties it owed under the Home Building Act 1989 (NSW). The major outstanding issue was quantification of reasonable rectification costs. In the Owners' view, this amounted to $1.17 million.

In demonstrating the loss, the Owners relied on the report of its quantity surveyor, Mr George Zakos, which it had served on Iris in July 2015. Initially, Iris did not intend on adducing any evidence. It instead filed a cross-claim against Mr Younan, seeking a declaration that he was liable as guarantor. In response to this, Mr Younan served the report of another quantity surveyor, Mr David Madden, in November 2016. This resulted in a conclave between the two surveyors and the production of a joint report.

Mr Zakos's estimates of rectification works were, in some respects, significantly higher than Mr Madden's. Iris argued that the Court should adopt a midpoint between the two experts' views.

In August 2017, Mr Younan communicated that he would not be tendering Mr Madden's report. Shortly thereafter, he and Iris settled. In the following days, Iris wrote to the Owners confirming Iris relied on Mr Madden's evidence and formally served the report. It then sought leave under rule 31.28 of the Uniform Civil Procedure Rules 2005 (NSW). The Owners opposed this, arguing Iris had made a "calculated decision" to avoid the initial tendering to "quarantine itself from any adverse consequences" which might result from this evidence.[1]

Decision

1 Mr Madden's report

The Court was satisfied that there were exceptional circumstances warranting leave. Iris could therefore rely on Mr Madden's report. In deciding this, Stevenson J distinguished *Cummins Generator Technologies Germany GmbH v Johnson Controls Australia Pty Ltd* (**Cummins**),[2] an earlier case where a party's decision to abandon certain evidence during the course of trial was not seen as exceptional.[3]

Unlike in *Cummins*, the parties' experts here had participated in a conclave and produced a joint report, indicating that both had assumed that Mr Madden's evidence would be adduced.[4] As a corollary, the Owners were not prejudiced by the Court's decision. Moreover, Iris had served the report on the Owners and the report itself did not rely upon other experts which did not go into evidence.

2 Quantum of damages

With respect to the most contentious items, which included preliminaries, profit and overhead, balcony waterproofing, and balustrades, Stevenson J generally favoured Mr Zakos's higher estimates. This was based on a preference for the way Mr Zakos had assessed and justified the costs of labour, materials and methodology.

For the remaining defects and add-on costs, the Court and parties agreed on a "global approach", particularly because the differences in opinion were minor.

Stevenson J ultimately rejected Iris's calls for a midpoint between experts. He stated that where there is ambiguity or "doubtful questions", there is a presumption against wrongdoer.[5] In this case, the minor variances could not be conclusively resolved one way or the other. Stevenson J acknowledged that "professional minds can reasonably differ",[6] and to some extent, both opinions were somewhat speculative in light of market fluctuations.[7]

The Court further noted that if there is a range, as there was here, it is perfectly reasonable that the wrongdoer (that is, Iris) be required to pay for loss found at the upper end of this range.[8] The Court consequently adopted 75% of the figure Mr Zakos recommended.

https://www.caselaw.nsw.gov.au/decision/59a3adbee4b058596cba9a59

1 At [32]
2 [2015] NSWCA 264
3 *The Owners – Strata Plan 84741 v Nazero Constructions Pty Ltd* [2017] NSWSC 1134, at [35]
4 At [29]
5 At [85]–[87], citing *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 59
6 At [78]
7 At [82]
8 At [87]

QUICKWAY CONSTRUCTIONS PTY LTD V ELECTRICAL ENERGY PTY LTD [2017] NSWSC 1140

KEYWORDS: ASSIGNMENT OF RIGHT TO PAYMENT; SECURITY OF PAYMENT

KEY TAKEAWAYS

A claimant may take advantage of adjudication under the Building and Construction Industry Security of Payment Act 1999 (NSW) even if it has assigned its rights to payments to a third party.

Background

In March 2017, Quickway engaged Electrical to undertake electrical cable hauling works at sites in Canterbury and Leichhardt. On 22 April 2017, Electrical sent invoices for works done at the two sites. The invoices were not paid.

Electrical submitted adjudication applications under the Building and Construction Industry Security of Payment Act 1999 (NSW) (**SOPA**) and obtained adjudication determinations in its favour. Quickway paid the required amounts into Court and obtained an interlocutory injunction preventing Electrical from taking any action to obtain the sums pending the outcome of this proceeding.

Issues

Electrical had previously entered into a factoring agreement with Bibby Financial Services Australia. Under this agreement, Electrical agreed to assign Bibby every debt owing from a customer in return for a payment matched to each debt. Consequently, each invoice included a notation that it "had been assigned" to Bibby and asked Quickway to make the payments directly to Bibby.

Separately, the construction contract between Quickway and Electrical set the date of submission for payment claims to be the last working day of each calendar month. Electrical submitted the payment claims on 22 April 2017. Quickway's payment schedule stated that the amount due for the Leichhardt works was nil as the payment claim was submitted before the reference date for April. Electrical responded that the reference date provided was valid under section 8(2)(a) of SOPA. The adjudicator decided in favour of Electrical as the relevant work had been undertaken in March and so the reference date was 31 March 2017.

Quickway commenced proceedings in the New South Wales Supreme Court to set aside the adjudication determinations on two key bases:

1 the SOPA adjudication process was not available to Electrical as it had assigned the underlying right to payment to Bibby; and

2 in relation to the Leichhardt invoice, the adjudicator failed to afford Quickway natural justice.

Decision

Parker J ruled against Quickway on the first basis but set aside the adjudication determination on the second. His Honour dealt with three issues:

1 whether an assignment of debt extended to the assignment of statutory rights under the SOPA;

2 whether payment could only be to the claimant; and

3 identification of the relevant reference date and natural justice.

Issue 1 — whether an assignment of debt extends to SOPA rights

Parker J found that a debt arising under the SOPA was assignable as a judgment debt. His Honour left open whether an assignable debt arose earlier under SOPA when the "statutory entitlement has crystallised", such as where a respondent fails to provide a payment schedule.

His Honour concluded that the assignment of debt did not also assign SOPA rights. Bibby thus could not enforce the statutory rights in its own name. Parker J held that it was not until the adjudication determination that a "debt assignable at law came into existence" and therefore, "the claim had to be pursued in the name of Electrical, though Bibby was entitled to obtain the fruits of the process".[1]

Issue 2 — whether payment could only be to the claimant

Quickway argued first that the claim for payment was an invoice by Bibby rather than by Electrical. Parker J rejected this argument based on the form of the invoice.

Quickway's second argument was that section 13(2)(b) of the SOPA requires the payment claim to direct payment to the claimant, in this case Electrical. Section 13(2)(b) states that the claim must include "the amount of the progress payment that the claimant claims to be due". Quickway asserted that the requirement should be read into the provision "by necessary implication, having regard to the provisions of the SOPA as a whole", and cited sections 11(1B) and 14(4), which require the payment to be made to the contractor.

Rejecting this argument, Parker J emphasised that the SOPA established a statutory scheme that creates "an entitlement in the contractor to receive payment whether or not the contractor has a contractual right to it",[2] and therefore the sections referred to grant the claimant a "statutory entitlement independent of the contractor's contractual rights".[3]

His Honour accepted Quickway's submissions that under such a construction the respondent may be required to pay twice: once to the contractor under the SOPA and once to the assignee under their assigned contractual rights.[4] Where the contractor successfully enforces a statutory right to payment and the assignee then seeks to enforce its contractual rights, the respondent would need to pay the assignee and then seek to recover their funds from the contractor under section 32(3)(b) of the SOPA. Parker J considered that there was "no room in the Act" for any other construction of the legislation.[5]

Issue 3 — identification of the relevant reference date

Parker J accepted Quickway's submissions that the payment claim was not valid under the SOPA as identifying the correct reference date was an essential element and the language "for example 28 April 2017" was insufficient.[6]

Further, his Honour found Quickway was expressly proceeding on the basis that the reference date was 28 April 2017 and did not have the opportunity to address the claim on the basis that the reference date was for March. Consequently, the adjudicator denied Quickway natural justice.[7]

Conclusion

Parker J discharged the interlocutory injunction and directed the plaintiff to bring in draft orders giving effect to his decision.

https://www.caselaw.nsw.gov.au/decision/59a4bbb3e4b074a7c6e183c5

1 At [21]
2 At [30]
3 At [27]
4 At [25], [31]
5 At [34]
6 At [45]
7 At [52]

ARCONIC AUSTRALIA ROLLED PRODUCTS PTY LIMITED V MCMAHON SERVICES AUSTRALIA PTY LTD [2017] NSWSC 1114

KEYWORDS: SECURITY OF PAYMENT; DUPLICATED CLAIM; PERMITTED RE-AGITATION; ISSUE ESTOPPEL; ABUSE OF PROCESS

KEY TAKEAWAYS

Duplicate security of payment claims attempting "a second bite of the cherry" are common. In a litigious context, the law has evolved mechanisms such a res judicata to dispose of duplicitous litigation. However, the jurisprudence on the applicability of these litigation mechanisms to the security of payment arena is in its infancy.

This case confirms that issue estoppel and abuse of process may block duplicated claims. They will not necessarily apply, though, for example where earlier attempts to seek adjudication fail on technical grounds.

Facts

McMahon Service Australia Pty Ltd (**McMahon**) was engaged by Arconic Australia Rolled Products Pty Limited (**Arconic**) to decommission an aluminium plant. McMahon claimed to be entitled to delay damages for undocumented hazardous materials. In a serious of botched attempts (in which the judge comments McMahon had not "covered itself in glory"[1]), McMahon attempted on four occasions to have the dispute over these delay damages submitted to adjudication.

On the first occasion McMahon, included a without prejudice report which meant the adjudicator had to recuse himself from determining the case. On the second occasion, the adjudicator was unable to hear McMahon's case because the claim formulated in the Adjudication Application was different from that in the Payment Claim.

On the third occasion, the adjudicator ruled that the payment claim was premature as no reference date had arisen to support it. For this reason, the adjudicator concluded he lacked jurisdiction to determine the matter.

McMahon then submitted a fourth payment claim regarding the same delay damages. Arconic sought an injunction to restrain the matter being put to the adjudicator, on the grounds that the attempts to agitate the same issues:

- breached the rule against issue estoppel; and
- constituted an abuse of process.

Summary of attempts to put issue to the adjudicator

Attempt 1	Inclusion of "*without prejudice*" report mean adjudicator had to recuse himself.
Attempt 2	Different formulation of case in the Adjudication Application compared to the Payment Claim meant adjudicator could not consider claim.
Attempt 3	Claim was premature because no reference date had arisen.
Attempt 4	Arconic sought injunction on the basis of issue estoppel and abuse of process.

Decision

In the New South Wales Supreme Court, McDougall J heard the injunction application. His Honour observed that there was nothing in the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOPA**) itself to prevent a claimant from claiming, in successive adjudication applications, amounts that have been the subject of previous payment claims. But his Honour also noted this was subject to the general law. There, the main concerns are the need to avoid the abuse of courts' processes (an adjudication determination ultimately becoming a judgment of the courts), and the general rule against litigating issues already resolved by a decision maker. His Honour noted it was settled that these principles applied to security of payment adjudications.[2]

However, in these particular circumstances, McDougall J held the rules against issue estoppel and abuse of process had not been breached. As McMahon had been thwarted on the three previous occasions in its attempt to refer the delay damages issue to the adjudicator, there had in fact been no hearing on the merits of the delay damages issue. Issue estoppel in respect of delay damages could only attach to a final decision on the question of whether delay damages were owed. As there had been no final decision, no issue estoppel could arise.

For a similar reason, his Honour held there was no abuse of process in McMahon persisting to try and have their claim for delay damages heard. This was not the case where a disgruntled litigant, unhappy with a decision that has gone against them, "using different bases or pretexts to justify the reconsideration of the same claim".[3] Rather, the claimant was just trying, unsuccessfully, to put the matter squarely before a decision maker. Despite the wasted costs and time, there was no abuse of process.

Conclusion

This decision does not break any new ground, being merely an orthodox recitation and application of the rules of issue estoppel and abuse of process. It nonetheless a useful reminder that claimants must get jurisdictional issues right the first time. The more attempts there are to be heard before an adjudicator, the greater the chance the respondent will seek to have the claim struck out as being duplicitous.

Second, the decision is another in a long line of cases which reveals the difficulty industry participants have in using security of payment legislation. McMahon three times tried to invoke the mechanics of the Act to resolve a claim for delay damages. Three times, they failed on a true technicality — submitting a without prejudice document, not aligning the submissions in the payment claim with the adjudication application, and failing to wait for a reference date to accrue. While the Court was critical of these botched attempts (noting the matter had "generated so much paper, so much work, and … substantial expense"),[4] McMahon's failures are another reminder of the complexity of the legislation.

https://www.caselaw.nsw.gov.au/decision/599b8e9ae4b058596cba9806

1 At [25]
2 *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190
3 At [29]
4 At [26]

AGL ENERGY LIMITED V JEMENA GAS NETWORKS (NSW) LTD [2017] NSWSC 765

KEYWORDS: ARBITRATION AGREEMENTS

KEY TAKEAWAYS

A dispute resolution clause requiring parties to mediate before having recourse to arbitration or litigation was not an enforceable arbitration agreement.

Facts

Jemena Gas Networks (NSW) Ltd (**Jemena**) operates a gas distribution network and AGL Energy Limited (AGL) is a gas retailer. Under an access arrangement instrument imposed by the Australian Energy Regulator under the National Gas Law, AGL had access to Jemena's gas network. Put simply, the access arrangement included in a schedule a "reference service agreement" (**RSA**) which set the terms on which Jemena was to supply services.

A dispute arose between the parties. AGL alleged that Jemena had breached its meter reading obligations under the RSA and that AGL had suffered loss as a result.

Following an unsuccessful mediation, Jemena notified AGL that it had referred the dispute to arbitration under clause 30.5(a) of the RSA. Shortly thereafter, AGL commenced proceedings in the Supreme Court of New South Wales.

The only question before the Court was whether the RSA included an arbitration agreement as defined in section 7(1) of the Commercial Arbitration Act 2010 (NSW) (**Act**):

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

The Supreme Court held that there was no arbitration agreement

Clause 30.5(a) of the RSA stated (emphasis added):

> *"In the event that discussions under clause 30.4 fail to resolve the Dispute, each Party expressly agrees to endeavour to settle the Dispute by mediation administered by the Australian Commercial Disputes Centre (ACDC) before* ***having recourse to arbitration or litigation.****"*

Jemena argued that the clause was an arbitration agreement because by expressly restricting the parties' recourse to arbitration until after mediation, the clause necessarily implied that after mediation they would have that recourse. Jemena cited two intermediate appellate court decisions where parties had agreed that disputes were to be referred to "arbitration or litigation". In both cases, the courts held that the contract contained an arbitration agreement. Thus, if one party elected to go to arbitration, that would prevail over an election for litigation by the other party, even if the election for arbitration occurred second.

Hammerschlag J closely compared the RSA with these authorities (discussed below).

Hammerschlag J held that clause 30.5(a) of the RSA did not constitute an "arbitration agreement" within the meaning of the Act. His Honour found that a reasonable person in the position of the parties would not have understood from the language of the clause that it was committing itself to compulsory arbitration. In making such a finding, his Honour emphasised that clause 30.5(a) of the RSA:

- merely restricted recourse to arbitration or litigation unless the necessary pre-conditions were fulfilled;[2]
- contained no words of election or words giving one party the right to compel the other in one direction;[3]
- provided no indication that arbitration had primacy over litigation;[4] and
- did not confer any right to litigate or any contractual right to force a compulsory arbitration.[5]

Consideration of earlier authorities

Since Hammerschlag J reached his decision after close analysis of two previous authorities, it is helpful to consider them in some detail.

Manningham City Council v Dura (Australia) Constructions Pty Ltd [1999] 3 VR 13 (Manningham)

In *Manningham*, the Victorian Court of Appeal considered whether a written building contract contained an arbitration agreement under section 4(1) of the old Commercial Arbitration Act 1984 (Vic). Although differently worded, that section is materially the same as section 7(1) of the current NSW Act.

Winneke P analysed the interaction between the two relevant contract clauses, 13.03 and 13.04. Clause 13.03 provided for a party to refer the dispute to arbitration or litigation. Notice was a condition precedent to commencing any arbitration or litigation. Clause 13.04 provided that a party electing to go to arbitration had to provide security for the costs of the arbitration, and if that occurred, the dispute was referred to arbitration. As such, his Honour found there was little room for doubt that the parties had agreed to go to arbitration if the procedure was followed.

Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd [2002] 2 Qd R 514 (Mulgrave)

In Mulgrave, the Queensland Court of Appeal followed *Manningham*. The contract in this case included provisions almost identical to clauses 13.02 and 13.03 in Manningham, but had no equivalent to clause 13.04.

McPherson J compared the clauses in *Mulgrave* and *Manningham* and concluded that the effect was the same. Both provided for the giving of an initial notice of dispute, followed by a negotiation phase, and then by a second notice by either party referring the dispute to arbitration or to litigation.

His Honour further observed that in both cases, the second notice signified to the other party that the negotiation phase was at an end. Similarly, in both cases, the consequence of including a notice of election to arbitrate was to refer the dispute to arbitration.

https://www.caselaw.nsw.gov.au/decision/59409f39e4b058596cba78bd

1 [2017] NSWSC 765 at [40]
2 At [29].
3 At [41]
4 At [43]
5 At [29]

SUPPOSED TO BE ALLIES, BUT WERE NOT FRIENDS:[1] WESTERN AUSTRALIAN RUGBY UNION V AUSTRALIAN RUGBY UNION LTD [2017] NSWSC 1174

KEYWORDS: CONTRACTUAL INTERPRETATION; COMMERCIAL ARBITRATION; APPEAL FROM ARBITRATOR'S AWARD

KEY TAKEAWAYS

A court will construe the meaning of a commercial contract objectively by reference to its text, context, purpose and what a reasonable person would have understood the terms of the contract to mean. Evidence of surrounding circumstances can be taken into account to assess whether a phrase or expression in the contract is ambiguous or capable of more than one meaning.

However, where the terms of the contract itself disclose its context, purpose and objects, and the meaning is not ambiguous, it is not permissible for an arbitrator or court to have recourse to background circumstances to ascertain the commercial purpose or objects of the contract. It is not permissible to do so to try to find what the parties, acting commercially sensibly, could or should have agreed, but did not agree.

Background

The Western Australian Rugby Union (**WARU**) and the Australian Rugby Union (**ARU**) entered into an Alliance Agreement dated 26 August 2016 (the **Alliance Agreement**).

Clause 1.1 of the Alliance Agreement contained the following definition of Term:

> *"**Term** means the period commencing on the Commencement Date and ending on the expiry date of the last of the SANZAR Broadcast Agreements (being 31 December 2020) or, subject to clause 2.4, if the last of the SANZAR Broadcast Agreements is terminated or renegotiated earlier as a result of the renegotiation of the commercial terms of a broadcast arrangement, such earlier date."*

By 19 July 2017, all of the SANZAR Broadcast Agreements had been renegotiated as a result of the renegotiation of the commercial terms of a broadcast arrangement. Importantly, despite the renegotiations, the period of the SANZAR Broadcast Agreements remained unchanged, with an expiry date of 31 December 2020.

An arbitral award was made on 11 August 2017 with respect to a dispute between WARU and ARU about the effect of these renegotiations on the Alliance Agreement. In that arbitration, WARU and ARU advanced differing constructions of Clause 1.1. ARU contended that the Alliance Agreement had come to an end, whereas WARU contended that it had not. WARU's argument rested on the phrase "renegotiated earlier" (in the definition of Term) meaning "renegotiated to end earlier".

WARU argued that where the definition of Term refers to the last of the SANZAR Broadcast Agreements being "renegotiated earlier", and to the Term ending on "such earlier date", this meant a renegotiation which had the effect that the last of the SANZAR Broadcast Agreements expired on date earlier than 31 December 2020. It argued that a renegotiation which left the period of the last of the SANZAR Broadcast Agreements unaffected, in the present situation, was not a renegotiation within the meaning of the provision.

The arbitrator held in favour of ARU. He held that the words "such earlier date" in the definition of Term referred to the time when the earlier renegotiation of the last of the SANZAR Broadcast Agreements happened. That had happened by 20 July 2017. Accordingly, the arbitrator declared that the Alliance Agreement had ceased to be in effect by no later than 20 July 2017.

WARU appealed to the New South Wales Supreme Court.

Issue

On appeal, WARU sought to show that the arbitrator fell into error in the construction he gave to the definition of the Term in the Alliance Agreement. Notably, WARU changed the emphasis of its argument.

WARU now argued that the words "such earlier date" related to the words "the expiry date of the last of the SANZAR Broadcast Agreements" such that the "ending" date was the expiry date of the last of the SANZAR Broadcast Agreements or "such earlier [expiry] date".[2] WARU attempted to show the Term of the Alliance Agreement was "pegged" to the expiration of the SANZAR Broadcast Agreements in the first place. The clause's objective was to provide a mechanism by which the Alliance Agreement and the SANZAR Broadcast Agreements would end on the same date, with an ultimate end date of 31 December 2020.

WARU further asserted that the arbitrator's construction made it almost impossible to delineate commercial terms from uncommercial ones. The construction ran counter to the intended longevity of the Alliance Agreement as a co-operative alliance between WARU and ARU, and did not fit with clause 2.4, which contemplated discussions between the parties if the SANZAR Broadcast Agreements were renegotiated during the Term. WARU alleged the arbitrator was wrong to take into account the background circumstances in respect of which he made findings, because the words of the Alliance Agreement were unambiguous.[3]

ARU, on the other hand, maintained that the words "such earlier date" referred to the date on which the last of the SANZAR Broadcast Agreements was renegotiated.

Decision

Hammerschlag J dismissed WARU's appeal with costs, reiterating the objective test to be applied in a task of contractual interpretation.

The Court based its discussion on the Alliance Agreement having the nature of a commercial contract. The meaning of the words used in it had to be determined by what a reasonable person would have understood them to mean, which required attention to:

- the language used by the parties;
- the commercial circumstances which the document addresses;
- the purpose of the transaction; and
- the objects it was intended to secure.[4]

Although evidence of surrounding circumstances of a contract could be taken into account to assess whether a phrase or expression in the contract was ambiguous or capable of more than one meaning, Hammerschlag J reasoned that that approach could not be applied in the present case.[5] The terms of the Alliance Agreement set out in detail its context, purpose and objects. There was no ambiguity, so it was not appropriate to refer to external material.[6]

Essentially, the difficulty that the Court had with WARU's argument was that the words of the definition of Term did not say that the renegotiation of the last of the SANZAR Broadcast Agreements had to result in a change of its expiry date to accelerate it. The Court looked squarely at the words of the Term, noting that the words of limitation the parties chose, namely that the renegotiation must be as a result of the renegotiation of the commercial terms of a broadcast arrangement, undermined the suggestion of some other unexpressed limitation.[7]

Instead, the default position in the definition of Term was that the Alliance Agreement would end on the expiry date of the last of the SANZAR Broadcast Agreements (being 31 December 2020). The default position would be displaced if that agreement was renegotiated earlier than 31 December 2020. There was no way the words "such earlier date" could be read to mean anything other than an earlier date of termination or of renegotiation.[8] The Court was of the view that if the parties had intended the Term to end only on earlier termination or expiry of the last of the SANZAR Broadcast Agreements, rather than the renegotiation of its commercial terms at large, they could easily have inserted that wording, but they had not.

As for WARU's submission about identifying commercial terms, the Court considered that any term may have commercial ramifications,[9] such that there were many commercially sensible choices available to the parties to agree on. The longevity of the Alliance Agreement was also reflected in the formulation the parties chose, and it had to be remembered that WARU and ARU did not have identical interests in the longevity of the Alliance Agreement.

Conclusion

Hammerschlag J reached the conclusion that the relevant provisions of the Alliance Agreement unambiguously accorded with ARU's construction.

To the extent that the arbitrator had regard to background circumstances to examine the parties' commercial motivations for the terms they agreed to, the Court considered that the arbitrator had done this impermissibly. However, the Court did not consider that the approach affected the correctness of the arbitrator's conclusion.[10]

https://www.caselaw.nsw.gov.au/decision/59acd9a4e4b074a7c6e1861f

1 At [66]
2 At [34]
3 At [50]
4 At [37]
5 At [43]
6 At [43]
7 At [52]
8 At [54]
9 At [68]
10 At [62]

CASTLE CONSTRUCTIONS PTY LTD V GHOSSAYN GROUP PTY LTD [2017] NSWSC 1317

KEYWORDS: SECURITY OF PAYMENT; SUPPORTING STATEMENT; HEAD CONTRACTOR; REFERENCE DATE

KEY TAKEAWAYS

1. A provision that payment to the contractor be made only when an *"engineer and surveyor [have signed] off on completion of work in accordance with approvals"* does not facilitate a statutory entitlement to a progress claim and is void under section 34 of the Building and Construction Industry Security of Payment Act 1999 (NSW) (**SoP Act**).
2. Where a head contractor submits a payment claim to a principal without an accompanying supporting statement, the payment claim has not been validly served under the SoP Act.
3. Notice that an adjudicator has been appointed is taken to have been effected when the notice reaches its destination, even if it is initially misdelivered.

Facts

Castle Constructions Pty Ltd (**CC**) was the sole shareholder of Castlenorth, a property investment and development company that owned land in Northbridge in NSW.

CC engaged Ghossayn Group Pty Ltd (**Ghossayn**) under an oral construction contract that obliged Ghossayn to perform bulk excavation, piling, anchoring and shoring works on the site.

Ghossayn submitted progress claims to CC on three occasions without dispute. On 30 September 2016, Ghossayn made a fourth and final payment claim for $134,107.22 but did not include an accompanying supporting statement as required by section 13(7) of the SoP Act. The payment claim asserted that 100 per cent of the work called for by the contract had been performed. CC disputed this.

Ghossayn sought the appointment of an adjudicator. The Authorised Nominating Authority then sent notification of the adjudicator's acceptance by registered post addressed to CC at its ordinary place of business (suite 35 at the Sailors Bay Road address in Northbridge); however, the notice was deposited in CC's neighbour's mailbox by error on 5 December 2016. The neighbour found the letter and deposited the notice in CC's mailbox at approximately 7:30pm on Wednesday, 7 December 2016.

CC lodged its adjudication response on Monday, 12 December 2016.

The adjudicator disregarded CC's adjudication response on the basis it was submitted more than 2 business days after receiving notice of the adjudicator's acceptance of the application. The adjudicator determined that CC pay Ghossayn the amount claimed. CC then appealed to the New South Wales Supreme Court.

Issues

On appeal, CC argued that the adjudicator had no jurisdiction because:

1. there was no available "reference date" (the reference date issue) under section 8 of the SoP Act to support the 30 September 2016 payment claim;
2. Ghossayn was a "head contractor" (the head contractor issue) under section 4 of the SoP Act but did not serve with the payment claim a "supporting statement" as required by section 13(7); and
3. the adjudicator wrongly concluded that CC did not serve its adjudication response within two business days after receiving notice of the adjudicator's acceptance of the application (as required by s 20(1)(b) of the SoP Act) (the service issue) and so wrongly concluded that he could not consider CC's adjudication response.[1]

Decision

Stevenson J held that the adjudicator's determination must be quashed, but only because of the absence of a supporting statement.[2]

Issue 1 — The reference date issue

Stevenson J held that a payment claim can only be made if there is an available reference date. That reference date can be expressly provided for in the contract, or if it is not, can be the date set under section 8(2)(b) of the SoP Act. On the other hand, a contractual provision which goes beyond fixing a mechanism for determining the date on which the contractor is to be paid will be invalidated by section 34 of the SoP Act if it:

(a) imposes conditions on the occurrence of a reference date;

(b) modifies or restricts the circumstances in which a contractor is entitled to a progress claim;

(c) inordinately delays or effectively prevents a reference date from arising;

(d) unjustifiably impeaches the making of a payment claim or renders the statutory entitlement practically illusory;

(e) imposes onerous conditions which make a reference date more of a theoretical possibility than an actuality; or

(f) does not facilitate a statutory entitlement to a progress payment.[3]

In the contract between CC and Ghossayn, there was a condition purporting to provide that payment to Ghossayn would be made only when an "engineer and surveyor [have signed] off on completion of work in accordance with approvals". The Court found that that condition did more than simply provide a mechanism for determining the date on which Ghossayn would receive a progress payment. It did not facilitate Ghossayn's statutory entitlement to a progress claim, but was rather intended to accommodate the requirements of the prospective purchaser of the site. Stevenson J therefore found that the condition was void by section 34 of the SoP Act and that the reference date was 30 September 2016.[4]

Issue 2 — The head contractor issue

Under section 13(7) of the SoP Act, a head contractor must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement that indicates that it relates to that payment claim. Under section 13(9), a supporting statement is a statement in a prescribed form which includes a declaration that all subcontractors have been paid all amounts due and payable in relation to the construction work concerned.

A "head contractor" is defined in section 4 as a person who is to carry out construction work or supply related goods and services for the principal under a construction contract (the main contract) and for whom construction work is to be carried out or related goods and services supplied under a construction contract as part of or incidental to the work or goods and services carried out or supplied under the main contract.

A "principal" means the person for whom construction work is to be carried out (or related goods and services supplied) under a construction contract and who is not themselves engaged under a construction contract to carry out construction work (or supply related goods and services).

Stevenson J determined that whether Ghossayn was a "head contractor" rested on whether CC as counterparty to the contract was a "principal",[5] such that Ghossayn was carrying out construction work "for the principal" under the "main contract". The second limb of the "principal" definition proved crucial: if CC was itself engaged under a construction contract by Castlenorth, then Ghossayn would not be a "head contractor", and would not be required to abide by the supporting statement requirement.

However, Stevenson J found there was no construction contract between CC and Castlenorth, citing CC's loan to Castlenorth of funds to enable the works on Castlenorth's property for support. Had CC been a contractor of Castlenorth, it would not have lent Castlenorth the funds needed to meet Ghossayn's payment claims, but would instead have charged Castlenorth for the services provided, and included in those charges an amount reflecting what CC had paid to its subcontractor Ghossayn.

Therefore, Ghossayn was a "head contractor" and its 30 September 2016 payment claim had not been validly served because there was no accompanying statement under section 13(7) of the SoP Act. Therefore, no statutory rights or entitlements arose by reference to that document.[6]

Issue 3 — The service issue

Under section 20 of the SoP Act, CC was obliged to lodge its adjudication response by the later of five business days after receiving a copy of Ghossayn's adjudication application or two business days after receiving notice of the adjudicator's acceptance of his appointment. Under section 31(1)(c), service of that notice is taken to have been effected when the notice is received at the ordinary place of business. Section 31(2) does not require that the notice be received during normal office hours.

Even though Australia Post had accidentally put the letter enclosing the notification of the adjudicator's acceptance into a different, neighbouring letterbox on 5 December 2016, the Court considered that the letter was effectively served at 7:30pm on 7 December 2016 when an employee responsible for the neighbouring letterbox deposited the letter in CC's letterbox.[7] CC's service of its adjudication response on 12 December 2016 was therefore out of time, and the adjudicator was thus bound not to take it into account.[8]

Conclusion

The Court quashed the adjudicator's determination for jurisdictional error, based on the Court's finding that Ghossayn, as a head contractor, had not served a supporting statement as required.

https://www.caselaw.nsw.gov.au/decision/59cc81a6e4b074a7c6e1909d

1 At [4]–[6]
2 At [8]
3 At [51]
4 At [58]
5 At [66]–[67]
6 At [91]
7 At [105]–[107]
8 At [121]

NSW INTRODUCES UNSAFE BUILDING PRODUCTS CONTROLS

KEYWORDS: NSW, UNSAFE BUILDING PRODUCTS

KEY TAKEAWAYS

The Building Products (Safety) Bill 2017 (Bill) will authorise bans on unsafe building products, rectification orders for existing and future buildings and public disclosure mechanisms to protect prospective purchasers.

Existing buildings will be exposed to rectification orders if found to contain building products which are later banned under the legislation.

The NSW Government has passed legislation to identify, ban and rectify the use of unsafe building products in commercial, residential and industrial buildings across NSW.

The *Building Products (Safety) Act 2017* (Act) will authorise bans on unsafe building products, rectification orders for existing and future buildings and public disclosure mechanisms to protect prospective purchasers.

The Bill has three main objectives:

1. Identifying unsafe building products.
2. Preventing the future use of unsafe building products.
3. Identifying and rectifying buildings affected by the past use of unsafe building products.

Importantly, existing buildings are exposed to rectification orders if found to contain building products which are later banned under the legislation.

Identifying unsafe building products

To allow the Fair Trading Secretary (**Secretary**) to determine which building products are unsafe, the Act introduces extensive investigate powers.

The Secretary will be able to authorise a 'building product investigation' to ascertain if a building product is unsafe and determine the location of any buildings where a product may be been used in an unsafe way.

Product assessments

Manufacturers or suppliers may be required to conduct product assessments, but authorised officers from Fair Trading will also be permitted to carry out assessments if a manufacturer or supplier fails to do so. Authorised officers will also be permitted to require manufacturers and suppliers provide information relating to a particular product, while being able to inspect premises, examine or inspect material, and remove samples for testing.

Reviews

The NSW Civil and Administrative Tribunal will deal with reviews of decisions of the Secretary or an authorised officer.

Preventing unsafe building products

The Secretary will have power to ban a building product if there are reasonable grounds to suspect that the use of such a product is unsafe. Under this 'building product use ban', the Secretary:

- is empowered to impose a total or specified ban on the use of a product;
- must give reasons for imposing a ban;
- may amend or revoke a ban at any time;
- may call for public submissions before or after imposing a ban;
- is required to give notice to the manufacturer of the building product before a ban is published, if practicable.

Penalties

The Act introduces a maximum $1,100,000 penalty for contravening a building product use ban for a corporation, and a further $110,000 maximum penalty for each day the offence continues. (Maximum penalty of $220,000 for individuals, two-year imprisonment, or both).

Penalties are also imposed for merely representing that a banned building product is suitable for use.

Directors and managers of corporations may be prosecuted if they knowingly authorised or permitted a breach of the legislation by their corporation.

Rectifying the use of unsafe building products

The Act introduces investigative powers to identify buildings affected by the use of unsafe building products. The Secretary can order rectification. Rectification orders can be issued in respect of buildings and structures existing before the date of commencement of the legislation. In this respect, it will operate retrospectively.

Affected building notices

If the Secretary is satisfied that a building is affected or may be affected by the use of a building product that is subject to a building product ban, an 'affected building notice' will be issued to the owner, relevant enforcement authority (usually local Councils), and the Commissioner of Fire and Rescue (if a fire risk has been identified).

General building safety notices

A 'general building safety notice' can also be issued if the Secretary is satisfied a particular class of buildings is affected by an unsafe building product.

Both an affected building notice and a general building safety notice will identify the safety risk posed by the use of the unsafe building product.

Building product rectification orders

Relevant enforcement authorities are given power to issue 'building product rectification orders'. The rectification orders will require the owner of an affected building to:

- eliminate or minimise the safety risks posed by the use of a banned building product; and/or
- remediate or restore the affected building following limitation or minimisation of the safety risk.

Development control orders

Building product rectification orders will be regarded as development control orders under the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**), ensuring that anyone issued with a rectification order will be afforded the procedural fairness protections outlined in the EP&A Act. The NSW Land and Environment Court will have power to hear appeals relating to rectification orders, and to amend or revoke any orders.

While enforcement authorities will usually issue an affected building notice before a building product rectification order, this is not mandatory. Enforcement authorities will play a proactive role in identifying buildings which are affected by unsafe building materials.

Disclosure to purchasers

Building product rectification orders are to be disclosed to purchasers. This includes disclosure of rectification orders on strata information certificates, planning certificates and vendor warranties in contracts for sale of land.

Major defects

The *Home Building Act 1989* will be amended to provide that use of a banned building product is a major defect in residential building work.

Looking forward

Some likely consequences of the Act will be:

- additional vendor, purchaser and mortgagee due diligence issues;
- impact on property values for affected properties;
- potential impacts on insurance availability and premiums;
- enforcement risk for owners (including strata owners corporations); and
- work, health and safety risk for building owners, landlords and employers more generally.

http://www.corrs.com.au/publications/corrs-in-brief/nsw-introduces-unsafe-building-products-controls/

INPEX OPERATIONS AUSTRALIA PTY LTD V JKC AUSTRALIA LNG PTY LTD [2017] NTSC 45: SUPREME COURT CONFIRMS ENTITLEMENT TO PROCEDURAL FAIRNESS IN ADJUDICATION PROCEEDINGS

KEYWORDS: ADJUDICATION; NATURAL JUSTICE

KEY TAKEAWAYS

The Northern Territory Supreme Court has held that an adjudicator's determination may be quashed if the Adjudicator fails to accord natural justice.

Facts

The plaintiffs, collectively referred to as INPEX, are joint venturers in the Ichthys Gas Field Development Project. The project consists of LNG infrastructure in Western Australia and the Northern Territory. In 2012, INPEX engaged JKC under an EPC contract to build onshore components of the project for a contract price of approximately US$13bn.

On 3 November 2016, JKC issued INPEX an invoice for work performed under the contract and a separate invoice for GST. On 24 November 2016, INPEX wrote to JKC disputing substantial portions of each invoice.

On 3 January 2017, JKC issued an adjudication application under the Construction Contracts (Security of Payments) Act 2004 (NT) (**Act**) seeking a determination that INPEX owed JKC US$83.9 million.

Conduct of the adjudicator

Following service of INPEX's adjudication response, the adjudicator invited submissions from the parties about whether the provisions implied into deficient construction contracts by section 20 of the Act should be imported into the EPC contract?

The adjudicator's preliminary view was that, due to the circular nature of the clauses in the EPC contract dealing with disputed payment claims, INPEX could indefinitely delay payment to JKC. Both INPEX and JKC responded that there was no basis for importing the implied provisions into the EPC contract.

Despite the parties' submissions, the adjudicator determined that section 20 operated to imply into the EPC contract the terms set out in Division 5 of the Schedule to the Act. He further determined that INPEX had failed to comply with clause 6(2) of Division 5 of the Schedule in that it had not given notice of its objection to the payment claim within 14 days. On that basis, the adjudicator found in favour of JKC for the full amount claimed in the Adjudication, plus interest.

1 *Hall Contracting Pty ltd v Macmahon Contractors Pty Ltd* (2014) 34 NTLR 17

2 [2014] WASC 40 [10]

INPEX sought judicial review of the adjudicator's determination and applied to the Court for the prerogative writ of *certiorari* to quash the Adjudicator's determination, or alternatively, a declaration that the determination was void.

Decision

Kelly J held that, by failing to give the parties a proper opportunity to address matters which were to form the basis of a decision which ignored the issues as defined by the parties, the adjudicator's conduct amounted to a substantial failure to accord natural justice. The determination was therefore a nullity and the Supreme Court issued an order for *certiorari* quashing the dermination.

Procedural fairness considerations

JKC argued that by requesting further submissions on whether the section 20 provisions should be imported into the EPC Contract, the adjudicator was impliedly informing INPEX regarding clause 6(2). Accordingly, JKC argued, INPEX could readily have anticipated that he was considering making a determination on the basis that INPEX had not disputed any part of the payment claim within the 14 days specified in cl 6(2).

Kelly J however agreed with INPEX, holding that the adjudicator should have given the parties opportunity to make submissions on the potential consequences if clause 6(2) in Division 5 of the Schedule was implied.

Kelly J emphasised the wording of the adjudicator's request for additional submissions, which instructed the parties that submissions "must be strictly confined to the question raised", and an earlier direction which was in similar terms. Her Honour held that this direction precluded INPEX from making submissions on what the consequences might be if the implied terms were imported into the EPC contract, or why those consequences should not automatically apply.

Kelly J considered that in these circumstances, the adjudicator was obliged to give the parties proper notice of the issues as he saw them so that they could respond.

This decision is consistent with *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd*[1] and *Zurich Bay Holdings Pty v Brookfield Multiplex Engineering and Infrastructure Pty Ltd*,[2] which set out when a court will deem an adjudicator's determination void because of a substantial failure to accord natural justice. The relevant factors are whether the adjudicator gave the parties (and in particular the losing party):

1. reasonable notice of the basis on which they intend to make their decision;
2. a fair opportunity to address that proposed basis; and
3. an opportunity to make submissions as to why the adjudicator should, or should not, decide that way.

Alternative argument

In the alternative, INPEX argued that the adjudicator was only authorised by the Act to adjudicate the payment dispute which was the subject of the adjudication application (so the adjudicator's determination was a nullity as it dealt with a dispute which was not the subject of the application and did not in fact exist).

Kelly J disagreed, holding that an adjudicator was not obliged to accept the dispute as agreed between the parties.

The adjudicator had a role to play in defining the nature of the payment dispute. This function is central to an adjudicator's statutory power to decide whether a determination may be made or the application must be dismissed under the Act.

Conclusion

This decision reaffirms the Supreme Court's jurisdiction to review adjudication determinations if there has been a substantial denial of natural justice. Natural justice considerations may require a decision maker to provide parties with an opportunity to respond to matters which may form the basis of the ultimate determination.

http://www.austlii.edu.au/au/cases/nt/NTSC/2017/45.html

QUEENSLAND GOVERNMENT PASSES BUILDING INDUSTRY FAIRNESS (SECURITY OF PAYMENT) BILL 2017 (QLD)

KEYWORDS: SECURITY OF PAYMENT; QUEENSLAND LEGISLATION

KEY TAKEAWAYS

The Building Industry Fairness (Security of Payment) Act 2017 (**the Act**) received royal assent on 10 November 2017, and is awaiting commencement by proclamation.

Accompanying regulations will be vital to understanding some provisions of the Act, however these have not yet been released.

Facts

Key changes include:

- the introduction of Project Bank Accounts (**PBAs**) for certain construction projects;
- the amendment and consolidation of the Building and Construction Industry Payments Act 2004 (**BCIPA**) and Subcontractors' Charges Act 1974 (**SCA**);
- amendments to the Queensland Building and Construction Commission Act 1991 (**QBCC Act**); and
- the introduction of penalty provisions to enforce compliance with the Act.

Principals and head contractors in particular will need to be aware of (and comply with) the changes, or risk being in breach of the new Act.

Project bank accounts

PBAs are to be implemented in two phases.

The first phase, to commence on 1 January 2018, will only apply to head contracts where the contract price is between $1 million and $10 million and the principal is the State or a State authority (if the State Authority decides that a PBA is to be established for the building contract).

The second phase, expected to commence on 1 January 2019, will expand the scope of PBAs so that they will be required for building contracts over $1 million whether the principal is a government or private entity, and potentially also to subcontracts, as well as head contracts.

PBAs will not be required for "engineering projects" which (while not yet defined) are likely to include projects for bridges, roads and ports. (The concept of "engineering projects" is expected to be defined in the Regulations).

What are the risks for head contractors?

Key risks include:

- compliance with administration requirements;
- costs of administering the PBAs; and
- reduced liquidity of the head contractor's business.

When will a PBA be required?

PBAs will apply to "building contracts" which are contracts for "building work", including:

- the erection or construction of a building;
- the renovation, alteration, extension, improvement or repair of a building;
- the provision of lighting, heating, ventilation, air-conditioning, water supply, sewerage or drainage in connection with a building;
- any site work (including the construction of retaining structures) related to work of a kind referred to above;
- the preparation of plans or specifications for the performance of building work;
- contract administration carried out by a person in relation to the construction of a building designed by the person;
- fire protection work;
- carrying out a completed building inspection;
- the inspection or investigation of a building, and the provision of advice or a report, for termite management systems for the building or for termite infestation in the building; or
- for other work prescribed by regulation.

A "building" is defined under the Act as a fixed structure that is wholly or partly enclosed by walls or is roofed.

Relationship with the PPSA

It also worth noting that under section 59 of the Act, a PBA is declared to be a statutory interest to which section 73(2) of the *Personal Property Securities Act 2009* (Cwlth) (PPSA) applies.

As such, subcontractors will have a priority interest in the monies in the PPSA which interest will have priority over any other security interest in the collateral (i.e. the monies in the project bank account) to which the subcontractor's priority interest is attached.

Repeal and replacement of the BCIPA

Under the Act, a payment claim will no longer need to state that it is made under BCIPA to trigger the statutory payment regime.

In the event a respondent disagrees with an amount claimed in a payment claim, the respondent will be required to issue a payment schedule that includes all reasons for withholding payment.

If a respondent does not provide a payment schedule in response to a payment claim, the respondent will not be allowed to submit an adjudication response if an adjudication is subsequently commenced.

Where a dispute does proceed to adjudication, respondents who provided a payment schedule will not be allowed to include new reasons for withholding payment in the adjudication response beyond what was included in the payment schedule. This is so even for "complex payment claims" for over $750,000 (excluding GST).

Claimants will have more time to make an adjudication application (generally 30 Business Days, up from 10 Business Days). The Regulations to the Act could potentially prescribe limitations on submissions and accompanying documents for adjudication applications and adjudication responses.

Response period for payment claims

A respondent to a payment claim is not required to give a payment schedule if it pays the full amount claimed before the end of the response period. The response period is the shorter of:

(a) if the construction contract is written, the shorter of the period provided for under the contract for either:

  (i) responding to the payment claim; or

  (ii) paying the full amount stated in the payment claim; or

(b) the period that is 25 business days after the day the payment claim is given to the respondent.

Failure to provide the payment schedule before the end of the response period will also render the respondent liable to a penalty of 100 penalty units, and is grounds for disciplinary action to be taken against the respondent under the *Queensland Building and Construction Commission Act 1991* (**QBCC Act**).

Reference dates

The definition of "Reference Date" has been amended so that if a contract is terminated and does not provide for (or purports to prevent) the reference dates surviving termination, the final reference date for the contract will be the date of termination.

Amendments to Queensland Building and Construction Commission Act 1991

New provisions directed towards preventing corporate phoenixing have been introduced so that persons of influence who were in a position to control or influence a construction company that failed will be excluded from obtaining a QBCC licence.

As a result of the amendments, the regulator now has greater oversight of the financial affairs of construction companies. Applicants and holders of QBCC licences will be required to satisfy "minimum financial requirements". It is expected that these requirements will be defined in the regulations.

Corporate phoenixing

The definition of an "influential person" has been expanded to include an individual in a position to control or substantially influence a company's conduct. This will increase the scope of provisions which prevent influential persons from holding QBCC licences or holding positions of influence in the business of another QBCC licensee.

The Act identified the following persons as potentially being influential persons:

- a chief executive officer, or general manager, or equivalent, or someone acting in those positions, in the company; or
- a person who directly owns, holds or controls 50% or more of the shares in the company, or 50% or more of the class of shares in the company; or
- someone who gives instructions to an officer of the company that the officer generally acts on;
- someone who makes, or participates in making of, decisions that affect the whole or a substantial part of the company's business or financial standing; or
- someone who engages in conduct or makes representations that would cause someone else to reasonably believe the person controls or substantially influences the company's business.

Federal government review

The final report of a federal government review into security of payment legislation in all Australian jurisdictions is due by 31 December 2017. Whether the Queensland government will subsequently introduce amendments to the new Act to incorporate recommendations made in that report remains to be seen.

Further information

For further information on this new legislation, please refer to the detailed client briefing paper available at:

http://www.corrs.com.au/publications/corrs-in-brief/critical-changes-to-the-queensland-building-industry-have-been-approved-by-parliament-here-is-your-guide/

PRINCIPAL PROPERTIES PTY LTD V BRISBANE BRONCOS LEAGUES CLUB LTD
[2017] QCA 254

KEYWORDS: LOSS OF OPPORTUNITY; CALCULATION OF DAMAGES

KEY TAKEAWAYS

A lost opportunity to secure a commercial benefit can be valuable – and therefore compensable — even if it was more probable that, had the opportunity been pursued, it would have resulted in a loss.

The Court of Appeal's decision also illustrates how to quantify the value of a lost opportunity. Here, the Court awarded damages based on the potential profit presented by the opportunity, discounted by the associated risks.

Facts

In November 2009, Principal Properties Pty Ltd (**Principal Properties**) and the Brisbane Broncos Leagues Club Ltd (**Leagues Club**) entered into a contract. Under it, the Leagues Club granted Principal Properties the option to acquire some of its land in Red Hill, Brisbane, at a price of $1,100,000 (inc GST). Principal Properties intended to develop the land into 56 short-term accommodation units. This required development approval, which in turn required the adjacent landowner, the Leagues Club, to consent to the proposed development. In repudiation of the contract, the Leagues Club refused to consent to Principal Properties' application.

Principal Properties subsequently terminated and sued for damages. Specifically, Principal Properties argued that the Leagues Club's repudiatory breach had caused it to lose the opportunity to make a profit from its proposed development of the land. Principal Properties relied on a feasibility report which estimated that the proposed development would result in a net profit of $5,379,402.

Applicable law

In support of its claim, Principal Properties relied on the High Court case of *Sellars v Adelaide Petroleum NL*.[1] In that case, the High Court recognised a loss of opportunity to profit as a type of compensable loss even if the likelihood of realising the profit was less than 50%.[2]

In a loss of opportunity claim, the plaintiff must show that the lost opportunity had "some value (not being a negligible value)". Whether the opportunity had more than negligible value depends on how likely it was that the opportunity would have resulted in a profit. The likelihood of a profit will also establish the precise value of that opportunity, which the court will award as damages to the plaintiff.[3]

The trial judge's decision[4]

The trial judge, Jackson J, identified four contingencies that Principal Properties would have had to overcome to realise the alleged profit. His Honour expressed the likelihood overcoming those contingencies in percentages terms as summarised in the table below:

Contingency	Likelihood of Principal Properties overcoming
Obtaining approval from the Council for the proposed short-term accommodation complex	~50%
Raising sufficient funds to purchase the land from the Leagues Club	~50%
Securing development finance	70%
Achieving sufficient pre-sales of the units at Principal Properties' proposed prices to satisfy the conditions of any finance	40%

However, aside from these contingencies, the trial judge rejected Principal Properties's expert's estimated prices of the units. In his feasibility report, the expert valued the units at $406,199 each. He based this figure on the prices of comparable units nearby. His Honour considered this an inappropriate comparison because the location of the proposed units was not as desirable as the location of the compared units, and therefore the demand would have been lower. Instead, his Honour accepted the Leagues Club's expert's valuation of the units at around $281,111 each. His Honour also disagreed with Principal Properties's valuation of the management rights to the units and the expected cost of certain budgeted items.

Having made these adjustments, the trial judge considered that Principal Properties would not have made any profit from the proposed development; in fact, it would have made a loss of around $2,700,000. His Honour concluded that, had the development gone ahead, it was more likely to make a loss than a profit. According to his Honour, it followed that the opportunity presented by the proposed development was valueless. The trial judge awarded nominal damages of $100.

The Court of Appeal

Delivering a judgment on behalf of the Court of Appeal,[5] McMurdo JA reversed the trial judge's decision. According to McMurdo JA, the trial judge's findings as to the chances that Principal Properties would overcome the contingencies noted above (all of which McMurdo JA accepted[6]) showed there was "more than a negligible chance that [Principal Properties] would have made a profit from [the] development."[7]

Contrary to the trial judge's reasoning, an opportunity was not valueless as a matter of law because it was more probable than not it would result in a loss.[8] To illustrate this point, McMurdo JA observed that many people pursue commercial opportunities despite the possibility — or even a probability — of incurring a loss. A classic example of this is mining exploration. McMurdo JA recognised there were limits to what could be considered a valuable commercial opportunity. If, for example, an opportunity had no chance of being profitable, it would have no value. Similarly, if an opportunity was one which "no rational investor would pursue" because of the "relative probabilities of a profit and a loss and the likely magnitude of each", it would also have no value.[9] But the opportunity presented by the proposed development was valuable because there

was a substantial prospect of Principal Properties developing the units, selling them at their estimated prices and subsequently realising a net profit.

In any event, McMurdo JA disagreed with the trial judge's factual premise that the development would have resulted in a loss because Principal Properties would have had to reduce its asking prices for the units. McMurdo JA considered that Principal Properties would not have suffered a loss because if it could not achieve presales at commercially viable prices, the development would not have gone ahead. Thus, even if an opportunity was valueless as a matter of law because it was more likely to result in a loss than a profit, this principle would not have applied in the present case.

Having found that Principal Properties had lost a valuable opportunity, McMurdo JA quantified the opportunity's precise value. Like the trial judge, McMurdo JA considered Principal Properties' estimate of a $5,379,402 net profit from the development too optimistic; his Honour considered $4,000,000 more realistic. His Honour then discounted this figure to account for the contingencies described above:[10]

Contingency	Likelihood of Principal Properties overcoming	Adjusted value of opportunity
		$4,000,000
Obtaining approval from the Council for the proposed short-term accommodation complex	~50%	$2,000,000
Raising sufficient funds to purchase the land from the Leagues Club	~50%	$1,000,000
Securing development finance	70%	$700,000
Achieving sufficient pre-sales of the units at Principal Properties' proposed prices to satisfy the conditions of any finance	40%	$280,000

McMurdo JA also made an adjustment for the small prospect that the development "would have resulted in an overall loss."[11] Accordingly, the Court of Appeal awarded Principal Properties $250,000 in damages.

http://classic.austlii.edu.au/au/cases/qld/QCA/2017/254.html

1 (1994) 179 CLR 332
2 (1994) 179 CLR 332 at 355 (Mason CJ, Dawson, Toohey and Gaudron JJ)
3 See (1994) 179 CLR 332 at 355 (Mason CJ, Dawson, Toohey and Gaudron JJ)
4 [2016] QSC 252
5 Philippides JA and Boddice J agreeing
6 At [53], [60], [65] and [106]
7 At [22]
8 At [24]
9 At [23]
10 At [111]–[114]
11 At [113]

TOMKINS COMMERCIAL & INDUSTRIAL BUILDERS PTY LTD V MAJELLA TOWERS ONE PTY LTD [2017] QSC 202

KEYWORDS: INTERPRETATION OF AUSTRALIAN STANDARDS CONTRACTS; PERFORMANCE SECURITY; BANK GUARANTEES

KEY TAKEAWAYS

Where a party disputes a final certificate, subject to the relevant clauses, there may be no amount due and owing until the dispute has been resolved. Parties should therefore carefully consider the express terms before seeking recourse to performance security in relation to amounts claimed in a final certificate.

Facts

In April 2014, Majella Towers One Pty Ltd (**First Respondent**) engaged Tomkins Commercial and Industrial Builders Pty Ltd (**Applicant**) to build a residential apartment building in Woolloongabba under the **Contract**. The body corporate for Majella Towers One Pty Ltd was the Second Respondent.

The Applicant gave the First Respondent two performance bonds ("bank guarantees") as required by clause 5.1. The First Respondent returned one bank guarantee on practical completion and retained the other. The First Respondent still held the second bank guarantee at the time of the application.

The Superintendent issued a final certificate stating that the Applicant owed an amount to the First Respondent.

The Applicant issued a notice of dispute in relation to all of the amount said to be owed. Two days after receiving the dispute notice, the First Respondent (in its own right and on behalf of the Second Respondent) gave notice of its intention to have recourse to the bank guarantee to:

(a) reduce the amount certified as payable in the final certificate; and, in the alternative;

(b) help meet the costs of rectifying defects.

The Applicant sought an injunction to restrain the Respondents from calling on the second bank guarantee and an order that the First Respondent deliver the bank guarantee to the court.

Issue

Under clause 5.2 of the Contract, the First Respondent was not entitled to have recourse to the bank guarantee unless:

1 the time for payment had passed;

2 the First Respondent remained unpaid; and

3 5 days had elapsed since the First Respondent gave notice of recourse.[1]

The First Respondent relied on clause 37.4 as giving rise to an entitlement to payment which had passed. That clause provides:

> ***"37.4 Final payment claim and certificate***
>
> *Within 28 days after the expiry of the last defects liability period, the Contractor shall give the Superintendent a written final payment claim endorsed 'the Final Payment Claim'...*
>
> *Within 42 days after the expiry of the last defects liability period or within 10 business days after the receipt of the final payment claim, whichever is earlier, the Superintendent shall issue to both the Contractor and the Principal a final certificate evidencing the moneys finally due and payable between the Contractor and the Principal...*
>
> *Those moneys certified as due and payable shall be paid by the Principal or the Contractor, as the case may be, within 5 business days after the Principal receives the final certificate, or within 15 days after the Superintendent receives the final payment claim.*
>
> *The final certificate shall be conclusive evidence of accord and satisfaction, and in discharge of each party's obligation in connection with the subject matter of the Contract except for: ...*
>
> *(d) unresolved issues the subject of any notice of dispute pursuant to clause 42, served before the 7th day after the issue of the final certificate."*

The Applicant's case

The Applicant's main argument was that the time for payment cannot have passed because a notice of dispute in relation to the entire amount certified in the final certificate had been served.

The Applicant sought to rely on the Court of Appeal's decision in *Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd* (**Martinek**)[2] for the interpretation of clause 37.4 of AS 4902-2000. Based on the Court of Appeal's reasoning in Martinek, the Applicant submitted that:

1 issuing the dispute notice qualified the Applicant's requirement to pay the amount identified in the final certificate;

2 as the dispute had not been resolved, no right to payment had arisen; and

3 the time for payment could not have passed.

Respondent's case

The Respondents argued that a final certificate becomes a debt due and owing once issued, and the Contract should not be construed to allow a party to avoid recourse to a bank guarantee merely by issuing a notice of dispute.

The Respondent further argued that if the dispute was determined in the Applicant's favour, the Applicant would have a right in restitution to claim back any overpayment of the final certificate (even though the Contract contains no mechanism for a repayment).

Decision

Brown J agreed with the decision in *Martinek* and the Court of Appeal's construction of clause 37.4. Her Honour considered the correct interpretation of the clause to mean that issuing a notice of dispute concerning the entire amount of a final certificate prevents the final certificate from being a debt due and payable, until the dispute is resolved.

Recourse to the bank guarantee is limited to non-payment of an amount in a final certificate, if the final certificate is undisputed. The Contract did not provide that the contractor should bear the risk of non-payment by the principal while the final certificate is in dispute. Instead, the risk was allocated under the Contract so that, where a final certificate is disputed and pending resolution, neither party has the benefit of payment.

On the correct construction, the bank guarantee should have been returned to the Applicant because there was no unpaid amount for which the

Respondents could have recourse to the security under the Contract.

There is nothing in the Contract that provides for a situation where a final certificate is successfully disputed and amounts are repaid to the successful party. This supports the finding that it was not the parties' intention for a payment to be made where it is the subject of a dispute.

Further, no provision of the Contract deals with amending the final certificate or issuing a further final certificate to reflect the outcome of a dispute. Her Honour found this supported the Applicant's argument that the trigger for the release of the bank guarantee was the issue of the final payment certificate.

Conclusion

Brown J found in favour of the Applicant and ordered the First Respondent pay the Applicant the amount of the bank guarantee, plus interest and costs.

http://classic.austlii.edu.au/au/cases/qld/QSC/2017/202.html

1 The judgment does not disclose the form of the contract, but these conditions are familiar from Australian Standards contracts

2 [2009] QCA 329

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

KEYWORDS: NON CONFORMING BUILDING PRODUCTS

KEY TAKEAWAYS

From 1 November 2017, amendments to the Queensland Building and Construction Commission Act 1991 (the Act) establish a chain of responsibility, placing duties on all supply chain participants to ensure building products are fit for an intended use.[1]

Parties that are involved in any stage of the supply chain and (importantly) their executive officers should be aware of these changes to the Act.

The *Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Act 2017* has amended four current pieces of legislation, including (principally) the Act.

The Non-Conforming Building Products: Code of Practice (**Code**) was made available from 6 November 2017(issued pursuant to the legislation) to assist parties to fulfil their duties under the amendments.[2] The Code can be accessed on the Queensland Building and Construction Commission (QBCC) website:

http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsCodeOfPractice.pdf

Who is affected?

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

The objectives of the legislation

The objectives of the legislative changes include:

- making all building supply chain participants responsible to ensure that non-conforming building products are not used on building sites in Queensland;
- improving safety on building and construction sites through expanded notification requirements for licensees and new information sharing arrangements between the QBCC and other regulatory agencies; and
- extending the ambit of disciplinary action that can be taken by the QBCC.[3]

The key changes

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

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

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

1. The imposition of new duties

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

A) Primary duty

The primary duty is that each person involved in the chain of responsibility must ensure, insofar as reasonably practicable, that a product is not a non-conforming building product.[4]

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

'Reasonably practicable' is defined in the legislation as:[5]

"that which is, or was at a particular time, reasonably able to be done in relation to the duty, taking into account and weighing up all relevant matters including—

(a) the likelihood of a safety risk or non-compliance risk happening; and

(b) the harm that could result from the safety risk or non-compliance risk; and

(c) what the person concerned knows, or ought reasonably to know, about—

(i) the safety risk or non-compliance risk; and

(ii) ways of removing or minimising the risk; and

(d) the availability and suitability of ways to remove or minimise the safety risk or non-compliance risk; and

(e) the cost associated with available ways of removing or minimising the safety risk or non-compliance risk, including whether the cost is grossly disproportionate to the risk."

A product will be a 'non-conforming building product' for an intended use if:[6]

(a) "the association of the product with a building for the use—

(i) is not, or will not be, safe; or

(ii) does not, or will not, comply with the relevant regulatory provisions; or

(b) the product does not perform, or is not capable of performing, for the use to the standard it is represented to perform by or for a person in the chain of responsibility for the product."

The Code outlines steps that may assist in ensuring that products used are conforming building products and that they satisfy the relevant regulatory standards.[7]

B) Additional duties

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

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

1. Designers

Designers of products must ensure, so far as reasonably practicable, that if the designer gives the design to another person (who is to give effect to that design), the design is accompanied by the required information for the product.[8]

The definition of 'required information' can be summarised as:[9]

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

The Code highlights ways to comply with the required information obligations such as:[10]

- evidence the product meets the relevant standard;

- circumstances the product can be used;
- how the product must be associated with the building; and
- instructions for use.

Ways that the Information can be given include:[11]

- being affixed to the product or on packaging for the building product;
- including a website address or QR code affixed to a product or placed on packaging for the building product; or
- providing information at the point of sale.

2. Manufacturers, importers and suppliers

Manufacturers, importers or suppliers for the product must ensure that the product is accompanied by the 'required information' for that product before the product is given to another person.[12]

This provision will not just apply to persons that sell, supply or transfer the product, but also those that facilitate the sale, supply or transfer of the product.[13]

3. Installers

Installers must ensure that the owner of the building is given the information about the product prescribed by regulation.[14]

The amending legislation is silent on whether an installer will be at fault if they forward information about the product that is inherently inadequate or insufficient due to failures earlier in the supply chain. Though it is not expressly stipulated in the legislation, the Code suggests that each person in the chain of responsibility will need to conduct their own due diligence investigation on the required information they receive to ensure they comply with the duties under the Act.[15]

4. Executive officers

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

Executive officers must exercise 'due diligence' to ensure that the company complies with the duty.[16]

Due diligence includes:[17]

- keeping up to date knowledge of the safe use of building products;
- understanding the nature of the business in regards to building products and be aware of safety and non-compliance risks;
- ensuring the company has in place processes to minimise risk and ensure compliance with the Act.[18]

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

C) Multiple Duties

Persons in the supply chain can have more than one duty at any one point in time.[19] Each duty held by a person will need to be discharged on its own merit.

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

- each person is responsible for the person's duty in regard to the matter;[20] and
- each person must discharge the person's duty to the extent the person can influence the matter or would have the capacity to influence the matter if that capacity was not limited by an agreement or arrangement.[21]

2. New offences

The amending legislation has introduced a number of new offences into the Act. These include:

- an offence, carrying a maximum of 1000 penalty points,[22] if someone breaches any of the duties discussed above;[23]
- an offence, carrying a maximum of 1000 penalty points, if a person knows or ought know that a building product is non-conforming and makes representations about the intended use of the product that does not comply with requirements for representations prescribed by regulations;[24] and
- an offence, carrying a maximum of 50 penalty points, if a person in the chain of responsibility has reasonable suspicion or knowledge that a building product is a non-conforming building product for an intended use and does not give notice to the Commission within 2 days (unless they have reasonable excuse).[25]

Notifiable Incidents

There is an additional duty imposed on all persons in the chain of responsibility to notify the QBCC of any 'notifiable incident'. Notifiable incidents include death, serious injury, or an incident that exposes a person to serious injury or illness.[26] Breach of this reporting obligation carries a maximum penalty of 100 penalty units.

1 *Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Act* 2017.
2 *Queensland Building and Construction Commission (Non-Conforming Building Products Code of Practice) Notice 2017.*
3 Explanatory notes for the Building and Construction Legislation *(Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Bill 2017,* page 1.
4 *Queensland Building and Construction Commission Act 1991* (the Act) s 74AF.
5 the Act s 74 AA 'reasonably practicable.'
6 the Act 74AB.
7 Department of Housing and Public Works (October 2017). *Non-Conforming Building Products: Code of Practice* (Code of Practice) 3.3.
8 the Act s 74AG (1).
9 the Act s 74AG (6).
10 Code of Practice 3.6.
11 Code of Practice 3.7.
12 the Act s 74AG (2).
13 the Act s 74AC (3).
14 the Act s 74AG (4).
15 Code of Practice 3.5.
16 the Act s 74AI (1).
17 the Act s 74AI (3).
18 the Act s 74AI (2).
19 the Act s 74AD (2).
20 the Act s 74AD (5)(a).
21 the Act s 74AD (5)(b).
22 The penalty unit value in Queensland is $126.15 (current from 1 July 2017).
23 the Act s 74AJ.
24 the Act s 74AK (2).
25 the Act s 74AL.
26 the Act, Schedule 2. 'notifiable incident.'

STRINGER V WESTFIELD SHOPPING CENTRE MANAGEMENT CO (SA) PTY LTD [2017] SASFC 138

KEYWORDS: FACILITIES MANAGEMENT; OCCUPIER'S LIABILITY; DELEGATION; VICARIOUS LIABILITY

KEY TAKEAWAYS

An occupier can delegate its duties, but to avoid liability, it will need to show it exercised reasonable care in selecting contractors, imposing appropriate terms and monitoring compliance.

In this case, the occupier avoided liability largely for an injury because the occupier was able to provide evidence about these three matters.

Facts

Mrs Stringer (the **Plaintiff**) was seriously injured when she slipped and fell while walking in the "Westfield — West Lakes" shopping centre, managed by Westfield Shopping Centre Management Co (the **Defendant**). The Plaintiff sued the Defendant as occupier, on the basis that she had slipped on some liquid which the Defendant had failed to clean.

The case is of wider importance because of the issue of the relative liability of occupiers, facilities managers and contractors such as cleaners.

The Defendants had engaged Reflections Cleaning Company (**Reflections**) to clean the shopping centre. About one minute before the fall, one of Reflections's cleaners changed a bag for a bin near where the accident was to take place. The trial judge found, based on the CCTV footage, that the Plaintiff had slipped on some liquid deposited by the cleaner employed by Reflections.

At trial, the Defendant successfully argued that it had delegated its cleaning duties to Reflections, and had therefore discharged its duty of care to the Plaintiff.[1] The Plaintiff appealed this decision to the Full Court of the Supreme Court of South Australia on five grounds, all of which were dismissed.

Decision

Ground 1 — Procedural fairness

The Plaintiff's evidence was that she slipped on a puddle larger than her foot, hurting her hand on the bin nearby as she fell. The Plaintiff alleged that the trial judge denied her procedural fairness by rejecting the Plaintiff's unchallenged evidence as to the nature and amount of the liquid, and in finding that the liquid had been deposited by the cleaner.

The Court considered the Plaintiff's arguments in the context of the principle that a trial judge's findings should not be disturbed unless the Plaintiff positively establishes good and sufficient reason to do so.[2]

In relation to the location of the fall, the trial judge preferred the evidence of CCTV footage, which showed that the point of the fall was not close to the bin. The Court found that it was open to the trial judge to prefer that footage as the best evidence on that topic, stating "[as] the Judge observed, the CCTV footage was not affected by the passage of time, nor by the "pain" or "shock" or the witnesses".[3]

The Plaintiff also argued that trial judge's finding that the liquid was "milky in colour" (based on the incident report prepared in relation to the fall) was unfair, because she was never challenged about this, citing *Stead v State Government Insurance Commission*.[4] The Court distinguished this case from Stead and found that, in this case, procedural fairness could be established by demonstrating that the party had knowledge of the existence of an issue, which was not limited to putting that matter to the party in cross-examination.[5] Since the Plaintiff had tendered the evidence of the incident report, the Court found that she would have known about the two inconsistent accounts. In any event, the principle in *Stead* that an appellate court will not order a new trial if it would inevitably result in the making of the same order as made at the first trial would apply.[6]

The significance of the colour of the liquid related to a new argument introduced by the Plaintiff in the appeal, namely that there were two independent spills, only one of which caused her fall.[7] The Court dismissed this theory, stating that this was "entirely at odds" with the Plaintiff's case at trial, and "unlikely in the extreme".[8]

Ground 2 — Was the Defendant's duty discharged?

The Plaintiff submitted that, in finding that the Defendant's duty was discharged, the trial judge failed to properly address the absence of evidence from the Defendant to show that it monitored Reflections' performance.

At trial, the Defendant relied on its written contract with Reflections (the **Contract**) and the testimony of its facilities manager, Mr Krndija. The Contract required Reflections to comply with specified minimum standards, to attend to spills immediately and to inspect the entire common mall and entrance area every 20 minutes.[9] Krnjida's evidence was that he met with Reflections's area supervisor weekly to discuss its performance, as well as meeting daily with the managing cleaner to discuss daily activities.[10]

The trial judge considered the issue of delegation in accordance with *Bevillesta Pty Ltd v Liberty International Insurance Co*,[11] noting that the Defendant has an evidentiary onus to establish it used reasonable skill and care:

1 in selecting Reflections;

2 by imposing appropriate terms and conditions on Reflections; and

3 in monitoring the compliance by Reflections under the Contract.[12]

The trial judge accepted Krnjida's evidence that Reflections was engaged as a result of a competitive tender and found that the Defendant had satisfied the first condition. In relation to the second and third conditions, the trial judge found that the terms of the Contract were onerous and entirely appropriate, and that the Defendant had reasonably monitored Reflections' performance of the Contract.[13]

The Plaintiff submitted that there was no evidence that the Defendant monitored the requirement that the area in which the Plaintiff fell be inspected every 20 minutes, and that there was no evidence of documents relating to the tender process or the reports required to be made under the Contract.[14]

The Court held that it is uncontroversial that the duty of an occupier in cases such as this can be delegated, and that the criteria for reasonable delegation of a duty of care are those set out in *Bevillesta*.[15] The Court noted the distinction between an evidentiary onus and a legal onus; if an occupier does lead evidence suggesting the duty has been delegated, the Plaintiff must negative delegation to discharge its legal onus of proving negligence.[16] The Court agreed with the trial judge's conclusions that:

1 Krnjida's evidence, taken with the terms of the Contract, discharged the Defendant's evidentiary onus; and

2 the Plaintiff failed to discharge the legal onus of establishing that the Defendant had not established each of the requirements for valid delegation.[17]

Ground 3 — Vicarious liability

The Plaintiff submitted that, in finding that the Defendant was not vicariously liable for Reflections' actions, the trial judge failed to take into consideration the nature of the relationship between the Defendant and Reflections, which she said involved a high level of control over Reflections' employees. The Contract contained a clause specifically renouncing any relationship of employer and employee.[18] It also allowed the Defendant to remove Reflections's employees from their work at the shopping centre, and required that Reflections' employees wear a uniform approved by the facilities manager.[19]

The Court considered the principles in *Hollis v Vabu Pty Ltd*[20] and Permanent Trustee Australia Ltd v Valeondis[21], and said that "it is crucial to assess all of the facts in order to ascertain the true nature of the relationship between the parties".[22] The Court found that "it was hardly surprising that the Defendant would impose strict contractual obligations on Reflections so as to enable it to monitor Reflections' performance and have safeguards in place should Reflections and its employees not comply with its obligations". However, this monitoring was not sufficient to bring the relationship within the scope of the vicarious liability regime.[23]

Ground 4 — Application of the Occupational Health, Safety and Welfare Act 1986 (SA)

The Plaintiff alleged that in finding that the Defendant was not liable to the Plaintiff pursuant to the statutory duty of occupiers in section 23 of the *Occupational Health and Safety and Welfare Act 1986* (SA) (the **Act**), the trial judge failed to take into account the size of the centre, the volume of traffic, and the well-recognised risk to safety.

The trial judge found that the spill was a singular act of carelessness by the cleaner employed by Reflections, to which the statutory duty to "ensure" reasonable care is taken did not extend.[24]

The Court considered authorities including *AFA Airconditioning Pty Ltd v Mendrecki and Others; Doan and Another v Mendrecki and Others*,[25] where Layton J stated that the "duty imposed by s 23 is to ensure that the workplace is maintained in a safe condition so far as is 'reasonably practicable'".[26] Since the cleaner deposited the liquid moments before the Plaintiff's fall, there was nothing the Defendant could have done as a matter of reasonable practicality.[27]

Ground 5 — Delay in judgment

The Plaintiff's final ground of appeal was that due to the delay of almost two years between the conclusion of the trial and the delivery of the judgment, the trial judge's findings were affected by operative delay, and so his reasons were inadequate.

The Court stated that "it is to be remembered that such a complaint is "not itself a ground of appeal", but rather, "relevant to the approach to be taken to the review of the findings of the trial judge"".[28] It was important that the trial judge was alive to the issue of the delay, and had prepared his reasons with this in mind, repeatedly referring to the full transcript of evidence and submissions that was taken from the trial.[29] The Court considered the delay in the context of the Plaintiff's other grounds of appeal, and found that, while the delay was unfortunate, no error had arisen as a result.[30]

http://classic.austlii.edu.au/au/cases/sa/SASCFC/2017/138.html

1 The trial judge also stated that Reflections, as the employer of the cleaner, would have been found negligent had it been joined to the action
2 Peek J at [22], with whom Kourakis CJ and Nicholson J agreed
3 At [51]
4 (1986) 161 CLR 141 (**Stead**), cited at [2017] SASFC 128 at [52]
5 At [53]
6 At [56]
7 At [57]
8 At [60], [64]
9 At [84]
10 At [86], [87]
11 [2009] NSWCA 16
12 At [91]
13 At [92]–[94]
14 At [96]
15 At [102]
16 At [104]
17 At [105]
18 At [111]
19 At [112]–[115]
20 (2001) CLR 21
21 (2009) 105 SASR 458
22 At [123]
23 At [126]
24 At [134]
25 (2008) 101 SASR 381
26 At [141]], quoting *AFA Airconditioning Pty Ltd v Mendrecki* (2008) 101 SASR 381, 411–12 (Layton J)
27 At [142]
28 At [70], quoting *John Diversey Australia Pty Ltd v Ferenczfy* [2013] SASCFC 59 (Gray and Sulan JJ)
29 At [75], [76]
30 At [78]

CONTRACT CONTROL SERVICES PTY LTD V DEPARTMENT OF EDUCATION AND TRAINING [2017] VSC 507

KEYWORDS: SECURITY OF PAYMENT; CLAIMABLE VARIATIONS; EXCLUDED AMOUNTS; SECOND CLASS OF VARIATIONS

KEY TAKEAWAY

A clause that allows either party to choose litigation or arbitration is a "method of resolving disputes" under section 10A(3)(d)(ii) of the Building and Construction Industry Security of Payment Act 2002 (Vic) (Act).

This is important because it can affect whether disputed variations can be dealt with in adjudications.

Facts

The Department of Education and Training (**DET**) engaged Contract Control Services Pty Ltd (**CCS**) as a builder on the Bendigo Senior Secondary College Theatre Project. CCS's final payment claim was disputed. DET served a payment schedule for $0.00.

CCS applied for adjudication. After an unfavourable determination by the adjudicator, CCS commenced judicial review proceedings in the Supreme Court of Victoria. The main question before the Court was whether the dispute resolution mechanism constituted a "method of resolving disputes" under section 10A(3)(d)(ii) of the Act.

Statutory background

Section 10A of the Act takes an infamously convoluted approach to variations. In crude summary, the adjudication process will not apply to the "second class of variations". A claimed variation will fall within the second class of variation in several situations, including where both of these conditions are satisfied:

- there is some dispute about the variation — including whether it is a variation, and its value; and
- the original contract sum exceeds $5,000,000 *"but the contract does not provide a method of resolving disputes under the contract".*

Thus, whether the contract provides a method of resolving disputes is vital and can affect whether a disputed variation will be subject to adjudication.

Supreme Court: there was a method of resolving disputes

The parties amended the AS2124-1992 standard form to include a specific procedure to deal with the second class of variation. That procedure was contained in clause 47.2A:

> *"In the event that the second class of variation payment claim dispute cannot be resolved or if at any time after the Superintendent has given a decision either party considers that the other party is not making reasonable efforts to resolve the second class of variation payment claim dispute,* ***either party may****, by notice in writing delivered by hand or sent by certified mail to the other party,* ***refer such second class of variation payment claim dispute to arbitration or litigation****." (emphasis added)*

CCS argued that Clause 47.2 (which dealt generally with disputes) and 47.2A did not satisfy the requirements of section 10A(3)(d)(ii) of the Act. These requirements had previously been considered in *Branlin v Totaro*[1] and *SSC Plenty Road v Construction Engineering (Aust)*,[2] as affirmed in *SSC Plenty Road v Construction Engineering (Aust)*.[3] CCS argued on the basis of these cases that the clause lacked the required elements of certainty and a mandatory obligation to resolve disputes by arbitration.

Specifically, CCS argued that to satisfy the second and third limbs of the test in *Branlin*, the contract must not only provide a dispute resolution process that is capable of resulting in a binding resolution of the dispute, and that adherence to that process must be compulsory. CCS contended that the contract provided an optional process that the parties might or might not follow.

Digby J closely examined the authorities and found that clauses 47.2 and 47.2A did constitute a method of resolving disputes under section 10A(3)(d)(ii) of the Act.

His Honour distinguished clauses 47.2 and 47.2A from the dispute resolution mechanism in the *SSC Plenty Road* cases. There, the contract did not provide any effective dispute resolution mechanism by which the claimant could oblige the other party to participate in an alternative dispute resolution process to resolve disputed second-class variation claims speedily. On the facts of this case, the contract did provide a potentially compulsory mechanism.

Digby J held that while the parties can always agree on other methods of resolving disputes, including prior to reference to arbitration, this possibility does not necessarily alter the enforceability of the arbitral process available to the aggrieved party seeking arbitral determination.

In short, Digby J held that:

- clauses 47.2 and 47.2A did constitute a method of resolving disputes under section 10A(3)(d)(ii) of the Act; and
- therefore, the plaintiff could not seek to have the second class of variations determined by adjudication.

The plaintiff's application accordingly failed.

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC//2017/507.html

Note: Corrs acted for the successful defendant.

1 [2014] VSC 492 at [65]
2 [2015] VSC 631 at [33]
3 [2016] VSCA 119

QUEENSLAND PHOSPHATE PTY LTD V KORDA [2017] VSCA 269

KEYWORDS: FORMATION OF CONTRACT

KEY TAKEAWAYS

An exchange of emails contemplating the terms of a proposed agreement is unlikely to constitute a binding and enforceable agreement unless all essential terms of the agreement are clearly and finally dealt with in that correspondence.

Facts

On 2 June 2016, Korda was appointed liquidator of Legend International Holdings Inc (**Legend**). Legend owned 100% of the shares in Paradise Phosphate Ltd (**Paradise**).

At the relevant time, Mr Sholom Feldman and his mother, Mrs Pnina Feldman, were directors of both Legend and another company, Queensland Phosphate Pty Ltd (**Queensland Phosphate**).

On 7 November 2016, Korda commenced proceedings seeking:

1. the appointment of a provisional liquidator to Paradise;
2. orders winding up Paradise in insolvency or on the just and equitable ground;
3. orders setting aside a bond deed and a security deed, both between Paradise, Legend and Queensland Phosphate, as a voidable transaction; and
4. orders declaring that:

- a share sale agreement (under which Legend's shares in Paradise were sold to Queensland Phosphate for $1, subject to an adjustment mechanism based on a valuation of Paradise's shares) was void; and
- the appointment of a receiver to Paradise was void.

The trial of the proceeding was due to commence on 1 May 2017.

In April 2017, Judd Commercial Lawyers (**JCL**), solicitors for Queensland Phosphate and Paradise, and Arnold Bloch Leibler (**ABL**), solicitors for Korda and the other respondent liquidators, exchanged correspondence containing proposals to resolve the proceeding. On 19 April 2017, ABL sent JCL a counter-offer to an earlier offer from Queensland Phosphate and Paradise. On 25 April 2017, JCL sent an email to ABL accepting the respondents' offer of 19 April 2017.

The next day, solicitors for both parties discussed the terms of a proposed deed of settlement by telephone.

The parties took different views on the consequence of the email exchange:

- The respondents' position was that a deed of settlement was necessary before a concluded and binding agreement came into existence.
- The applicants' position was that the exchange of emails produced a concluded and binding agreement. This was notwithstanding the fact that the applicants' solicitor engaged in discussions with the respondents' solicitor after the email exchange about the terms of a deed of settlement.

The trial judge at first instance concluded that *"the parties did not intend that, as a consequence of the mere exchange of emails, the proceedings were to be immediately terminated in the absence of a formal deed of settlement executed by all parties."*

On appeal, the question for the Court was whether the judge at first instance had erred in this conclusion. In other words, the Court was required to determine whether the email exchange on 19 and 25 April 2017 gave rise to a concluded and binding agreement.

Decision

The Court held that there should be a grant of leave to appeal, as it was plainly arguable that the email exchange of 19 and 25 April 2017 gave rise to a concluded and binding agreement. However, as this argument was bound to fail, the Court dismissed the appeal.

In reaching this conclusion, the Court noted:

1. Whether there was a binding agreement is to be determined objectively from the terms of the emails, read in light of the surrounding circumstances and having regard to the commercial context in which they were exchanged. If an essential term was not agreed, then the "agreement" is incomplete and did not give rise to an enforceable contract. Further, the existence of important matters on which the parties have not reached consensus will render it less likely that they intended to be immediately bound before the execution of a formal document.
2. In determining whether a binding contract was in fact formed, regard may be had to the parties' subsequent communications:
    - to see what was important or essential to the transaction;
    - as admissions; and
    - as evidence of the parties' contractual intention.

Ultimately, the Court considered that the context and subsequent communications between the solicitors demonstrated that the exchange of emails on 19 and 25 April 2017 did not give rise to a concluded, binding agreement.

Several matters of critical significance had not been dealt with in the email exchange. These included:

- payment of Paradise's expenses while the sale process was occurring;
- the question of fees that might be owed to the Receiver and which might be recoverable out of Paradise's assets;
- whether the Feldmans would remain directors of Paradise;
- the timing and extent of mutual releases;
- the position of the liquidators; and
- the timing of dismissal of the proceeding.

The Court considered that all of these matters are important matters of context when assessing whether the parties intended to be immediately bound by what they had agreed. That these matters were not covered by the 19 and 25 April 2017 email exchange, combined with the fact that matters of this kind would ordinarily be expected to be covered by a formal settlement agreement, led the Court to find that the email exchange between the parties' solicitors did not give rise to a complete and binding agreement.

http://classic.austlii.edu.au/au/cases/vic/VSCA/2017/269.html

PITFALLS IN THE GLOBAL CONSTRUCTION MARKET: ARCADIS GLOBAL CONSTRUCTION DISPUTES REPORT 2017

KEYWORDS: GLOBAL DISPUTES REPORT

KEY TAKEAWAYS

In the recently released Arcadis 2017 Global Construction Disputes Report, construction activity is predicted to grow steadily due to "more robust global demand, reduced deflationary pressures and optimistic financial markets".[1]

This optimistic outlook is measured alongside market uncertainty, increased complexity of projects, commodity and currency fluctuations, and skills shortages due to construction workers leaving the industry.[2]

These macro factors all pose significant project risks, and often escalate to disputes.[3] With this in mind, it is unsurprising that the failure to administer contracts properly remained the leading cause of construction disputes.[4]

Globally, the report records that construction disputes have decreased marginally in value and in duration.[5]

Global Trends

The report indicates that dispute durations are steadily decreasing. The global average in 2016 was 14 months, a decrease of more than one month from the previous year.[6] In terms of quantum, the trends reported suggests that this is also decreasing. The global average value of disputes was reported to be US$42.8 million in 2016, a decrease of over US$3 million.[7]

Across all sectors, the social infrastructure/public sector was reported to have experienced the most disputes.[8]

Regional trends

Asia

In its 2015 report, Arcadis identified that disputes values in Asia dropped significantly to an average of US$67 million, yet remained approximately 45% higher than the global average.[9] The average dispute value in Asia increased to US$84 million, the highest global average dispute value recorded by Arcadis in 2016.[10] The average length of disputes dropped to 14.6 months, decreasing by almost 5 months when compared with 2015.[11]

Arbitration was reported to be the most common method of alternative dispute resolution in Asia in 2016, signifying a shift away from party-to-party negotiation.[12] Although Arcadis attributed this to other methods of ADR failing to satisfy parties' expectations,[13] it is more likely a result of international arbitration centres being proactive and committed to attracting business from parties in the construction industry, encouraging them to resolve disputes in leading arbitration hubs such as Singapore and Hong Kong. These jurisdictions saw, and will continue to see, an increase in large international disputes which Arcadis attributed to China's "One Belt, One Road (OBOR)" initiative.[14]

Europe

In the United Kingdom, the impact of Brexit is likely to correlate with an increase in disputes, caused by uncertainty in the UK construction and engineering industry.[15] Previously, Arcadis had suggested that fears influenced investment decisions, but predicted that any additional impact on the construction industry (beyond the labour market) would be limited.[16]

On a more positive note, the UK recorded the lowest average dispute duration globally, at 12 months.[17]

Middle East

In the Middle East, Arcadis noted a sharp drop in dispute values from US$82 million in 2015, to US$56 million in 2016.[18] The drop in oil prices has led to greater project deferrals and cancellations, resulting in a sharp increase in the number of disputes in the region.[19]

Key statistics

Preferred methods of dispute resolution

As in 2014 and 2015, party-to-party negotiation ranked as most preferred in 2016. The most preferred method in Asia, arbitration, came in second globally in 2016, up from third in 2015.[20]

Causes of disputes

The most common global cause for disputes since 2014 has been the "failure to properly administer the contract".[21]

Value of disputes

The global average value of disputes was US$51 million in 2014, US$46 million in 2015, and US$42.8 million in 2016, signifying a significant drop over a three year period.[22]

Kinds of disputes

Joint ventures continue to be regarded as a significant source of disputes, and globally, over 30% ended up in dispute in 2016.[23]

What should businesses expect?

Arcadis predicts further turbulence in the industry. Parties will be expected to adapt their current policies on project procurement, finance and delivery to keep up with a relatively unpredictable global economy; one which, for the most part, is responding to protectionist measures.[24]

https://www.arcadis.com/en/united-states/our-perspectives/global-construction-disputes-report-avoiding-the-same-pitfalls/

Note: this article is based on a draft Corrs Thinking Piece by Ben Davidson, Jaclyn Masters and Jonathan Mackojc.

1 Arcadis, Global Construction Disputes Report 2017: *"Avoiding the Same Pitfalls"*, at [6]
2 At [2]
3 At [6]
4 At [10]
5 At [9]
6 At [9]
7 At [9]
8 At [10]
9 Arcadis, Global Construction Disputes Report 2016: *"Don't Get Left Behind"*, at [16]-[17]
10 At [9]
11 At [15]
12 At [17]
13 At [17]
14 At [17]
15 At [23]
16 Arcadis, Global Construction Disputes Report 2016: *"Don't Get Left Behind"*, at [23]
17 At [22]
18 At [18]
19 At [20]
20 At [11]
21 At [10]
22 At [9]
23 At [11]
24 At [7]

RIVA PROPERTIES LIMITED V FOSTER + PARTNERS LIMITED [2017] EWHC 2574 (TCC)

[2017] EWHC 2574 (TCC)

KEYWORDS: BREACH OF DUTY; PROFESSIONAL ADVICE

KEY TAKEAWAYS

The fact a professional is not a costs specialist is not a blanket defence against any action for breach of duty involving advice related to costs. However, the breach must still be an effective cause of the loss suffered.

Facts

An investor, Mr Dhanoa, controlled four companies (the **Claimants**).[1] The Claimants sued architects Foster + Partners Limited (**Fosters**) for professional negligence.

In 2007, Dhanoa purchased land close to Heathrow Airport and one of the claimants (Riva Properties Limited) engaged Fosters to design a 5-star hotel on that site. Dhanoa's account of the facts (which the judge preferred) was that he had advised Fosters early in July 2007 that the hotel was to be built within a budget of £70 million. (A contingency was later added so that the budget rose from £70 million to £100 million.) In January 2008, Dhanoa engaged a costs consultant, EC Harris, who costed Fosters' design at £195 million. At meetings that followed, Fosters told Dhanoa that through "value engineering", the cost of the hotel could be brought down to £100 million without major reductions in scope. Fosters' attempts to achieve savings did not succeed. According to Dhanoa, it was only in 2011 that he received independent professional advice that such a reduction would never have been possible. By this time, Dhanoa had already spent £4 million in professional fees, including those paid to Fosters.

The Claimants primarily sought loss of profits associated with delay in building the hotel. (They had engaged other architects to design a hotel on similar terms as those put to Fosters, albeit only in outline.)

Decision

Factual disputes

Much of the judgment was concerned with resolution of factual disputes, as Fosters denied all of the critical facts the Claimants asserted. It claimed in its defence, for example, that Dhanoa did not communicate the budget to it between July 2007 and January 2008, a claim that was proven false within 30 minutes of cross-examination of Fosters' primary lay witness (at [40]–[41]). Similarly, both of the expert architects engaged by the parties agreed that the scheme could never have been valued engineered down to £100 million, with Fosters' expert stating that this was "blindingly obvious" (at [54]). On the basis of these findings, much of Fosters' defence was unsustainable, including its position on breach and its 14 contributory negligence claims.

1 Riva Properties Limited, Riva Bowl LLP, Riva Bowl Limited and Wellstone Management Limited

2 At [137]–[147], citing *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 617G. Under English law, there are three requirements: first, reasonably foreseeable harm; second, a relationship of proximity; and third, that imposing liability would be fair, just and reasonable

3 At [148]

4 At [155]–[156] and [161]–[162]

5 At [206], and at [204] citing Borealis AB v Geogas Trading SA [2010] EWHC 2789 at [43]–[45]

6 At [248], referring to *The Golden Strait Corporation v Nippon Yusen Kubishika Kaisha* [2007] 2 ACT 353 at [29], [32] and [36]

7 *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518

Duty and breach

Fosters' express duty to Riva Properties to exercise due skill and care in the performance of its duties was found in Clause 8.1 of the deed of appointment (**Appointment**). Fraser J held that Fosters did not owe duties of care in negligence to Riva Bowl LLP and Riva Bowl Limited (the second and third claimants), as there was not a relationship of proximity or neighbourhood between Fosters and these companies, thereby failing the second part of the test in Caparo.[2] Fraser J stated further that imposing such a duty would not be "fair, just and reasonable" in the context of the third part of the Caparo test,[3] as the Appointment contained mechanisms that could have been used to require Fosters to enter into direct warranties with third parties.

In this case, while Fosters did not have an obligation to provide detailed costs advice of the kind a specialist quantity surveyor would provide, it did need to take cost implications into account when preparing the design, and advise the claimants if any element of the design would affect the ability to stay within the prescribed budget (at [125]–[129]). Instead, the evidence showed that Fosters had failed to take budget into consideration at all (at [98]).

In light of this, Fraser J found that Fosters was responsible for the two primary breaches alleged by the claimants, namely that Fosters acted negligently in failing to take the budget in account, and in providing advice that value engineering could reduce the cost of building the hotel to £100 million (or alternatively, failing to advise that value engineering could not produce the savings that would bring the hotel within budget).[4]

Causation

The issue of causation primarily arose in the context of the claimants' loss of profits claim. Fosters raised two arguments. Both failed.

The first was the degree to which Dhanoa could be said to have relied on Fosters' advice at all, since he had engaged EC Harris as quantity surveyors. Fraser J held that this did not break the chain of causation, as such a finding would be directly contrary to the findings already made in respect of Fosters' breach (at [199]–[200]).

The second was that Dhanoa's reliance on Fosters' advice was "so unreasonable as to break the chain of causation". Fraser J found that as a "world leading architectural practice", advice that value engineering could bring the cost down to £100 million was "exactly the sort of advice that would be relied upon by a client, and was relied upon here by Mr Dhanoa" (at [201]).

Despite these findings, Fraser J concluded that the giving of the advice was not the effective cause of the claimants' failure to secure funding,[5] as the events in question had occurred around the onset of the global financial crisis. Whether the cost of the hotel had been £100 million or £195 million, Dhanoa's losses stemmed primarily from the financial crisis. He was unable to borrow the sums required for the expensive scheme with his limited cash reserves, as financial institutions had become more cautious (at [201]–[206]).

Fraser J went on to say that an identical result would be reached if the claim was analysed by asking whether the Claimants' inability to obtain funding was "a type of harm from which Fosters had a duty to keep the Claimants harmless" (at [207]). The scope of Fosters' duty did not extend to giving advice on the business viability of the hotel scheme. It did not form any part of the architectural services Fosters was engaged to provide (at [211]–[212]).

Loss, quantum and conclusion

Even though the claimants' were not awarded damages for loss of profits, they were awarded damages on the "expectation basis", calculated by reference to the money that would need to be spent on the new scheme (reflecting "the value of the contractual bargain of which the claimant has been deprived as a result of the defendant's breach"[6]).

Fraser J found that the best measure would be to assess the costs the claimants actually incurred in connection with Fosters producing its design and the attempts at value engineering. Any work done that could be re-used in the new scheme would not be claimable, but Fraser J found that no such work existed: everything would need to be started from scratch (at [251]–[252]).

Although the individual identities of the four claimants were not significant for most of the issues in the trial, the matter was enlivened on the question of quantum, as some of the relevant costs associated with the scheme were incurred by the Second and Third Claimants, who were not party to the Appointment. Fosters argued that these costs were not recoverable, relying on the *Panatown* decision[7] on recovery of third party loss by a contracting party. Fraser J disagreed; although the Appointment contained a warranty mechanism, it had not been used. Further, the costs the claimants incurred were merely being used as the measure of the costs that would need to be incurred again to build the new scheme. There was no reason to expect that the First Claimant would not pay those sums for the new scheme (at [311]).

Fraser J found that the First Claimant was entitled to recover £3,604,694.36 from Fosters, with costs and interest to be decided later.

http://www.bailii.org/ew/cases/EWHC/TCC/2017/2574.html

KLRCA'S STANDARD FORM OF BUILDING CONTRACTS: AN ARBITRAL INSTITUTION'S GUIDE FOR THE CONSTRUCTION INDUSTRY

Keywords: New Standard Form Contracts

Key takeaways

On 15 August 2017, the Kuala Lumpur Regional Centre for Arbitration (**KLRCA**) launched a suite of standard form contracts (SFCs) for construction projects.[1] This initiative is the first of its kind in the arbitration world.

The KLRCA has a website[2] dedicated to its SFC initiative, where parties can access three free contracts:

1. Main Contract;
    - Main Contracts [with quantities]; and
    - Main Contracts [without quantities];
2. Standard Sub-Contract; and
3. Minor Works Contract.

Highlights

Parties may download sample copies of the SFCs free of charge. Parties also have the option of customising their contract by filling out an online form on the SFC- website.[3]

This development is particularly important for the construction industry in Malaysia, which has faced problems with best practice in safety standards, integration with the international market, labour shortages, quality issues, delays, abandoned projects, accidents, reliance on unskilled foreign labour, and poor contract administration.

KLRCA's suite of SFCs has been tailored to the Malaysian market. The SFCs are relevant to a range of parties including principals, contractors, sub-contractors and consultants.

http://sfc.klrca.org/#about

Note: this article is an abbreviated form of a draft Corrs Thinking Piece by Matthew Muir and Jonathan Mackojc.

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

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