Corrs Projects Update

July 2020

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Welcome to the latest edition of Corrs Projects Update July 2020

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

We hope that you find it interesting and stimulating.

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Insights

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

The information contained in this publication is current as at July 2020.

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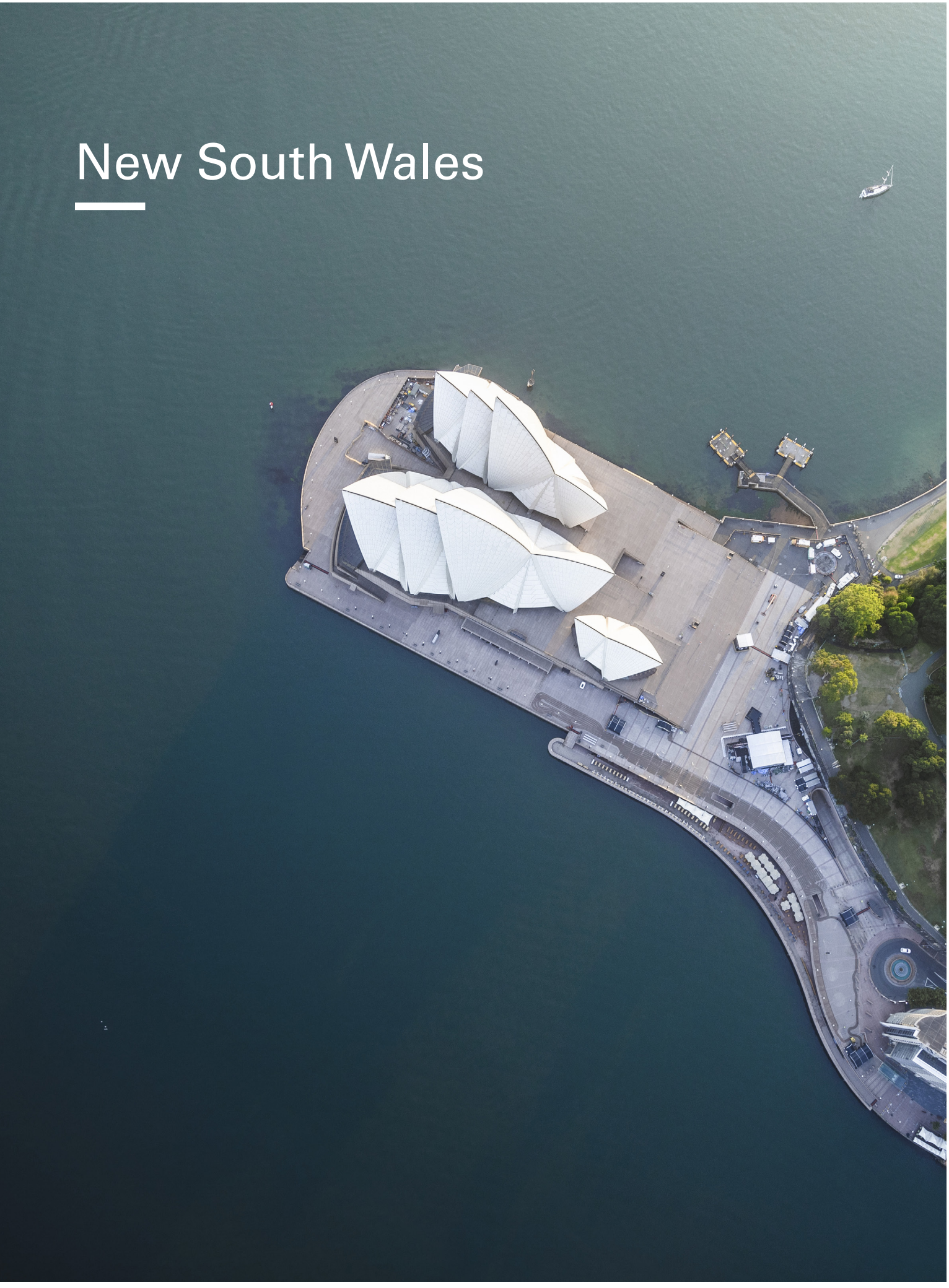


Canterbury-Bankstown Council v Payce Communities Pty Ltd

[2019] NSWSC 1419

Key takeaways

Generally, the concurrent pursuit of a payment claim in court proceedings and by adjudication under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) is not, in itself, an abuse of process.

To make out an abuse of process claim, the simultaneous pursuit must be "unjustifiably oppressive". The onus of establishing oppressiveness is a "heavy one".

Keywords

concurrent adjudication and litigation; abuse of process; breach of "implied undertaking"

Background

Canterbury-Bankstown Council (**Council**) entered into a contract with Payce Communities Pty Ltd (**Payce**) for the redevelopment and fit out of a senior citizens community centre and library. At practical completion, the parties disputed the extent and costing of variations.

Under the contract, Payce was entitled to make a payment claim on the twenty-fifth day of the month in which practical completion was certified. Payce was also entitled to make a final payment claim within 28 days after the expiry of the last defects liability period.

First payment claim and adjudication process

In October 2018, Payce served a payment claim on Council seeking $1.772 million in respect of 41 variations. The Council responded with a payment schedule of $Nil.

Payce applied for adjudication. The adjudicator determined that Payce was not entitled to any payment for the variation works because no reference date was available for the October payment claim. The adjudicator did not deal with the merits of Payce's claim.

Supreme Court proceedings and the second payment claim

Payce commenced Supreme Court proceedings against the Council to recover the costs of the disputed variation works.

While the Court proceedings were underway, the defects liability period expired and Payce served its final payment claim on the Council. In the Final Payment Claim, Payce claimed for the costs of the disputed variations. To support the Final Payment Claim, Payce relied on evidence that had been adduced in the Supreme Court proceedings.

In response to the Final Payment Claim, the Council again served a payment schedule of nil. The Council also commenced these proceedings to restrain Payce from seeking to invoke the adjudication procedures under the Act, claiming that it would be an abuse of process to do so while court proceedings were already underway.

The issue before the court was thus whether it is an abuse of process to seek adjudication while litigation is still in progress.

No necessary abuse of process

Henry J held that the concurrent pursuit of claims for payment in court proceedings and by adjudication under the Act is not, in itself, an abuse of process. The right to prosecute claims concurrently under the Act may only be limited where there are "some additional circumstances that could generate an abuse of process".[1]

Henry J held that the party seeking to restrain the use of the Act must show that it is an abuse of process, and that such an onus is a "heavy one".

There was no abuse of process here, and the Court dismissed the Council's claim.

In concluding that pursuing adjudication and court proceedings simultaneously will not automatically amount to an abuse of process, Henry J explored what would need to be established to raise a successful claim. The indicators include:

1. proceedings being brought for some "improper or illegitimate purpose"; or
2. use of a process which makes proceedings "seriously or unfairly burdensome, prejudicial or damaging, or productive of serious and unjustified trouble and harassment", or "unjustifiably oppressive".

The Council faced an "undoubtedly greater burden" in having to contest the adjudication claim while preparing for the Supreme Court proceedings, but that is not sufficient prejudice to give rise to an abuse of process.

Accordingly, running concurrent litigation and adjudication will generally not be considered an abuse of process.

https://www.caselaw.nsw.gov.au/decision/5da92964e4b0ab0bf6072f26

1 At [19], citing *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* [2005] NSWCA 49 at [24]

Modog Pty Ltd v ZS Constructions (Queenscliff) Pty Ltd

[2019] NSWSC 1743

Key takeaways

Courts will preference substance over form when interpreting payment claims. The parameters of a payment claim are a matter for an adjudicator.

An error in interpreting a payment claim is not a jurisdictional error and so cannot be used to invalidate an adjudicator's determination.

Keywords

jurisdictional error; payment claims

Facts

Modog Pty Ltd (**Modog**) subcontracted ZS Constructions (Queenscliff) Pty Ltd (**Queenscliff**) on an apartment complex in Freshwater, NSW. A dispute arose in relation to a claim by Queenscliff.

By way of background:

- Queenscliff emailed Modog attaching a "Payment Summary Sheet" for the project. On the same day, Queencliff sent a further six emails, attaching invoices referred to in the Payment Summary Sheet and addressed to Modog, ZS Australia and other entities (together, the **Payment Claim**).
- In response, Modog served five payment schedules assessed as zero, due to irregularities with the Payment Claim.
- Queenscliff applied for adjudication. The adjudicator accepted that the Payment Claim was valid under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) and determined Queenscliff was entitled to be paid nearly $90,000.

Issues

Modog challenged the adjudication under section 22 of the Act, on three grounds:

1. that the Payment Claim was not valid under section 13(1);
2. that the Payment Claim had not been served in accordance with section 17; and
3. that the adjudicator committed a jurisdictional error because there was no jurisdiction to determine multiple Payment Claims in respect of a single reference date.

No jurisdictional error

Henry J dismissed the proceedings and found that there was no jurisdictional error.

Issue 1 — Was there a Payment Claim under section 13(1)?

Modog argued Queenscliff had not submitted a valid Payment Claim as:

- it did not specifically demand payment (because the invoices provided in support of the Payment Claim were addressed to various entities); and

- Queenscliff indicated that the invoices would be sent later (and Modog relied on the decision in *Quickway Constructions Pty Ltd v Electrical Energy Pty Ltd*,[1] in which the Court concluded that an adjudication determination should be quashed when the invoices did not constitute an entitlement to the claimant).

Queenscliff argued Modog had misunderstood the Payment Claim and that the invoices addressed to various entities demonstrated an entitlement to be paid for disbursements. Further, this was a matter to be decided by the adjudicator, because the parameters of a Payment Claim are a matter for an adjudicator to determine and an error in interpreting a Payment Claim for the purpose of an adjudication is not a jurisdictional error.

Henry J agreed with Queenscliff: it was open for the adjudicator to interpret the claim as a Payment Claim.

Issue 2 — Was the Payment Claim sent by Queenscliff?

Modog contended that the Payment Claim was not valid as it had not been served by the correct person under section 17 of the Act. The email had been sent by an individual who was not a director of Queenscliff and the only legal entity mentioned in the email was ZS Australia.

Queenscliff argued that these errors were not relevant; they had exchanged correspondence in the same way previously, including when detailing terms of the contract. Her Honour agreed. The sender was the project manager employed by Queenscliff and in this capacity, he prepared monthly progress claims.

Issue 3 — Were there multiple Payment Claims in respect of a single reference date?

Modog argued that even if the 11 September email and attachments amounted to a Payment Claim, it was one of four Payment Claims Queenscliff sent on the same day. Modog submitted that sending four Payment Claims contravened section 13(5) of the Act, which provides that a claimant cannot serve more than one Payment Claim in respect of each reference date under the construction contract.

Her Honour rejected Modog's submission that the invoices represented separate Payment Claims and found that, when viewed as a matter of substance rather than form, there was only one Payment Claim.

Conclusion

Her Honour dismissed proceedings and ordered that the nearly $60,000 paid into Court by way of security be paid to Queenscliff.

https://www.caselaw.nsw.gov.au/

1 [2017] NSWCA 337

Brolton Group Pty Ltd v Hanson Construction Materials Pty Ltd

[2020] NSWCA 63

Key takeaways

When assessing a payment claim, an adjudicator cannot adopt a reference date different from the one in the payment claim.

An adjudicator cannot determine a dispute on a basis neither party argued without allowing the parties to make submissions on the matter.

Keywords

reference dates; jurisdictional error; denial of natural justice

Background

Hanson Construction Materials Pty Ltd (**Hanson**) engaged Brolton Group Pty Ltd (**Brolton**) to build a quarry processing plant at Bass Point, New South Wales. The contract entitled Brolton to claim monthly progress payments (clause 11.4) and payment for the value of completed work on termination (clause 12.3).

In August 2019, Brolton served a payment claim under clause 11.4 which was said to cover work "up to September 2018", but included amounts for work completed after 25 September 2018 and interest up to August 2019. Hanson later terminated the contract on 3 October 2018.

The payment claim was disputed and Brolton applied for adjudication under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**).

The adjudicator found that, given the parties' entitlements under clause 12.3, Brolton's payment claim was supported by a reference date of 23 October 2018 and awarded Brolton nearly $2.9 million.

Hanson commenced proceedings in the Supreme Court of NSW seeking a declaration that the determination was void. Ball J found in favour of Hanson on the basis that the determination involved jurisdictional error and a denial of natural justice.[1] Brolton appealed.

Issues on appeal

The principal issues before the Court of Appeal were:

1. whether, by adopting an unavailable reference date of 23 October 2018, the adjudicator undertook the task he was required and authorised to do under section 22(1) of the SOP Act; and
2. whether the determination involved a denial of natural justice.

Issue 1 – The adjudicator failed to undertake his task

Gleeson JA (with whom Meagher and Payne JJA agreed) found that the adjudicator failed to perform the task required. The parties came to an agreement that the relevant reference date of the payment claim was 25 September 2018. On that basis, Gleeson JA held that under section 22(1) of the SOP Act, the adjudicator had to determine the payment claim in respect of that reference date. Instead, the adjudicator calculated the payment Brolton was entitled to on a purported reference date of 23 October 2018.

1 *Hanson Construction Materials Pty Ltd v Brolton Group Pty Ltd* [2019] NSWSC 1641

Citing *Southern Han*,[2] Gleeson JA held that a payment claim with an available reference date is a precondition which enlivens the power of the adjudicator. If the adjudicator addresses a differently defined payment claim, they are not acting within the confines of section 22(1).

Accordingly, Gleeson JA held that the adjudicator had no authority to make a determination regarding Brolton's payment claim in that way. The determination was thus made in jurisdictional error.

Issue 2 – The determination denied Hanson natural justice

The scope of the dispute before the adjudicator was restricted to the terms of the payment claim, Brolton's adjudication application and Hanson's adjudication response.

Gleeson JA found that each party proceeded on the basis that the payment claim was made under clause 11.4. Neither party had notified the other or later argued that the payment claim was made under clause 12.3 or that Brolton was entitled to make the payment claim with a reference date of 23 October 2018.

The adjudicator determined the dispute on these bases, neither of which the parties had contended, and did not give the parties an opportunity to make submissions on the matter. Gleeson JA held that this amounted to a denial of natural justice.

Conclusion

The court unanimously dismissed the appeal and Brolton was ordered to pay Hanson's costs.

https://www.caselaw.nsw.gov.au/decision/5e9798c8e4b0d927f74aedef

2 *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd* (2016) 260 CLR 340; [2016] HCA 52

TWT Property Group Pty Ltd v Cenric Group Pty Ltd

[2020] NSWSC 72

Key takeaways

Where a payment claim or adjudication application should have been pursued in earlier proceedings, Anshun estoppel will prevent a party from making the claim or application. Attempting to make the claim or application may be an abuse of process.

Failure by an adjudicator to consider all submissions put forth by parties to an adjudication may result in an adjudication determination being found void.

Keywords

payment claims for old work; Anshun estoppel

Background

By contract dated 20 June 2017, TWT Property Group Pty Ltd (**TWT**) engaged Cenric Group Pty Ltd (**Cenric**) to demolish and excavate a site in Harris Street, Pyrmont. Cenric subcontracted Bundanoon Sandstone Pty Ltd (**Bundanoon**) to excavate and sell sandstone from the site. On 19 March 2018, TWT excluded Cenric from the site and engaged Bundanoon directly to carry out the sandstone excavation.

On 29 March 2018, Cenric commenced proceedings against TWT and Bundanoon, claiming damages and a right to set off the amount owing to Cenric against a cross-claim brought by TWT. Cenric did not, however, make a claim for the work it had done up to 19 March 2018.

On 14 January 2019, Cenric applied for adjudication based on a December 2018 payment claim for $444,726, the amount Cenric argued it was owed for the work it did before it was excluded from site. TWT served a payment schedule for $Nil.

The adjudicator found that the payment claim was not served within 12 months after the construction work, to which the claim related, was last carried out and therefore did not comply with section 13(4)(b) of the *Building and Construction Industry Security of Payment Act 1999* (NSW). Consequently, TWT owed Cenric nothing under the purported payment claim. Cenric withdrew its adjudication application and lodged a further adjudication application in respect of the same payment claim.

TWT brought proceedings to challenge the December 2018 payment claim or, alternatively, to uphold the adjudication.

Issues

Issue 1 – Was it an abuse of process to make a payment claim?

In proceedings before a court of competent jurisdiction, parties must bring forward their whole case. Under Anshun estoppel, a party will not be permitted to raise, in a subsequent proceeding, a claim or an issue of fact or law that is so connected or so relevant to the subject matter of the first proceeding that it was unreasonable for that party not to have made the claim or raised the issue in the first proceeding.

Stevenson J determined that it was unreasonable and inexplicable that Cenric did not include a claim for unpaid work in the original proceedings. On this basis, Stevenson J was satisfied that Cenric should be estopped from claiming payment for work done prior to its exclusion from the site, in later proceedings.

Issue 2 – Was the payment claim too late?

Stevenson J noted that it was not necessary to determine this issue, given Cenric was estopped from making the subsequent adjudication application. It was accepted, however, that if it had been necessary to deal with this issue, the adjudication determination would be void on the basis that there had been a denial of natural justice. Stevenson J found that the adjudicator had erred in overlooking Cenric's submissions that the payment claim related to sandstone excavation done within 12 months before the payment claim was served.

Stevenson J reasoned that, had the adjudicator considered such submissions, they would have reached a different conclusion. Consistent with *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport*,[1] a failure to consider submissions is a substantial breach of natural justice that renders a determination void.

Conclusion

TWT's claim succeeded: Cenric was estopped from making a claim for payment for work done prior to its exclusion from the site.

https://www.caselaw.nsw.gov.au/decision/5e44acfee4b09d076393df5f

1 (2004) 61 NSWLR 421; [2004] NSWCA 394

Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd

[2020] NSWSC 208

Key takeaways

The commencement of court proceedings does not affect the time limit for bringing an adjudication application.

Allegations that supporting statements accompanying payment claims are knowingly false require clear evidence.

Keywords

withdrawing adjudication applications; supporting statements

Background

Parrwood Pty Ltd (**Parrwood**) engaged Trinity Constructions Pty Ltd (**Trinity**) to design and construct 59 apartments. The contract was based on AS 4902-2000. In July and August 2019, Parrwood served notices to show reasonable cause for default. Trinity failed to show cause, and Parrwood exercised its right to terminate under clause 39.4. Trinity did not contest Parrwood's exercise of this right.

Clause 39.6 of the contract provided:

> "When work taken out of the Contractor's hands has been completed, the Superintendent shall assess the cost thereby incurred and shall certify as moneys due and payable accordingly the difference between that cost (showing the calculations therefor) and the amount which would otherwise have been paid to the Contractor if the work had been completed by the Contractor."

It was agreed a reference date arose on 25 August 2019. On 6 September 2019, Trinity served a payment claim. Parrwood responded with a payment schedule for $Nil.

The parties proceeded to adjudication. The first adjudicator determined that the amount owing to Trinity was "no amount" as at the time the payment claim was made, Parrwood had validly exercised its right to take work out of Trinity's hands (**First Determination**). This meant that payments under the contract were suspended until they became payable under clause 39.6.

The first adjudicator determined that the mechanisms under clauses 39.4 and 39.6 were not voided by section 34 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**), which prohibits contracting out.

Trinity purported to withdraw the adjudication application and made a new adjudication application under section 26 of the Act. The second adjudicator found that the first adjudicator had failed to perform his statutory function because he declined to determine the payment claim. Consequently, the determination of the first adjudicator was void and the second adjudicator could determine the claim herself (**Second Determination**).

In the NSW Supreme Court, Parrwood sought a declaration that the Second Determination in favour of Trinity was void. Trinity filed a cross-summons, without leave, seeking a declaration that the First Determination was void.

Supreme Court

Issue 1 — Could Trinity argue the First Determination was void?

Ball J held that it was neither necessary nor sufficient for Trinity to seek a declaration that the First Determination was void in order to secure its right under section 26. It was open to Trinity to take the view that the determination was void and proceed on that basis, needing only to exercise its rights within the prescribed time limit.

Commencing court proceedings would not of itself suspend the section 26 time limit. His Honour held that although the cross-summons was filed late, Trinity's position that the First Determination was void was self-evident, since it purported to withdraw the first adjudication application.

His Honour also noted that Parrwood could have commenced proceedings seeking a declaration that the First Determination was valid, or could have waited for the outcome of the second adjudication application. Parrwood chose the latter. Even if it had commenced proceedings, this would not have eliminated the need for Trinity to exercise its rights under section 26 either.

Issue 2 — Was the First Determination void?

Ball J held that the First Determination was void.

His Honour explained that the first adjudicator failed to comply with his statutory duty to determine the amount to be paid. Rather, the first adjudicator had concluded that, as a result of the decision to take the work out of Trinity's hands, the right to a progress payment was suspended until clause 39.6 took effect.

Parrwood submitted that the fact that the first adjudicator determined a nil progress payment did not mean that he had failed to determine the claim, relying on the words "if any" in section 22(1) of the Act. However, Ball J noted that this was not an accurate representation of what the first adjudicator had done.

The first adjudicator had decided that it would be premature to decide and that he had declined to determine any entitlements. His Honour noted that the question was not what the effect of the contract was, but the effect of the Act in the circumstances.

Ball J also distinguished the parties' circumstances from that of *Southern Han Breakfast Point v Lewence Construction*.[1] His Honour explained that the High Court held that no reference date could arise after the principal had elected to take the work out of the contractor's hands and that no such right to a progress payment could be pursued after suspension. However, Trinity's right to a progress payment had arisen before the suspension. Thus, it had a right to make a progress claim and to have it adjudicated in accordance with the Act.

Issue 3 — False supporting statements

Parrwood argued that the supporting statement served with the payment claim contained a false statement as it stated that all amounts due and payable to subcontractors had been paid. Parrwood submitted that Trinity owed three subcontractors omitted from the supporting statement substantial sums of money and that it should be inferred that Trinity's statement was knowingly false. However, Parrwood did not lead any evidence that Trinity knew that the supporting statement was false.

Ball J declined to express a view on whether compliance with sections 13(7) and (8) of the Act is a precondition to a valid payment claim but observed that clear evidence was required to establish such a serious allegation. Parrwood had not provided that evidence.

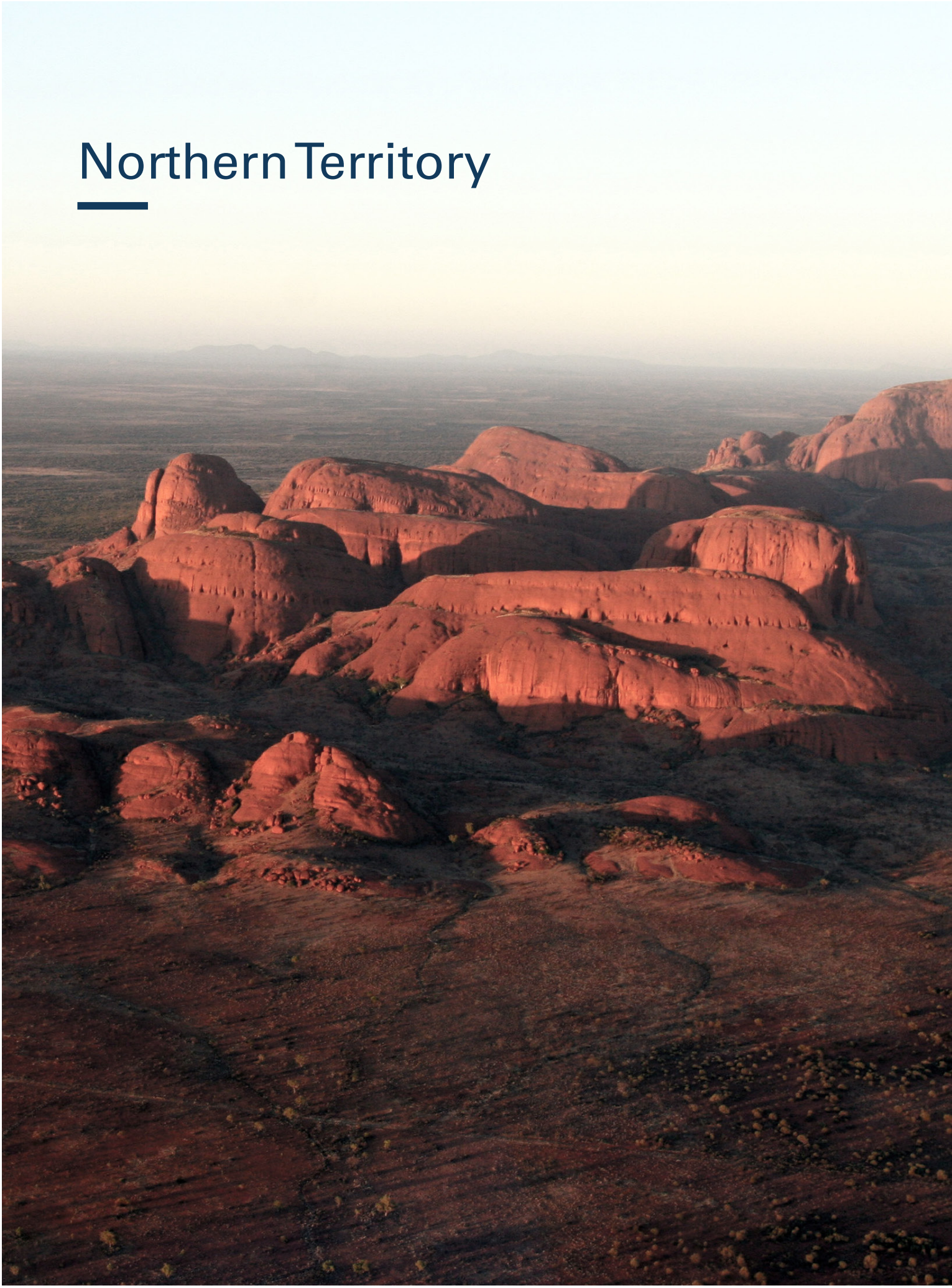
Conclusion

The First Determination was declared null and void. Parrwood was ordered to pay Trinity's costs.

https://www.caselaw.nsw.gov.au/decision/5e65cd0de4b0c8604babcfc0

1 *Southern Han Breakfast Point Pty Ltd (In Liquidation) v Lewence Construction Pty Ltd* (2016) 260 CLR 340; [2016] HCA 52

Northern Territory



Rirratjingu Parties v Galpu Parties

[2019] NTSC 77

Key takeaways

Under the *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT) (**Act**), the courts can appoint an arbitrator where the parties have failed to agree a procedure to appoint one. For this to happen, there must be a written arbitration agreement recording that all the parties have agreed to submit disputes to arbitration.

Keywords

failure to agree to an arbitrator

Background

A dispute arose about the apportionment of mining royalties between Rirratjingu Aboriginal Corporation (as representative of Rirratjingu Parties), Gurruwiwi (as representative of the Galpu parties) and Gumatj Corporation (as representative of the Gumatj Parties).

In a court-annexed mediation, the parties entered into agreements to compromise. These agreements provided for the appointment of a retired superior court judge to arbitrate.

The parties approached the Honourable Robert French AC to act as arbitrator and a draft arbitration agreement appointing Mr French was prepared. However, one of the parties never signed because it had exhausted its legal funding.

In the Supreme Court of the Northern Territory, Rirratjingu Aboriginal Corporation sought an order under section 11(4) of the Act to appoint Mr French as arbitrator.

Judgment

Before Grant CJ could determine the application, the Court had to decide whether there was an "arbitration agreement" under section 7 of the Act.

Section 7 — Arbitration agreement

Section 7 of the Act provides that an "arbitration agreement" is an agreement, which must be in writing, to submit to arbitration all or certain disputes which have arisen, or which may arise, between the parties in respect of a defined legal relationship.

Grant CJ found that the agreements to compromise (not the draft arbitration agreement) satisfied the requirement of an arbitration agreement. The agreements to compromise, which all parties signed in the course of the earlier mediation, were written agreements to submit their disputes to arbitration.

Section 11 — Appointment of arbitrators

The plaintiff sought an order under section 11(4) of the Act. It provides that where a party fails to act as required by a procedure agreed by the parties, or the parties are unable to reach an agreement expected of them under the procedure, any party may ask the courts to take the action needed to appoint an arbitrator.

In this case, the agreements to compromise stated that, if the parties were unable to agree on an arbitrator, the parties were to ask the President of the Law Council of Australia to nominate an arbitrator. However, the agreements did not provide any means of making the appointment. Section 11(4) of the Act therefore did not apply as the parties had not agreed on a workable procedure for appointing an arbitrator.

Rather, the Court held that the application fell under section 11(3) of the Act which provides that the court will appoint an arbitrator where the parties have failed to agree on a procedure for appointing one.

All parties had agreed on the appointment of Mr French but the procedure for his appointment had been thwarted because one party had not executed the draft arbitration agreement. Grant CJ ordered the appointment of Mr French on the terms set out in the agreements that all parties signed in the earlier mediation.

Implications

This case is a reminder that an arbitration agreement may exist in many forms provided it is in writing and agreed by all parties. The case also highlights the need to draft a workable procedure for the nomination and appointment of the arbitrator.

https://supremecourt.nt.gov.au/data/assets/pdf_file/0006/760614/2019NTSC77RirratjinguPartiesvGalpuParties-and-Anor_25092019.pdf

Queensland

Prime Constructions (Qld) Pty Ltd v HPS (Qld) Pty Ltd

[2019] QSC 301

Key takeaways

Several principles are relevant when determining whether an adjudicator has made a jurisdictional error:

- Adjudicators' reasons should demonstrate that they have endeavoured in good faith to consider the issues.
- Adjudicators need not refer to all of the evidence, but it must be sufficiently clear that they have considered the relevant evidence or arguments.

Even if adjudicators fail to properly comprehend material, it does not mean that they did not consider it (bearing in mind the weight of documents adjudicators may need to consider in limited time).

Keywords

jurisdictional error; payment claims

Background

In May 2018, the applicant (**Prime**) engaged the first respondent (**HPS**) to supply, install and glaze the windows of a mixed use development in Cairns, including hotel and apartment towers.

A year later, HPS served a payment claim. Prime's payment schedule deducted over $866,000 for the cost of rectifying water damage to rooms in the hotel tower that Prime claimed HPS was responsible for (**Rectification Deduction**). HPS applied for adjudication.

The adjudicator found that the windows were not defective and only allowed around $70,000 for the Rectification Deduction.

Prime sought relief in the Supreme Court of Queensland on the basis that the adjudicator made multiple jurisdictional errors.

Issues

Prime alleged the adjudicator's finding regarding the Rectification Deduction contained five separate jurisdictional errors:

- a failure to genuinely consider evidence because the adjudicator did not have regard to aspects of the supporting materials in Prime's adjudication response;
- a failure to provide natural justice by not notifying Prime that a decision would be made based on something not in the materials;
- a failure to provide any assessment of costs claimed for certain levels of the hotel as part of the Rectification Deduction;
- a failure to have regard to relevant material and to give adequate reasons for rejecting Prime's allegations; and
- a failure to genuinely consider the relevant material regarding general costs.

Findings

Flanagan J held that the adjudication decision did not contain any jurisdictional errors and dismissed the application. In determining whether there was jurisdictional error, his Honour applied the following principles:

- adjudicators' reasons should demonstrate that they have endeavoured in good faith to consider the issues;
- jurisdictional error may occur where findings or conclusions have no basis, are bare conclusions and do not reveal due consideration;
- there is no need to refer to all of the evidence but it must be clear enough that the relevant evidence or point has been considered; and
- the inadequacy, insufficiency, inconsistency or illogicality of reasons for a decision does not of itself amount to jurisdictional error.

Flanagan J applied these principles to each of the five alleged errors.

First alleged error

Prime alleged that the adjudicator failed to have regard to a matter recorded in one of the statutory declarations provided in Prime's adjudication response, even though it was contrary to Prime's primary position.

Flanagan J found no jurisdictional error based on this. It is not the adjudicator's role to "trawl through" all of the material to try to find evidence which supports a case the respondent did not itself present in its written submissions.

Second alleged error

Prime alleged the adjudicator did not afford natural justice by failing to inform Prime that he intended to use an approach that neither party contemplated in their submissions.

His Honour found that the second jurisdictional error was contingent on Prime establishing the first jurisdictional error, therefore, it failed.

Further, contrary to Prime's arguments, his Honour found that the adjudicator's approach was generally consistent with Prime's submissions.

Third alleged error

The adjudicator declined to provide any assessment with respect to two levels of the building because there was no evidence regarding whether they experienced water damage. Prime argued, however, that the adjudicator should have considered evidence included in a statutory declaration provided on Prime's behalf.

Flanagan J found that the evidence in the statutory declaration was not relevant to identifying responsibility for water damage on those two levels. Further, Prime's written submissions did not alert the adjudicator to the alternative evidence in the relevant statutory declaration. Flanagan J concluded that it was "not incumbent on the adjudicator 'to go hunting for evidence.' "

Fourth alleged error

Prime alleged that, in rejecting Prime's basis of apportioning liability for the water damage in each room, the adjudicator failed to have regard to relevant material, including a report, and failed to give adequate reasons.

His Honour concluded that although the adjudicator's reasoning was brief, he determined the issue of apportionment on the basis of Prime's onus of proof. This reflected "a genuine consideration" of the issue. Further, the brevity of the reasoning was in part a product of Prime's submissions. Finally, his Honour held that even if the adjudicator had failed to properly comprehend Prime's report, it did not mean he did not consider it.

Fifth alleged error

Prime alleged that the adjudicator did not make a finding regarding a particular category of costs claimed by Prime. His Honour found that, while there was no explicit mention of the claim, the adjudicator did make a finding in regards to "general costs", which Flanagan J interpreted to include the claims that Prime argued had not been determined.

Thus, no jurisdictional error was established and the Court dismissed the application.

https://www.sclqld.org.au/caselaw/QSC/2019/301

Galaxy Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd t/a CCA Winslow

[2020] QSC 51

Key takeaways

1. An adjudicator's determination under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**) is void if it is delivered after the statutory maximum period;
2. An adjudicator who fails to deliver a decision in time is not entitled to be paid; and
3. A contractor who performs "building work" without the appropriate licence will not be entitled to any payment under the contract (even for works for which an appropriate licence is held) and will not be able to access adjudication.

Keywords

late adjudication determinations; licences for "building work"

Background

Galaxy Development Pty Ltd (**Galaxy**) engaged Civil Contractors Pty Ltd trading as CCA Winslow (**CCA**) to do civil works, predominantly bulk earthworks, as part of a small subdivision in Coomera, Queensland. The contract price was approximately $1.3 million. The scope of works included a minor component for the removal and relocation of an existing bus stop shelter and the installation of a bike rack, valued at approximately $37,000 (**Bus Stop Works**).

CCA held a structural landscaping licence, as defined in Schedule 2 of the *Building and Construction Commission Act 1991* (Qld) (**QBCC Act**).

A dispute arose in relation to one of CCA's payment claims, which ultimately went to adjudication.

Although the adjudicator's decision was due by 24 October 2019, it was not until 29 October 2019 that the adjudicator purported to deliver his decision. The adjudicator held that CCA was entitled to be paid approximately $1.3 million, including payment for the Bus Stop Works.

Issues

Galaxy applied to the Supreme Court of Queensland for a declaration that the adjudicator's decision was void because either:

- the adjudicator's decision was delivered after the maximum period prescribed by the BIF Act; or
- the contract was void on the basis that CCA was not appropriately licensed.

Issue 1 — Was the late adjudication decision void?

Section 85(1) of the BIF Act prescribes the timeframes in which an adjudicator "must" deliver their adjudication determination. Both parties in this case accepted that the adjudicator's decision was delivered after the prescribed timeframe.

In determining whether an adjudication determination delivered after the prescribed timeframe is void, Dalton J paid significant attention to the precise wording of the BIF Act (particularly the deliberate and discerning use of the mandatory word "must"). Her Honour also considered the wording used in the Victorian and New South Wales security of payment regimes, as well as the previous wording of the *Building and Construction Industry Payments Act 2004* (Qld).

Her Honour held that the wording of the BIF Act supported Galaxy's argument that a late adjudication decision is void.

- First, section 86 of the BIF Act specifically provides for extending the time in which an adjudicator may deliver a decision. This is an indication that time limits are very important.
- Second, section 94(2) of the BIF Act allows another adjudication when an adjudication determination is not delivered by the due date.
- Third, the ability to discontinue an adjudication under section 97 of the BIF Act did not appear to apply where an adjudication determination is not issued by the due date and the claimant wishes to have a new adjudication under section 94 of the BIF Act. This suggests that the adjudication ceases to be "live" if the adjudicator has failed to deliver the determination within time.[1]

Interstate decisions, including the appellate decision in *Ian Street Developer Pty Ltd v Arrow International Pty Ltd*,[2] have demonstrated that a late adjudication determination can remain valid. Her Honour distinguished those cases primarily on the basis of the "plain contrast" in wording between the Victorian and New South Wales Acts, and the Queensland Act, particularly in relation to a claimant's right to another adjudication if a determination is late. This right does not exist under the NSW and Victorian security of payment regimes.

Accordingly, her Honour held that the adjudication determination was void and the adjudicator was not entitled to his fee.

Issue 2 — Was the contract void because CCA did not hold the appropriate licence?

Since the adjudicator's determination was void, Dalton J noted it was strictly unnecessary to deal with the licensing issue but did so because it was fully argued by the parties.

Section 42 of the QBCC Act provides that a person must not carry out work for which it does not hold the appropriate licence class. Anyone who carries out building work without the appropriate licence class is not entitled to any monetary or other consideration for doing so.

Galaxy alleged that the Bus Stop Works did not fall within the scope of works allowed by CCA's landscaping licence. As a result, it argued, CCA could not recover payment under the contract and any adjudication determination considering otherwise was void for want of jurisdiction.

Although the Court hinted at the absurdity of the issue (given the low value and low complexity of the Bus Stop Works relative to the rest of the contract), the Court was required to consider whether three particular pieces of work fell outside the scope of CCA's licence or whether they were otherwise excluded from the QBCC Regulations. These pieces of work were:

- the relocation of a bus shelter shed;
- the installation of a new bike rack; and
- the removal and reaffixing of a small seat at a bus stop.

CCA successfully argued that the bus shelter shed was a "prefabricated shed" within the allowable scope of works for the landscaping licence, however was unsuccessful in arguing that the bike rack and bus stop seat fell within the exclusions for "work on roads" under Schedule 1 of the QBCC Regulations.

After a long and detailed consideration of the statutory and common law definition of a "road", her Honour found that a structure in or under a footpath – such as a bus stop – was not excluded from the licensing regime in the same way that a structure in or under a road would be. As a result, her Honour concluded that CCA was not licensed to perform the bus stop works.

In accordance with section 42 of the QBCC Act, the result of the licensing issue, which the Court noted as being "absurd in reality", was that CCA was not entitled to be paid for any work under the contract worth $1.3 million (rather than simply those works which fell outside the scope of its licence).

Conclusion

While the Court declared the adjudication determination void, on the basis that it was delivered after the statutory maximum period, the Court's consideration in relation to the licensing issues serves as an important reminder to contractors and subcontractors to ensure they hold the appropriate licence class for all "building works" under contract.

https://www.sclqld.org.au/caselaw/QSC/2020/51

1 At [27]. The choice of section will affect whether an adjudicator is entitled to their fee

2 [2018] VSCA 294

South Australia

Tincknell v Duthy Homes Pty Ltd

[2020] SASCFC 24

Key takeaways

Where a claim for damages for defective work is based on proposed remedial works, those works must be reasonable and proportional to the defect and the benefit the remedial works would achieve. In the alternative, claimants should argue and lead evidence for diminution of value due to the defective work.

The prevention principle will not relieve the contractor from a claim for delay liquidated damages where the contract provides the right to claim an extension of time and the contractor fails to do so.

Keywords

prevention principle; rectification damages

Background

This was an appeal in the South Australian Full Court of the Supreme Court from a decision of a Judge of the District Court concerning the construction of a residential home. At first instance, Duthy Homes (**Builder**) sued Tincknell (**Owners**) for payment of the final progress claim under their contract. The Owners claimed that the works on the property had not reached practical completion and cross-claimed that the Builder was in breach of contract and statutory warranties. The Owners sought damages for:

- the cost of remedial works;
- pain and suffering;
- delay caused by the Builder; and
- the Builder's contravention of section 52 of the now repealed *Trade Practices Act 1975* (Cth) (**TPA**).

The Owners also sought damages against the Builder's director, in his personal capacity, for negligence and as an accessory to the Builder's contravention of the TPA.

The primary Judge found that certain rectification costs the Owners claimed were unreasonable and that the Owners were not entitled to damages for breach of contract or breach of statutory warranty. The Judge dismissed the Owners' claim for delay damages, pain and suffering, and contraventions of the TPA. The Judge awarded the Owners part of the amount of back charges and held that the Builder was entitled to the final progress claim, plus the difference between the "float" for variations, less those items where a remedial work order was inappropriate. Both parties appealed the decision.

The Owners argued the primary Judge erred, including by:

- dismissing the claims for certain defective works;
- dismissing the claims for delay damages and damages for contravention of the TPA;
- finding that the works had reached practical completion on a specific date;
- finding that the Builder was permitted to carry out remedial work on the hot water system in accordance with the recommendations of the Builder's expert rather than the Owners' expert; and
- dismissing some of the claims for back charges.

The Builder appealed against the costs order awarded by the primary Judge.

Full Court

Parker J gave the leading judgment, with Peek and Doyle JJ agreeing.

Owners' appeal grounds

Issue 1 – Claim for remedial cost relating to defective works

The main question was whether the primary Judge erred by dismissing the damages claim on the basis of disproportionality between the cost of the Owners' proposed remedial work and the benefit that it would achieve.

Parker J considered the principles stated by the High Court in *Bellgrove v Eldridge*[1] and found that in this case, the risk of damage due to the defective works was insubstantial and the proposed remedial works would not constitute a reasonable response to the deficiency.

Parker J noted that had the pleading included damages based upon diminution in the value of the building caused by the deficiency in the waterproofing, the Owners may have been entitled to damages on that basis. However, as the case was not conducted that way, there was no evidence to indicate whether there was such a diminution in value due to the deficiency.

Issue 2 – Claim for delay damages

The Owners made a claim for damages for the delay in achieving practical completion. The Builder contended that because the Owners contributed to the delay, the "prevention principle" operated so as to deny the Owners' claim for damages.

Parker J held that the Builder was not entitled to rely upon the prevention principle because the Builder failed to seek an extension of time to which it was entitled under the contract due to delays caused by the Owners.[2]

However, the Owners chose not to move into the house after it became suitable for occupation and it seemed the Owners would not have moved into the house even if it had been completed on time. Parker J held that the chain of causation leading to the Owners' alleged loss was broken, and dismissed the claim.

Issue 3 – Breach and damages for misleading or deceptive conduct

In the contract, the Builder represented that it had the necessary skill and expertise to carry out the works. The Owners argued that they relied on the representations in entering into the contract and sought relief under the TPA on the basis that the deficiencies in the works meant that the Builder's representations were false.

Parker J held that while there were clearly problems with some of the work performed by the Builder, the evidence was insufficient to establish that the representation as to the skill and expertise of the Builder was actually misleading or deceptive at the time it was made, and that a much more substantial degree of incompetence and lack of capacity to perform the work would need to be demonstrated to establish such a claim.

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASCFC/2020/24.html

1 (1954) 90 CLR 613; [1954] HCA 36

2 The Full Court did not refer to the recent New South Wales Court of Appeal decision in *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151. That case is analysed in detail in a Corrs Insight here.

Victoria

Siemens Gamesa Renewable Energy Pty Limited v Bulgana Wind Farm Pty Ltd

[2020] VSC 126

Key takeaways

The use of surrounding circumstances to interpret a commercial contract remains contentious.

This case supports the view that evidence of surrounding circumstances will only be admissible if the language used in the contract is ambiguous. It also supports the view that evidence of the surrounding circumstances cannot be used to identify the ambiguity.

The decision also emphasises the primacy of the written language of the contract over "business common-sense" considerations.

Keywords

contractual interpretation

Background

Bulgana Wind Farm Pty Ltd (**Bulgana**), the owner and developer of a wind farm project in Victoria, engaged Siemens Gamesa Renewable Energy Pty Limited (**Siemens**) under an engineering, procurement and construction contract.

The dispute arose as a result of delays to practical completion. Bulgana had threatened to call on unconditional performance bonds issued by Siemens to satisfy its entitlements to liquidated damages. However, following negotiations, the parties entered into a Second Agreement, the essence of which was that Bulgana:

- would offset any liquidated damages against amounts due to Siemens; and
- would not draw on the performance bonds.

Subsequently, Bulgana again sought to call upon the performance bonds.

The crux of the matter was whether the Second Agreement prevented Bulgana from calling upon the performance bonds. On the issue of contractual construction, Bulgana sought to rely on evidence of the surrounding circumstances and prior negotiations. Siemens argued that this evidence was inadmissible as the text of the Second Agreement was unambiguous.

The decision

Riordan J extensively considered whether ambiguity is a precondition to the admissibility of evidence of surrounding circumstances. His Honour accepted that Mason J's "true rule" in *Codelfa* represents the law in Australia:

> "The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning."[1]

The difficulty, of course, lies in what the true rule means. Riordan J held that the authorities on the issue supported a conclusion that the true rule does not permit evidence of surrounding circumstances to find ambiguity. His Honour considered that to find otherwise would be to undermine the purpose of the parol evidence rule and the finality of written instruments.

Riordan J's decision is consistent with Victorian authority that generally takes a more restrictive approach to the admissibility of evidence of surrounding circumstances.[2] As Riordan J squarely acknowledged, this approach conflicts with the more permissive approach taken in some other jurisdictions, notably in New South Wales Court of Appeal and in the Full Court of the Federal Court.

Bulgana had attempted to argue that there was no business common-sense in agreeing to forego its rights to call on an unconditional performance bond. However, Riordan J was wary of the court applying a "business common-sense" test. In the present case, commercial considerations did not justify a departure from the language the parties used.

Ultimately, Riordan J found that the Second Agreement was enforceable and prevented Bulgana from calling on the unconditional performance bonds.

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2020/126.html

1 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 352

2 See, for example, *Apple and Pear Australia Ltd v Pink Lady America LLC* [2016] VSCA 280

Adcon Vic Pty Ltd v Icon Co (Vic) Pty Ltd (No 2)

[2020] VSC 227

Key takeaways

Parties seeking injunctive relief must clearly establish that there is a serious issue to be tried and that the balance of convenience favours granting the injunction. These fundamental requirements apply to an injunction restraining a party from calling on a performance bond.

A plaintiff that fails to establish these elements may face hefty indemnity costs.

Keywords

performance bonds; injunctions; indemnity costs

Background

Head contractor Icon Co (Vic) Pty Ltd (**Icon Co**) engaged Adcon Vic Pty Ltd (**Adcon**) under a concrete and form subcontract (**the Subcontract**). Adcon gave Icon Co two performance bonds as security.

Subsequently, Adcon's performance was delayed and the superintendent certified $1.364 million in liquidated damages. Icon Co called on the first performance bond.

Adcon commenced proceedings to restrain Icon Co from having recourse to the first of two performance bonds (**the later application**).

However, at this point in time, Adcon had already been unsuccessful in an earlier injunctive application to prevent Icon Co from having recourse to the second performance bond (**the earlier application**).

To establish an entitlement to injunctive relief, the plaintiff must demonstrate that:

- there is a serious question to be tried;[1] and
- the balance of convenience favours the grant of the injunction sought.[2]

The decision

Issue one — Was there a serious issue to be tried?

Adcon claimed that the serious issue to be tried was whether Icon Co's actions in calling on the first performance bond were unconscionable under sections 20 or 21 of the Australian Consumer Law (**ACL**). Adcon argued that:

1. the Subcontract obliged Icon Co to release the first performance bond within 14 days of practical completion;
2. the superintendent had implicitly recognised that practical completion had been reached by rejecting four of Adcon's claims for extensions of time on the basis that they concerned a period post-dating practical completion;
3. Icon Co did not release the first guarantee within 14 days; and
4. the superintendent had not revised his decision to reject Adcon's extension of time claims or given evidence to support Icon Co's case.

1 There is significant debate over whether the correct formulation is "a serious question to be tried" or a "prima facie case". Properly understood, the tests are arguably interchangeable: Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57 at [70] (Gummow and Hayne JJ)

2 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [19], [65]–[72]

Digby J addressed each of these claims in turn, finding none persuasive. His Honour held that Adcon's claim did not establish the existence of a serious issue to be tried.

In response to the first argument, Digby J held that the Subcontract gave the superintendent a number of powers, including the power to certify practical completion. Until the superintendent had issued the certificate of practical completion, Adcon had not achieved practical completion of the works.

Digby J was not convinced that the superintendent's rejection of Adcon's extension of time claims had the effect of recognising practical completion. Rather, Digby J gave weight to the superintendent's evidence, which expressly refuted this. Digby J also gave weight to the superintendent's evidence that Adcon's extension of time claims were non-compliant.

Since practical completion had not been achieved, Icon Co was not obliged to release the first performance bond.

Issue two — Did the balance of convenience favour granting the injunction?

Digby J was satisfied that there was no serious issue to be tried, so it was not necessary to make a finding regarding the balance of convenience. However, his Honour noted that Adcon relied on the same arguments advanced in support of injunctive relief in the earlier application, which the Court had already determined to be unconvincing.

Costs

In the later application, Icon Co sought indemnity costs on the basis of two offers made to Adcon in which Icon Co agreed to accept a tender of the sum secured in lieu of having recourse to the first performance bond.

In assessing the costs application, Digby J considered:

- Icon Co's offers;
- Adcon's inability to identify a serious issue to be tried or to establish that the balance of convenience favoured granting an injunction; and
- the fact that Adcon sought to re-agitate the claims already ventilated in the earlier application.

Based on this, Digby J awarded indemnity costs in favour of Icon Co.

https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2020/227.html

Western Australia

Salini-Impregilo S.p.A. v Francis

[2020] WASC 72

Key takeaways

Under the *Construction Contracts Act 2004* (WA) (**Act**), an adjudicator may adjudicate multiple disputes simultaneously. A dispute becomes adjudicated when the adjudicator considers the merits of a dispute.

An adjudicator must make their determination within the prescribed time, but may withhold a record of that decision until they have received payment.

Keywords

simultaneous adjudications; judicial review

Background

In 2016, Salini-Impregilo S.p.A. and NRW Pty Ltd (together **Salini**) engaged Geodata Engineering Pty Ltd (**Geodata**) for architectural, engineering and other design-related services on the Forrestfield Airport Link Project. Under the Contract, Geodata could obtain progressive payment for its works by issuing payment claims to Salini.

Disputes arose over two payment claims (IPA 23 and IPA 24). On 11 September 2018, Geodata applied for an adjudication of the IPA 23 dispute (**First Application**). On 1 October 2018, Geodata applied for an adjudication of the IPA 24 dispute (**Second Application**).

David Francis (**Adjudicator**) was appointed as the decision-maker in both disputes. Since there were multiple applications and determinations, it is helpful to set out a chronology.

On 3 October 2018, the Adjudicator asked for an extension of time to hear the First Application. Salini denied this request. On 5 October 2018, the Adjudicator informed the parties that he would dismiss the First Application unless Salini granted an extension of time. The prescribed time to dismiss or determine the dispute expired on 10 October 2018.

Prior to time expiring for the First Application, the Adjudicator asked the parties for submissions on whether Geodata had submitted its Second Application validly under the Act. The time to determine or dismiss the Second Application expired on 29 October 2018. Late in the evening of that date, the Adjudicator notified the parties that he had made his determination (**First Determination**) but would withhold publication until he received payment.

The Adjudicator notified Geodata of his fees on 30 October 2018 and was paid later that day. After making cost and syntactical amendments to the record of the First Determination, the Adjudicator sent the parties a record of his decision shortly thereafter.

After the Second Determination was made, Geodata made a further application on 7 November 2018 (**Third Application**) relating to the same dispute involved in the expired First Application. In the Third Application, Geodata also sought costs against Salini due to their alleged unreasonable, frivolous or vexatious conduct. In his determination (**Second Determination**), the Adjudicator decided that Salini was required to pay the full amount of his fees.

Judicial review

In 2018 and 2019, Salini commenced judicial review proceedings in relation to the First and Second Determinations. Salini alleged that:

1. the Adjudicator purported to adjudicate the First Application and Second Application simultaneously;
2. the First Determination was not made within the prescribed time;
3. the Adjudicator illegally amended the record of the First Determination;
4. the Adjudicator exhibited apprehended bias by making the Second Determination, as it could determine whether the First Application was dismissed or expired;
5. the Third Application was invalid as the Adjudicator had dismissed the First Application;
6. the Adjudicator acted unreasonably by recovering all of his costs from Salini;
7. the Adjudicator erred by not re-agitating a defence in the Third Application that was dismissed in the First Determination; and
8. the Second Determination was generally unreasonable.

Archer J rejected each of Salini's grounds for judicial review, finding that none of the Adjudicator's findings or decisions involved jurisdictional error. Her Honour held that the Adjudicator had the authority to make errors within jurisdiction, and found that Salini did not establish that the Adjudicator acted outside of his powers under the Act.

In order to assess whether the First and Second Applications had been heard simultaneously, the judgment addressed the proper construction of "determination". Archer J found that the point at which a dispute becomes determined is when the adjudicator reviews the merits of the case. For the purposes of the First and Second Applications, the Adjudicator at no point determined the disputes simultaneously.

In relation to the legality of the Third Application, Archer J concluded that the Adjudicator had not dismissed the First Application. The Adjudicator had only reserved his right to dismiss the First Application, without actually doing so. This is significant because while the Act does not permit subsequent hearings of prior disputes, it does permit determinations of disputes that were subject to a previously expired application.

By finding that the First Application had not been dismissed, Archer J upheld the validity of the Third Application and Second Determination.

https://ecourts.justice.wa.gov.au/eCourtsPortal/Decisions/DownloadDecision/e2cfdf7f-f487-40e7-95ec-d858b9c777f4?unredactedVersion=False

Sandvik Mining and Construction Australia Pty Ltd v Fisher (No 2)

[2020] WASC 123

Key takeaways

A claimant may be entitled to make separate adjudication applications in respect of payment disputes arising from the same progress claim.

Keywords

multiple adjudication applications under one progress claim

Background

Sandvik Mining and Construction Australia Pty Ltd (**Sandvik**) had subcontracted *Civmec Construction & Engineering Pty Ltd* (**Civmec**) to provide some machines for a bauxite mine.

The parties fell into dispute of progress payments. This resulted in two adjudication determinations under the *Construction Contracts Act 2004* (WA) (**Act**).

Sandvik sought judicial review of the second adjudication. It argued that the adjudicator did not have the power to make the second determination because there had been a determination about the same "payment dispute" in an earlier adjudication. Sandvik relied on:

1. section 25(a) of the Act, which provides that if an application for adjudication has already been made, a further application cannot be made; and
2. section 41(1)(b) of the Act, which provides that if an adjudicator makes a determination, a further application for an adjudication of the dispute cannot be made.

Sandvik argued that both determinations involved the same payment dispute, and by operation of sections 25(a) and 41(1)(b) of the Act, Civmec was not entitled to make the second application because an application in relation to that dispute had already been made and the dispute had been determined.

Issue

The main issue was whether a progress claim can only give rise to a single payment claim and a single payment dispute. Once any part of a progress claim is the subject of an adjudication, does that define the "payment dispute", meaning that an adjudicator would not have jurisdiction to subsequently adjudicate other disputed items arising from that progress claim?

The decision

In the Supreme Court, Archer J determined that each item in a progress claim is capable of triggering a separate "payment dispute" which can separately be adjudicated.

Her Honour noted that the Act prevents multiple determinations of the same payment dispute. However, it does not prevent:

1. multiple determinations of different payment disputes in relation to different progress claims; or
2. multiple determinations of different payment disputes arising from the same progress claim, where the principal seeks an adjudication of the merits of a counterclaim to that claim.

Archer J held that, where a single progress claim includes multiple disputed items, each item can (in theory) be the subject of an adjudication application. In such cases, each item will be the "payment claim" giving rise to its own "payment dispute". (Her Honour emphasised the practical limits of this observation, noting that a party that segregated parts of a payment dispute vexatiously might be obliged to pay both parties' costs.) Further, a group of items from a single progress claim can be aggregated in a single adjudication giving rise to the payment dispute.

Archer J determined that principles of res judicata, issue estoppel and Anshun estoppel have no bearing on the identification of what the payment dispute is. The Act itself expressly prevents multiple determinations of the same payment dispute.

There is no reason to construe the Act as meaning that, once one or more items of dispute arising from a progress claim have been made the subject of an adjudication, no other items arising from the same progress claim can be the subject of an adjudication. In her Honour's view, different groups of non-overlapping items can each be the subject of an adjudication application. The application in respect of each group will involve a different payment claim and a different payment dispute (in relation only to the items in that group).

Her Honour noted that, regardless of whether the disputes arise under the same or different progress claims, the limitations on simultaneous adjudications must be met before the same adjudicator can adjudicate payment disputes simultaneously.

Her Honour dismissed Sandvik's application.

https://ecourts.justice.wa.gov.au/eCourtsPortal/Decisions/ViewDecision?returnUrl=%2feCourtsPortal%2fDecisions%2fFilter%2fSC%2fRecentDecisions&id=67e6db57-0de5-4250-bb22-ba489a65c32d

Property and Infrastructure

Reopening buildings in the wake of COVID-19 – practical issues and considerations

The Federal Government's recently released three-step plan to restarting Australia's economy following the coronavirus pandemic (**COVID-19**) poses several questions and practical issues for landlords and tenants. Below is a summary of what landlords and tenants need to consider as part of their reopening plans and how best to prepare as restrictions ease.

Obligations and liabilities of a landlord

No laws or guidelines have been introduced that require landlords to protect against COVID-19, or to ensure social distancing measures are enforced, when reopening their premises. However, landlords have a number of obligations in relation to infectious illnesses and work health and safety (**WHS**).

Civil liability

Landlords have a general duty to take reasonable care of their premises to protect persons from harm, which includes diseases. This duty includes providing and maintaining reasonably safe areas of buildings, where such areas are accessible to tenants and the public.

However, landlords will not be responsible for areas of the premises outside of the landlord's control, such as a tenant's premises.

Landlords may also owe a duty of care to notify tenants of a COVID-19 infection at the building.

Work Health and Safety laws

Under WHS laws, landlords have a primary duty of care to ensure, as far as reasonably practicable, the health and safety of workers and other persons is not put at risk. This duty will apply to the extent that an area is managed and controlled by a landlord. The common areas of a building could be one such example.

Landlords also have a duty to consult and cooperate with tenants when coordinating WHS matters. This duty will also only apply to the extent that a landlord has control over an area.

Entries and exits to the building, common areas (including lifts and shared facilities) and emergency planning pose the greatest risk to landlords for liability under the WHS laws in a COVID-19 context. To mitigate these risks, landlords should engage with tenants about their expectations for managing exposure to COVID-19 in the building.

Liability for duty of care

A landlord's duty of care is qualified by what is "reasonably practicable", meaning that its nature and scope will depend on the circumstances. The COVID-19 pandemic is an unprecedented event and it is difficult to predict how courts may rule on exposure claims or alleged breaches of WHS laws.

We can say that the drafting of leases will be critical, as will the landlords" approaches to managing health and safety risks. Landlords must be proactive in assessing the risk, and working towards reasonably practicable steps to eliminate or control that risk.

Delegation of duties

To an extent, civil liability and common law duty of care may be delegable to a property manager with appropriate skills, expertise and experience.

The WHS duties are non-delegable. However, landlords may seek to discharge their duties through the engagement of a property manager with appropriate skills, expertise and experience. Engaging such a person may itself constitute a reasonably practicable measure to enable a person to discharge their WHS duty.

Complying with lease

Landlords may be responsible for cleaning the common areas of their buildings under their leases. If so, they should consider providing additional cleaning services to prevent COVID-19 from spreading. While additional services may have cost implications, landlords should review the outgoings provisions in their leases to see whether such costs are recoverable from their tenants.

Obligations of tenants

Tenants have similar duties of care under civil and WHS law. Under their leases, the tenant are typically obliged to:

- comply with all laws and requirements of authorities relating to the premises; and
- inform the landlord of matters that may affect the safety at the building, such as an infectious disease.

Landlords should be mindful of how they respond to notifications from tenants of any reported cases of persons so landlords do not assume more responsibility than the law requires of them.

Other considerations and recommendations

Safe Work Australia has useful guides on how to limit the spread of COVID-19 which might assist landlords with reopening plans.

The Property Council of Australia has recommended:

- managing the flow of people – implementing staggered arrival and departure times to alleviate congestion in common areas;
- elevating cleaning practices – enhancing cleaning of high touch point areas like lift buttons and railings; and
- restarting building systems – addressing health risks such as legionella, low air quality or mould in buildings that have "hibernated" during the shutdown.

Our own recommendations to landlords are:

- require social distancing require social distancing and provide measures to enable staggered start and finish times;
- increase cleaning of common areas;
- keep open communication with tenants about reopening plans; and
- remind tenants of their obligations under their leases and at law.

Employment

National COVID-19 Safe Workplace Principles

Most State and Territory governments have directed people to continue working from home (or remotely), if possible. In certain areas (e.g. metropolitan Melbourne), this has been mandated and there are corresponding rules around the wearing of face masks when away from home. Currently, the only exception is Western Australia where the government has encouraged people to return to work, unless they are unwell or vulnerable.

We expect that over the coming weeks and months, there will be an increase in people returning to work as restrictions ease and guidance from State and Territory governments is updated.

1. All workers, regardless of their occupation or how they are engaged, have the right to a healthy and safe working environment.

2. The COVID-19 pandemic requires a uniquely focused approach to work health and safety (WHS) as it applies to businesses, workers and others in the workplace.

3. To keep our workplaces healthy and safe, businesses must, in consultation with workers, and their representatives, assess the way they work to identify, understand and quantify risks and to implement and review control measures to address those risks.

4. As COVID-19 restrictions are gradually relaxed, businesses, workers and other duty holders must work together to adapt and promote safe work practices, consistent with advice from health authorities, to ensure their workplaces are ready for the social distancing and exemplary hygiene measures that will be an important part of the transition.

5. Businesses and workers must actively control against the transmission of COVID-19 while at work, consistent with the latest advice from the Australian Health Protection Principal Committee (AHPPC), including considering the application of a hierarchy of appropriate controls where relevant.

6. Businesses and workers must prepare for the possibility that there will be cases of COVID-19 in the workplace and be ready to respond immediately, appropriately, effectively and efficiently, and consistent with advice from health authorities.

7. Existing State and Territory jurisdiction of WHS compliance and enforcement remains critical. While acknowledging that individual variations across WHS laws mean approaches in different parts of the country may vary, to ensure business and worker confidence, a commitment to a consistent national approach is key. This includes a commitment to communicating what constitutes best practice in prevention,mitigation and response to the risks presented by COVID-19.

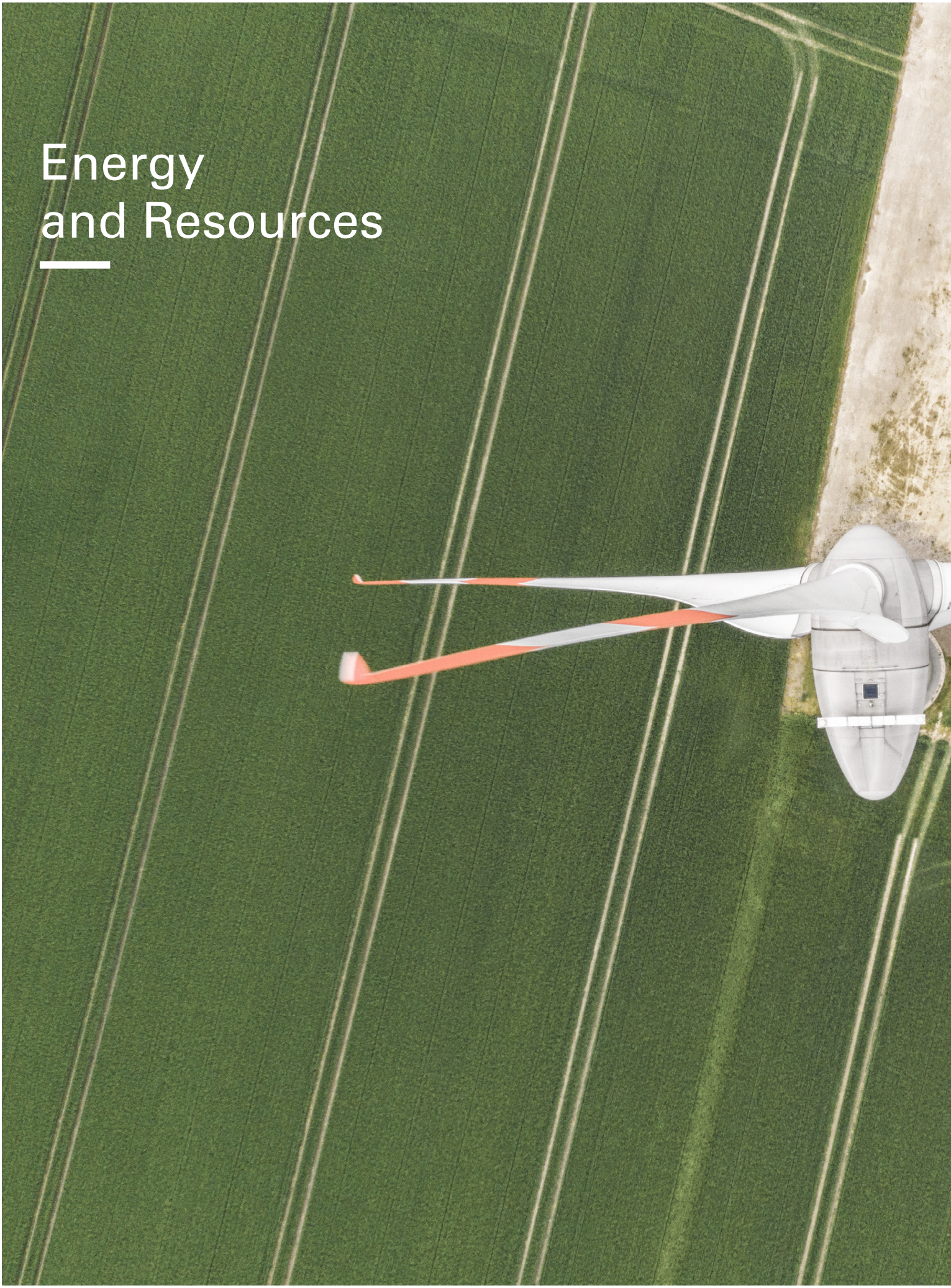
8. Safe Work Australia (SWA), through its tripartite membership, will provide a central hub of WHS guidance and tools that Australian workplaces can use to successfully form the basis of their management of health and safety risks posed by COVID-19.

9. States and Territories ultimately have the role of providing advice, education, compliance and enforcement of WHS and will leverage the use of the SWA central hub in fulfilling their statutory functions.

10. The work of the National COVID-19 Coordination Commission will complement the work of SWA, jurisdictions and health authorities to support industries more broadly to respond to the COVID-19 pandemic appropriately, effectively and safely.

For further important and detailed information for employers on the return to work, please refer Corrs special report Work health and safety issues for employers as Australia returns to work

Energy and Resources



Australia's critical minerals sector is open for foreign investment but early and constructive engagement with FIRB is essential

In the past six months the Commonwealth Government has made it clear that the development of the critical minerals sector[1] in Australia, including through foreign investment, is a priority.

Despite this, over the past few weeks it has been reported that two proposed direct investments by foreign companies into ASX-listed miners with business operations focused on critical minerals[2] have been unsuccessful in obtaining approval under Australia's foreign investment law.

Some commentators have suggested that this indicates the Government's attitude to foreign investment in this sector is inconsistent with its previous public announcements. Whether this is true or not is difficult to assess as reasons for decisions and details of interactions with the Government on foreign investment matters are not published. However, we note that the Treasurer and the Foreign Investment Review Board (**FIRB**) when dealing with foreign investment and Australia's "national interest", must take into account broader considerations, including the specific details of each of the proposed transactions and the sensitive nature of the critical minerals sector amid global concern (that existed well before the emergence of COVID-19) that critical mineral supply chains must be diversified both in terms of location and control.

Given those broader considerations, it is clear that as with all sensitive sectors, and particularly since COVID-19, early and constructive engagement with FIRB by foreign investors seeking to acquire interests in the Australian critical minerals sector will be essential to identify any likely national interest concerns, and to explore whether any such concerns can be adequately dealt with through the imposition of conditions to any approval or structuring a transaction in a different way.

Commonwealth Government's position on critical minerals

The Commonwealth Government has made three key announcements in the last six months that indicate it wants to encourage and support new critical minerals investment in existing or future mines.

1. Export Finance Australia to fund critical minerals projects.

In November 2019, the Commonwealth Government announced that Export Finance Australia (**EFA**), formerly the Export Finance Insurance Commission, and its Defence Export Facility would focus on financing and supporting projects to extract and process Australia's rare earths and critical mineral supplies. EFA jumped out of the starting blocks and has since February 2020 been engaged in discussions with Alkane Resources Limited to assist in the financing of its Dubbo Mine, which will have a mine life of 75 years and extract critical minerals such as zirconium, hafnium, niobium, tantalum, yttrium and rare earth elements.

2. Establishment of the Critical Minerals Facilitation Office.

In January 2020, the Commonwealth Government established the Critical Minerals Facilitation Office (**CMFO**). The CMFO's purpose is to act as an advocate for Australia's critical minerals sector and drive its future development by assisting project sponsors to obtain finance and source offtake agreements. To this effect it got off to a roaring start, before COVID-19 travel restrictions were introduced, having led several trade missions to the United States and Canada where a number of co-operation agreements have been signed between government bodies as well as the private sector.

1 Critical minerals have been identified as those minerals which are essential and often not substitutable in important technologies, some of which are also subject to supply security concerns. A full explanation of which minerals make up the critical minerals sector can be found in the following report produced by GeoScience Australia: https://d28rz98at9flks.cloudfront.net/124161/Rec2018_051.pdf.

2 The first transaction, a $20 million subscription for 11.1% of ASX-listed Northern Minerals Limited (whose flagship project is the Browns Range Pilot Dysprosium Project in Western Australia) by China's Baogang Group, was blocked by the Treasurer as it was contrary to Australia's "national interests". The second transaction, Yibin Tianyi Lithium Industry Co., Ltd's proposed $14.1 million investment in ASX-listed AVZ Minerals Limited (whose sole critical minerals project is a proposed lithium and tin mine in the Democratic Republic of Congo), did not proceed as originally announced and structured after Yibin Tianyi withdrew its FIRB application due to the Australian Government advising Yibin Tianyi that the investment would be "contrary to the national interest".

3. COAG Critical Minerals Work Plan

On 16 April 2020, the Commonwealth Government facilitated the second Resources Ministers Roundtable Meeting (**Roundtable Meeting**). At that meeting the Resources Ministers of each State and Territory and the Commonwealth identified that investment into Australia's critical minerals sector would be vital to the economic recovery of Australia as the world emerges from its COVID-19 enforced hibernation, and unanimously endorsed the COAG Critical Minerals Work Plan (**Work Plan**).

The CMFO has been tasked with overseeing the implementation of the Work Plan, the initial priorities of which are:

1. The development of a national ethical certification scheme (with an associated Australian critical mineral brand) to:
    a. showcase Australia's robust regulatory standards to prospective investors and trading partners; and
    b. position Australia as the provider of choice as an ethical and responsible global supplier.
2. The identification of opportunities for a range of critical minerals precincts and hubs to:
    a. develop new supply potential, and accelerate project approvals and development;
    b. support downstream opportunities, including by establishing pre-assessed mining precincts, industrial hubs for processing, precincts for tailings reclamation and infrastructure corridors.

Early engagement with FIRB will be important going forward

It is clear that the potential opportunities for growth and investment in the critical minerals sector in Australia are significant. In seeking to invest in or partner with existing owners in the sector, foreign investors will need to be mindful that:

- the current increase in the "default" timeframe for FIRB's processing of applications may give rise to issues for parties seeking to transact and secure a first mover advantage, although FIRB has been clear that it will prioritise applications for investments which will benefit Australian jobs and businesses; and
- as is the case for all sensitive sectors, review of a proposed transaction by FIRB may add an additional overlay of uncertainty to investment in an emerging growth sector within the broader Australian resources industry, as it is not yet clear what conditions FIRB will require for foreign investment into critical minerals assets (these are not publicly disclosed, and will vary to reflect the individual characteristics of each transaction and investor).

As noted above, early engagement with FIRB by foreign investors seeking to invest in the Australian critical minerals sector is recommended so that potential investors can factor in any issues arising from that engagement into transaction negotiations and timeframes.

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Chambers Asia Pacific Guide, 2018

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Chambers Asia Pacific & Global Guides, 2019

Best Lawyers – Corporate Law
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"Provided outstanding support on the deal ."
Oil and Gas client

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