BUILDING AND CONSTRUCTION CASES 2017

A REVIEW OF BUILDING AND CONSTRUCTION CASES AT FIRST INSTANCE AND ON APPEAL DECIDED BY THE SUPREME COURT OF NSW IN 2017

PAUL FOLINO - GALLO
BARRISTER - AT - LAW
THIRD FLOOR WENTWORTH CHAMBERS
180 PHILLIP ST SYDNEY NSW 2000
PH: 8915 2810
FAX: 8815 9585
EMAIL: PFOLINO-GALLO@WENTWORTHCHAMBERS.COM.AU

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Simic v New South Wales Land and Housing Corporation [2016] HCA 47

Coram: French CJ, Kiefel, Gageler, Nettle and Gordon JJ

High Court of Australia

Date: 7 December 2016

CONTRACT — Construction of terms — Performance bonds — Where unconditional undertakings by financial institution to pay on demand ("Undertakings") required as security under construction contract — Where Undertakings and underlying finance applications erroneously referred to non-existent entity as payee because incorrect information provided by applicant for security — Principle of autonomy — Principle of strict compliance — Whether possible to construe references to non-existent entity in Undertakings and applications as references to counterparty to construction contract.

Facts

The New South Wales Land and Housing Corporation ("the Corporation") engaged Nebax to demolish buildings and construct units. Nebax and the Corporation entered into a construction contract under which Nebax was required to provide $144,965.06 as security. The security was in the form of unconditional undertaking from ANZ to pay on demand. Mr Simic misidentified the Corporation in two undertakings and finance applications as a non-existent entity. In 2013, the Corporation called on the undertakings and the bank refused to pay as the Corporation was not the correct beneficiary of the bonds. The Corporation contended, and both the judge at first instance and the plurality of the appeal accepted that the determination of the proper beneficiary was a matter of construction.

Decision

The High Court allowed the appeal. The Court found that the undertakings could not be construed to overcome the erroneous designation of the beneficiary. circumstances where the beneficiary of the bond was misdescribed, The Court found that, as it had been established that there was a clear common intention to the parties to the undertaking for the Corporation to be the beneficiary of the bonds, the Court was able to address the error through the equitable remedy of rectification.

The Court found that the misdescription could not be overcome by construing the documents by reference to the parties' subjective intention. If the Court simply construed the bonds as being made in favour of the Corporation, it would require the Bank to enquire as to the circumstances giving rise to the misidentification, which plainly it was not required to do. At the time the undertakings were called upon, the Bank was therefore not required to give effect to answer the Corporation's demand. The Court found, however, that the misdescription of the Corporation meant that the undertakings no longer accurately reflected the actual common intention of the parties and used the equitable remedy of rectification to give effect to the undertakings.

***Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd* [2016] HCA 52**

Coram: Kiefel, Bell, Gageler, Keane and Gordon JJ

High Court of Australia

Date: 21 December 2016

STATUTORY CONSTRUCTION — Building and Construction Industry Security of Payment Act 1999 (NSW), s 13(1) — Whether existence of reference date under construction contract precondition to making of valid payment claim.

CONTRACT — Construction of terms — Where construction contract made provision for contractor to "claim payment progressively" by making a "progress claim" — Whether it was the parties' intention that the contractor's right to make a progress claim under construction contract was to survive termination.

Facts

Southern Han and Lewence Construction were parties to a contract for the construction of an apartment block in Breakfast Point. The Contract provided that Lewence could claim payment progressively on the 8th day of each month for the work done to the 7th day of that respective month. Where there was a significant breach by Lewence, the Contract set out a mechanism whereby Southern Han would serve a notice to Lewence to show cause with the right to take the work out of Lewence's hands if it failed to show reasonable cause.

On 10 October 2014, Southern Han gave Lewence a notice to show cause. On 27 October 2014, after Lewence had responded to the notice to show cause, Southern Han gave Lewence a further notice purporting to excise its right under cl 39.4 to take the remaining works to be completed from the hands of Lewence. Lewence, having shown cause, treated the giving of that further notice as repudiation of the Contract. On 28 October 2014, Southern Han accepted the repudiation and elected to terminate the contract.

On 4 December 2014, Lewence served a payment claim for work completed under the contract pursuant to the formal requirements of s13(2) of the SOP Act but did not nominate a reference date. Southern Han provided a payment schedule asserting that it owed no money.

Southern Han sought relief in the Supreme Court asserting that the payment claim was not one made under the SOP Act for want of a reference date. Accordingly, it asserted the adjudicator did not have jurisdiction to make a determination. The primary judge made the declaration sought, quashing the adjudication determination.

On Appeal, the NSW Court of Appeal unanimously held that the existence of a reference date is not a precondition to the making of a valid payment claim and overturned the Court's decision at first instance.

The key consideration of the case was whether the existence of a reference date under a construction contract is a precondition to the making of a valid payment claim under the SOP Act.

Decision

The High Court held that the existence of the reference date is a precondition to the making of a valid payment claim. It was a fortiori that this was consistent with other provisions of the Act including s13(5) of the Act that required that one payment claim could only be made in respect of each reference date. The Court further held that a payment claim that did not meet

this precondition was ineffective at engaging the mechanisms of the statute and the adjudication procedures set out in the Act.

As this was the first occasion that the High Court considered the SOP Act, it made further observations. The Court held that it was impermissible to include damages for breach of contract or a claim for restitution in a payment claim. Accordingly, where the Contract expressly fixes a date for the claiming of a progress payment, the statutory time for claiming progress payments has no application. In circumstances where there was no contractual provision indicating that the right to progress payments survived termination, the Contractors rights were limited to those which had already accrued prior to the date of termination. Accordingly, there was no available reference date, and no payment claim could therefore be made. Its remedies were limited to those in contract.

The upshot of the case is that a payment claim cannot be made without a valid reference date. In the absence of an express provision, a reference date will not arise after the contract is at an end.

The High Court overturned the decision of the NSW Court of Appeal.

Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2) [2016] NSWCA 379

Coram: Bathurst CJ, Beazley P, Basten, Macfarlan and Leeming JJA

Supreme Court of New South Wales Court of Appeal

Date: 23 December 2016

BUILDING AND CONSTRUCTION — Adjudication of payment claim — Review of adjudicator's decision — Whether review available for non-jurisdictional error of law on the face of the record.

CIVIL PROCEDURE — Application to reopen earlier judgment of Court — Decision as to scope of supervisory jurisdiction — Consideration of subsequent authorities — Resolving uncertainty in reasoning.

STATUTES — Scope of supervisory jurisdiction of Supreme Court — Whether jurisdiction restricted absent an express privative clause — Whether jurisdiction limited to non-jurisdictional errors of law on face of record — Inter-relationship of Supreme Court Act 1970 (NSW), s 69 and Building and Construction Industry Security of Payment Act 1999 (NSW).

Facts

Shade Systems subcontracted to Probuild for the supply and installation of louvres to a development. On 23 December 2015, Shade Systems served a payment claim pursuant to the SOP Act. On 11 January 2016, Probuild served a payment schedule asserting no money was owing. On 15 February 2016, an adjudication determination was made in the appellant's favour for an amount of $277,755.

The adjudicator allowed Shade Systems the majority of the claim and rejected Probuild's claim for set-off for liquidated damages. The basis of the adjudicator's rejection of the claim in set-off was made on three bases;

- the liquidated damages could not be calculated in accordance with the subcontract
- the subcontractor could not benefit from their own wrong; and
- liquidated damages are a penalty

Shade Systems sought review of the determination in the Supreme Court alleging a denial of procedural fairness in the adjudication process which constituted a jurisdictional error and errors of law in the determination reasons.

At first instance, Emmett AJ found that the adjudicator erred in holding that Probuild was not entitled to liquidated damages. His Honour held that the supervisory jurisdiction of the Supreme Court was available to review non-jurisdictional errors of law on the face of the record and, having established such an error, quashed the determination and remitted the matter back to the adjudicator. Shade Systems appealed the decision of Emmett AJ on the basis that the Supreme Court did not have power to quash an adjudication determination on the basis of a non-jurisdictional error of law.

Decision

The issue before the Court of Appeal was whether the Court had power to intervene in cases where the only errors identified were non-jurisdictional errors of law. The appellant said that binding authority is *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 and *Chase Oyster Bar*

Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393 both decisions supported that conclusion.

Allowing the appeal, the Court unanimously held, consistently with Brodyn, that the SOP Act did not permit review of the determination of an adjudicator otherwise than for jurisdictional error.

The purpose of s69(5) of the Supreme Court Act is to ensure that previous sections of the Act do not derogate from the existing privative clauses which had been construed as limiting the supervisory jurisdiction in particular areas to jurisdictional errors, excluding grounds based on error of law on the face of the record. There is, however, no explicit privative clause in the Security of Payment Act.

Basten JA regarding the above stated at [48]:

> *"The exercise of construction required of this Court concerns the interaction of two pieces of State legislation, namely the Security of Payment Act and s 69 of the Supreme Court Act. Viewed broadly, and somewhat abstractly, it may be seen that s 69, with its expanded concept of the "record", provides a mechanism for review of ultimate determinations of inferior courts and tribunals little different from a statutory provision granting an appeal for error of law. Statutory appeals so limited are commonplace. On one view, the omission of any such statutory appeal for error of law demonstrates a legislative intention inconsistent with review for errors of law, not constituting jurisdictional error. On the other hand, the absence of a privative clause may indicate an intention to allow review by the Supreme Court for errors of law on the face of the record."*

This case was the subject of an appeal to the High Court. The judgment is yet to be handed down.

Torbey Investments Corporated Pty Ltd v Ferrara [2017] NSWCA 9

Coram: McColl, Basten and Simpson JJA

Supreme Court of New South Wales Court of Appeal

Date: 7 February 2018

Construction and interpretation of contracts –whether terms imposing procedural requirements and time limits for notices of breach and termination were mandatory – effect of non-compliance

Facts

Torbey Investments on the one part, and Vito and Maria Ferrara on the other, entered into a building contract for the construction of a residential property. Work by the builder was to be completed by early 2006; however, it was delayed. The builder agreed to finish the work by 30 June 2007 including an itemised list of variations.

On 9 July 2007 a rectification order was issued to the builder by NSW Fair Trading. That work was not completed by the builder. On 9 July 2007, the Ferraras sent a notice of termination to the builder, by regular post. It is important to note that Clause 33 of the building contract provided that notices must be *'given by certified mail or personally'*.

On 23 July 2007, Torbey responded to the purported termination notice by indicating that it wished to remedy any breaches and continue with the contact. On 3 August 2007, Torbey having not undertaken any further work, the Ferrara sent to the builder, again by regular post, a notice terminating the contract.

Torbey commenced proceedings in the CTTT seeking payment of the sum of $170,114 as the final progress claim under the contract. The Ferraras filed a cross-claim seeking damages in respect of the rectification expenses for the defective and incomplete works that were undertaken by Torbey.

On 17 May 2013, the CTTT made orders that the Ferraras were to pay Torbey $38,171.40, and Torbey was to pay the Ferraras $115,055 for incomplete and defective work. The amounts were set off resulting in the balance owing to the Ferraras in the sum of $116,580.60.

On 14 June 2013, Torbey appealed to the District Court. The court concluded that the tribunal had not made any error in law. This was qualified to one error concerning the manner in which the Tribunal dealt with a sum unpaid under the contract. A further hearing culminated in the Court delivering judgment in favour of the Ferraras.

On 15 January 2016, Torbey commenced proceedings in the New South Wales Court of Appeal seeking to have the decision of the District Court reviewed. Torbey argued that the building contract had not been validly terminated because the notices issued by the owners did not comply with notice requirements under the contract.

Decision

The Court of Appeal held that the owners' failure to comply strictly with the notice requirements under the contract did not invalidate the termination of the contract. As the letters giving notice of termination were responded to by the builder, the court found that the builder's response effectively acknowledged receipt of the notice and in turn an understanding that the owners intended to terminate the contract. The notice of termination was held to have been validly served notwithstanding it was not served in accordance with the contract.

***FAL Management Group Pty Limited as Trustee for TF Investment Trust v Denham Constructions Pty Ltd* [2017] NSWSC 150**

Coram: Ball J

Supreme Court of New South Wales

Date: 24 February 2018

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) – stay of proceedings – whether stay of judgment should be lifted – release of payment made into Court.

Facts

In October 2013, FAL Management entered into a design and construct contract with Denham Constructions. In July 2014, Denham served a plaintiff claim, later making an adjudication application that culminated in Denham obtaining an adjudication certificate. Denham registered the adjudication certificate as a judgment debt in the District Court of New South Wales in the sum of $511,229.94.

Shortly after, N Moits & Sons, a subcontractor of Denham, served FAL with a notice of claim under the Contractors Debts Act. There was uncertainty as to whether FAL was obliged to pay Moits as the subcontract existed between Moits and an entity known as Denham 960. The District Court stayed the judgment that Denham had obtained against FAL in the amount of $365,000.10 on the condition that FAL commence proceedings in the Supreme Court that put into issue the validity of Moits' claim and that it pay the sum of $365,000.10 into Court.

FAL commenced proceedings in the Supreme Court and Hammerschlag J made orders dismissing the proceedings and continuing the stay on that part of the District Court judgment pending the outcome of the separate proceedings commenced by Moits. The sum of $365,000.10 that was paid into the District Court was transferred to the Supreme Court.

On 16 June 2014, FAL terminated the construction contract. On 20 June 2014 Denham commenced separate proceedings against FAL in the Supreme Court seeking, among other things, the return of security provided under the Contract in the sum of $1,609,000. On 30 July 2014, FAL filed a cross-claim against Denham seeking to recover overpayments made to Denham. The amount of the cross claim was in excess of $10,000,000. The evidence filed was substantial and demonstrated the strength of its claim for an amount well in excess of $365,000.

On 30 August 2016, FAL received the sum of $1,609,000 after calling upon the unconditional undertaking. Denham was also placed in to liquidation in August 2016. FAL and Denham both filed applications seeking payment of the moneys held by the court.

Decision

The court made orders for the money to be paid to FAL and for the District Court judgment to be permanently stayed. In considering the decision to stay proceedings, Ball J held that the court was not confined to consider the reasons under which the stay was originally granted but instead was entitled to consider any reasons advanced for a continuation of the stay. His Honour considered the judgment obtained by Denham under the SOPA. Although a judgment under SOPA it is enforceable immediately, unlike other judgments, it does not affect a party's rights under the relevant contract, inter se.

In *Hakea Holdings Pty Limited v Denham Constructions Pty Ltd* [2016] NSWSC 1120, the court set out various factors to be taken into account when considering whether to stay

proceedings. Those matters included the strength of the contractual claim, the likelihood that the contractor will be unable to repay the amount the subject of the determination and the risk that the contractor will become insolvent if a stay is granted

In circumstances where;

- Denham had gone into liquidation and that any amount paid to it would no longer be recoverable. Accordingly, the effect of lifting the stay would be to render what was supposed to be an interim payment, a permanent and irrecoverable payment.
- FAL had a strongly arguable claim to recover the payment and significantly more pursuant to its contractual claim; and
- Denham was never entitled to the payment under the contract

Ball J ordered that the proceedings ought to be permanently stayed. His Honour also noted that There was nothing preventing Denham's liquidator from suing FAL to recover the moneys if paid out.

Walker Group Constructions Pty Ltd v Tzaneros Investments Pty Ltd [2017] NSWCA 27

Coram: Bathurst CJ, Beazley P and Gleeson JA

Supreme Court of New South Wales Court of Appeal

Date: 1 March 2017

CONTRACT — Building and construction contracts — Defects in concrete pavements at container terminal at Port Botany — Breach of warranty admitted — Breach arose prior to acquisition by first respondent of leasehold over terminal — Whether accrued cause of action for breach assigned to first respondent — Whether reference to surrounding circumstances permissible in construction of deed of assignment — Whether first respondent acquired terminal with knowledge of defects and therefore suffered no loss as a consequence of them — Whether first respondent entitled to recover damages for cost of full replacement of concrete pavement — Whether damages awarded to first respondent ought to have been reduced for betterment.

PROCEDURE — Costs — Whether costs should not have been awarded on an indemnity basis.

Facts

Walker was responsible for the design and construction of a container terminal at Port Botany. The terminal was built in 2003 on land owned by Sydney Ports Corporation. This land was, at the time, leased to P&O Trans Australia with whom the contract for construction was entered into.

Walker engaged the second respondent AMT engineers to design the concrete pavement that formed part of the terminal. On 1 April 2004, P&O transferred its interest in the leasehold to a subsidiary, Smith Bros, who in turn transferred its interest to Tzaneros on 2 December 2005. On the same day, a deed between P&O, Tzaneros and Smith Bros was signed purporting to assign P&O's warranties given by Walker to Tzaneros. Walker provided a letter of consent to this assignment.

Following the laying of pavement, cracks began to develop in some pavement types. Tzaneros claimed from Walker and AMT the cost of replacing the defective pavement. The issues before the Court were:

- Whether on a proper construction of the terms of the Deed of Assignment and the letter of consent from WGC, there was an assignment by P&O to Tzaneros of any accrued causes of action for breach of the building warranties.
- Whether construction of the relevant documents by reference to the surrounding circumstances was permissible.
- Whether Tzaneros acquired the terminal with knowledge of the defects and therefore suffered no loss as a consequence of those defects.
- Whether Tzaneros was entitled to recover damages for the cost of full replacement of the pavement.
- Whether a reduction in the sum of damages awarded to Tzaneros for betterment should have been made.

Decision

The Court held that the deed of assignment should be interpreted like any other contractual provision with respect to interpretation. The Court cited Electricity General Corporation v Woodside Energy's approach to construing a commercial contract in terms of "The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar."

The documents at issue were historical drafts of the agreement that contained text deleted from a document during negotiations. The Court held that under the principles of construction the evidence is inadmissible as it concerns subjective intention. Reliance was placed on the *Codelfa* principle However, even if it was, for the exception in Codelfa to apply it would be necessary to show that the parties to the deed, that is Smith Bros and Tzaneros, had mutually concurred in rejecting a construction that the assignment extended to the past breaches (Codelfa at 353), or that the deletion negates an inference from the surrounding circumstances that the deed bears a meaning positively rejected by the deletion.

The crux of the submission was that had Tzaneros knowledge of the defects, this would have factored into the cost of the assigned rights and break the chain of causation. The Court did not agitate this issue and held that the present case concerns an assignment of contractual warranties including the right to sue for past breaches.

The general principle on which damages are recoverable by a building owner for breach of a building contract is the cost of making the work or building conform to the contract, subject to the qualification that not only must the work be necessary to rectify the defect but also a reasonable course of action. The Court held that repairing the entire pavement was not an unreasonable course of action and further that the sale of a property does not necessarily disentitle the owner to recover damages, the cost of remedying the defects provided it would be reasonable work.

This ground of betterment was not made out. The application contended that the original pavement had an operational life of 20 years and remedying the defects would render the operational life of the pavement 50 years. The proposed replacement pavement has been designed to ensure the terminal can continue in operation thus avoiding consequential loss which would otherwise have flowed from the breach.

The court followed the decision of the primary judge holding that His Honour "was correct in rejecting a claim for betterment on this basis. First, as the primary judge pointed out, the contract provided for a pavement with a minimum life of 20 years. A pavement properly designed to the specification would not be expected to be unusable immediately on the expiration of such a period. The position is similar to that considered by this court in Hyder Consulting where such a claim for betterment was rejected by the majority on the basis that there was no advantage to the plaintiff beyond the speculative proposition that the new pavement might last longer than the old one if properly built "

Fairfield City Council v Abergeldie Contractors Pty Ltd [2017] NSWSC 166

Coram: Ball J

Supreme Court of New South Wales

Date: 6 March 2017

BUILDING AND CONSTRUCTION — Building and Construction Industry Security of Payment Act 1999 (NSW) — Progress payments scheme — Requirement of valid reference date under contract — Date of practical completion — Whether payment claim valid.

CONTRACTS — Construction of contract — Meaning of "date of practical completion" — Whether practical completion dependent on building superintendent's opinion, or objective existence of state of facts — Whether "date of practical completion" is the date of certificate of completion.

Facts

Fairfield City Council entered into a building contract with Abergeldie Contractors Pty Ltd. The contract provided that after practical completion there were two reference dates. The first being the 28th day of the month after completion. The project manager for Abergeldie advised that practical completion had been achieved on 16 September 2016 and requested the Council's superintendent issue a certificate of practical completion.

On 28 October 2016 the builder submitted a payment claim to Fairfield City Council. On 25 November 2016, Abergeldie submitted a further payment claim which was substantially the same as the payment claim it served on 16 September 2016 ('the second payment claim").On 25 November 2016, after the second payment claim was served, the superintendent issued the certificate which indicated completion on 16 September 2016. On 7 December 2016, the Council issued a payment schedule advising no amount would be paid as there was no valid reference date which permitted a claim to be made in November.

The Court declared there was no reference date in November 2016, the payment claim was invalid and quashed the favourable determination of the adjudicator in the contractor's favour.

Abergeldie filed an adjudication application. The adjudicator determined that Abergeldie was entitled to be paid part of the sum claimed. The adjudication determination was challenged by the Council in the Supreme Court.

Decision

The Court found in favour of the Council, holding that the Second Payment Claim was not a payment claim within the meaning of the SOP Act as it was not made in respect of a reference date under the building contract. Accordingly, following the decision of Southern Han, the court granted relief in the nature of certiorari, quashing the adjudication determination.

Samuel Homes Pty Ltd v Derek Raithby [2017] NSWSC 205

Coram: Hammershlag J

Supreme Court of New South Wales

Date: 6 March 2017

BUILDING AND CONSTRUCTION — Building and Construction Industry Security of Payment Act 1999 (NSW) – Claim for relief in the nature of certiorari quashing an adjudication determination – necessity to bring proceedings expeditiously.

Facts

Samuel Homes was engaged in the business of building residential homes. Raithby was an architect who was engaged to provided services to the builder for a number of residences. On or around 30 March 2016 Raithby served a payment claim on Samuel Homes under the Building and Construction Industry Security of Payment Act 1999 (NSW) (SOP Act). Samuel Homes did not serve a payment schedule in response. Raithby applied for an adjudication determination that culminated with the adjudication determination made on 20 June 2016. The adjudicator determined that Samuel Homes owed $18,799 to Raithby.

Raithby filed the adjudication determination with the Local Court and obtained judgment against Samuel Homes. Raithby then availed himself of other processes available to obtain payment, including but not limited to garnishee orders. All of those attempts were unsuccessful.

On 17 February 2017, Samuel Homes commenced Supreme Court seeking relief in the nature of certiorari in respect of the adjudication determination and having the Local Court judgment set aside.

Decision

The court refused to grant the relief sought by Samuel Homes by reason of the significant and unacceptable delay in bringing the proceedings. The explanation for the delay, that the director for Samuel Homes was in unrelated proceedings and had delayed bringing the instant claim in the hope of settling both disputes exacerbated rather than exonerated its delay.

In circumstances where the nature of the remedies are discretionary, when coupled with the objects of the SOP Act being the expeditious resolution of payment claims on an interim basis, Hammershlag J held that Samuel Homes' delay of eight months in bringing proceedings was enough to refuse the granting of the discretionary relief sought.

The Court also noted that the substantive challenges to the adjudication determination could not be made out by operation of section 20(2A) of the Act, as the builder's failure to serve a payment schedule in response to the payment claim precluded it from serving an adjudication response. It was a foriori that there was no evidence before the court that Samuel Homes did not owe Raithby the money the subject of the judgment.

His Honour also capped the costs recoverable to $5,000.00 by reason of the modest sum of money that was the subject of the dispute.

Lainson Holdings Pty Ltd v Duffy Kennedy Pty Ltd [2017] NSWSC 203

Coram: Stevenson J

Supreme Court of New South Wales

Date: 7 March 2017

CONTRACT — Building and construction contracts – dispute resolution clause – expert determination – whether pending expert determination arises from a 'dispute' within the meaning of dispute resolution clause

Facts

Lainson Holdings and Duffy Kennedy entered into a contract for the construction of residential apartments. The contract was comprised of two discrete documents: a building contract and a deed. The deed sought to clarify and extend the parties' obligations under the building contract and in the event of inconsistency take precedence over the terms of the building contract. Importantly, both the contract and the deed provided for the resolution of disputes by expert determination.

In May 2016, the parties exchanged a notice of dispute. The dispute involved or was related to the procurement of finance. The expert was unable to compel production of documents that were required to resolve the dispute. Lainson Holdings sought a declaration that the dispute was not a dispute within the meaning of the deed or, in the alternative, a declaration that the parties did not intend that the relevant dispute be determined by expert determination.

Decision

The Court refused to grant the declaratory relief. In so refusing, the Court held that primacy must be given to the express terms of the deed. The deed provided that 'any dispute or difference whatsoever arising out of or in connection with this contract' was to be submitted to an expert.

The Court further held that reference to the phrase “this contract” contemplated both the building contract and deed as a whole. was satisfied that the reference to 'this contract' meant the parties' contractual relations as a whole. Accordingly, Stevenson J held that the instant dispute was a dispute within the meaning of the deed. His Honour further held that there was no discrete dispute resolution process under the building contract as distinct from the deed, and if there were, the deed would supervene. The Court held that, having regard to the wording of the provision and reference to “any dispute” that the dispute resolution mechanism applied to the instant dispute and that there was no basis to qualify or curtail the operation of the provision in the manner contended for by Lainson Holdings.

Parkview Constructions Pty Limited v Total Lifestyle Windows Pty Ltd t/a Total Concept Group [2017] NSWSC 194

Coram: Hammerschlag J

Supreme Court of New South Wales

Date: 7 March 2017

BUILDING AND CONSTRUCTION — Building and Construction Industry Security of Payment Act 1999 (NSW) (the Act) — Sections 17(3), 17(5) and 19 — Interpretation Act 1999 (NSW) ss 21(1) — Where an adjudication application made by the claimant differs from that referred by the authorised nominating authority to the adjudicator — Where an adjudication application served on the respondent is not a copy of that referred to the adjudicator — Where a claimant delivers a Universal Serial Bus (USB stick) containing an adjudication application.

Facts

Parkview brought proceedings to quash an adjudication determination on the grounds that it is infected by jurisdictional error and/or denial of procedural fairness.

On 18 May 2015, Parkview engaged Total to design, supply and install glazed windows and doors at the Woolooware Bay Town Centre. On 11 October 2011, Total served a payment claim pursuant to the SOP Act for $668,177.24. On 25 October 2011, Parkview served a payment schedule asserting the payment amount of nil.

Total prepared a "hefty" adjudication application which in physical form ran four full lever arch folders. Section 1 was the application on a form published by the nominated adjudicators that ran 11 pages and the remaining three sections totalled 1,438 pages. On 8 November, the deadline for an application pursuant to the Act, Total's legal officer uploaded the adjudication application to the adjudicator's online cloud storage and provided a link to where the files had been uploaded.

However, the versions uploaded were not the version upon which it sought to rely, which were uploaded separately on the same day. The legal officer pasted a copy of the application on a USB stick and sent to via post to Parkview's physical address with a covering letter. Parkview received the USB stick on 9 November and it was reviewed by the assistant to Parkview's managing director.

On 17 November 2016, Parkview served its adjudication response which apparently included written submissions. On 12 December 2016, the adjudicator delivered his adjudication determination (dated 9 December 2016). He determined that the adjudication application was served on Parkview on 9 November 2016, upon delivery of the USB stick as opposed to when the documents on the USB were reviewed. Accordingly, he found, the adjudication response was out of time, and he disregarded it.

Parkview sought to challenge the adjudication determination on the grounds that the adjudicator had no jurisdiction to determine the application, that the adjudicator had fallen into jurisdictional error and denied Parkview of procedural fairness

Decision

The Court held that with regard to delivery by USB, the documents are not to be taken as writing for the purposes of the Act. It does not represent or reproduce words in visible form in the way s 21 of the Interpretation Act has in mind. Looking at it, one sees only a small piece of plastic, perhaps with some circuitry on it. It is a device which, if actioned, is capable of representing or reproducing what is stored on it in visible form.

In order to access what is stored on it, the recipient must take the step of accessing, opening and viewing the files stored on it. To take delivery of a USB stick as service of an instrument stored on it in writing, is as untenable as it would be to take delivery of a compact disc, cassette or vinyl record as itself constituting aural transmission of what is recorded on it. To access information on a USB stick, the recipient must have compatible technology. This cannot be regarded as an inevitability, even today.

Further, with respect to the inconsistent applications before the adjudicator and those served upon Parkview, the Court held that the adjudicator could not consider material which was only provided in hard copy after the fact.

By using the words an adjudication and then using the words the adjudication, s 19(1) makes it clear that the written words which constitute the adjudication application made to the authorised nominating authority must be referred to the adjudicator.

The Act contemplates that it is the same written words which are to be copied to the respondent and, for that matter, to be referred by the authorised nominating authority to an adjudicator. Compliance with this requirement is an essential preliminary for the decision-making process for which the Act provides.

The Act confers jurisdiction on an adjudicator to determine only the application which was made and then referred to her or him, not some other application.

The Court made an order quashing the adjudication determination and permanent injunction restraining Total from acting on it. Parties to be heard on costs.

Futurepower Developments Pty Ltd v TJ & RF Fordham Pty Ltd [2017] NSWSC 232

Coram: Ball J

Supreme Court of New South Wales

Date: 14 March 2017

BUILDING AND CONSTRUCTION — Building and Construction Industry Security of Payment Act 1999 (NSW) (the Act) - natural justice - procedural fairness – whether the adjudicator adequately dealt with contract variations

Facts

On 12 June 2015, Futurepower Developments (Futurepower) entered into a construction contract with TJ & RF Fordham Pty Ltd (TRN) to undertake the construction of roads and drainage works for a residential subdivision at Jardine Drive Edmondson Park.

On 29 April 2016, TRN submitted a payment claim under the SOP Act that included amounts for variations to the contract for costs associated with removing asbestos discovered during excavation.

On 11 May 2016, Futurepower's served a payment schedule in which it proposed to pay an amount of $216,144.27 but indicated an amount payable of $0 in respect of the variations. That amount was subsequently paid. On 25 May 2016, TRN lodged an adjudication application. The adjudicator found in favour of TRN for both the amount paid and an amount for the variations, totalling $684,054.89.

Futurepower sought to have this determination quashed for jurisdictional error on the basis that the adjudicator failed to have proper regard to its submissions, or in the alternative, for failing to provide adequate reasons for its decision.

Decision

The court dismissed Futurepower's claim for relief, concluding that the applicant had been afforded procedural fairness. The fact that the adjudication determination failed to take into account of the amount paid by Futurepower did not render the determination invalid. Such a failure could be addressed by an adjudicator invoking the slip rule pursuant to s22(5) of SOP Act. As the SOP Act gave the adjudicator jurisdiction to address such an error, it could not be jurisdictional error.

Ball J also held that the adjudicator had adequately considered Futurepower’s submissions. His Honour reviewed relevant principles highlighting the following salient points;

- reasoning for an administrative decision should not be read “minutely and finely with an eye keenly attuned to the perception of error
- the reasons should be read in their entirety
- consideration of whether the applicant has been afforded procedural fairness must take into account the scheme prescribed by the Act and the fact that it is “inappropriate” for the court to “sift finely through the reasons of the decision maker in an attempt to find slips warranting the court’s intervention
- failure to give “lengthy, elaborate or detailed” reasons is not indicative of a denial of natural justice

- honest error in identifying or addressing issues for determination is not the same as making a determination without good faith that would render an adjudication determination invalid.

Empire Glass and Aluminium Pty Ltd v Lipman Pty Ltd [2017] NSWSC 253

Coram: Ball J

Supreme Court of New South Wales

Date: 17 March 2017

CONTRACTS — Construction — Dispute resolution clause — Requirement under contract that expert determination be final and binding "unless a party gives notice of appeal" within 15 days — Whether contractual right to litigate arises.

PRACTICE AND PROCEDURE — Notice of motion — Application for permanent stay or dismissal of proceedings — Whether dispute resolution clause gives rise to right to have dispute determined by the court.

Facts

On 21 November 2014, Empire agreed to supply Lipman with the design, supply, construction and associated works for the refurbishment of the lobby of 580 George St Sydney for $3.75 million. The contract included a dispute resolution mechanism at cl 42.1.

Under cl 42.11*, The decision of any expert would be final and binding, unless a party gives notice of appeal to the other party within 15 Business Days of the determination; and is to be given effect to by the parties unless and until it is reversed, overturned or otherwise changed under the procedure in the following subclauses.* Cl 42.12 provided that if the determination does not resolve the issue, either party may commence litigation proceedings.

The parties raised disputes with each other from March to August 2016 which were sent for expert determination made on 29 November 2016 pursuant to the terms of the contract.

Empire gave notice of appeal in accordance with cl 41.11 and commenced proceedings on the same date seeking to re-agitate the issues considered by the experts. Lipman filed a notice of motion seeking a stay or dismissal of the proceedings on the grounds the disputes between the parties had been resolved by expert determination and it was not open for Empire to re-agitate the issues in Court.

Decision

The Court held that the contract made it clear the parties intended the appeals process to involve a rehearing by a Court. The clause is drafted broadly, so as to apply to all disputes arising between the parties and despite commercial reasons for thinking the parties may have preferred to avoid the necessity of re-agitating issues, it was also important to incorporate an appeals process. However, due to the substantial amount of money involved, it would not be commercially unreasonable to incorporate a substantive right of appeal into their dispute resolution process in those circumstances.

Clause 42.11(c) stated that the parties must give effect to the determination until it is "reversed, overturned or otherwise changed" under the procedure in cl 42.12. Those words make it plain that notwithstanding the commencement of court proceedings the parties remain bound by the determination until it is reversed, overturned or otherwise changed. That makes commercial sense where the right is a general right of appeal.

Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd [2017] NSWCA 53

Coram: Beazley ACJ, Basten and Leeming JJA

Supreme Court of New South Wales Court of Appeal

Date: 23 March 2017

BUILDING AND CONSTRUCTION — Where builder filed payment claim under Building and Construction Industry Security of Payment Act 1999 (NSW) — Where resulting adjudication determination filed as judgment debt — Whether requirement to notify affected party of judgment debt before commencing proceedings to enforce it — Whether s 25(4) creates right to such notice.

BUILDING AND CONSTRUCTION — Ex parte garnishee order obtained — Whether duty of candour to inform court that affected party had commenced proceedings challenging validity of underlying adjudication determination under Supreme Court Act 1970 (NSW), s 69.

Facts

In December 2010, Fitz Jersey engaged Atlas Construction, to design and construct a major development at Mascot.

On 15 November 2016, Atlas served on Fitz Jersey a final payment claim pursuant to the SOP Act for an amount in excess of $10.5 million plus interest. On 29 November 2016, Fitz Jersey served a payment schedule asserting it owed no money to Atlas.

The adjudication determination held that the payment claim was payable in full and as Fitz Jersey did not make payment within five business days pursuant to the Act, Atlas obtained an adjudication certificate and held a judgement debt after it was filed in the Supreme Court. Atlas obtained a garnishee order which was served on the developer's bank for monies owning from the bank account of the Fitz Jersey. This money was paid but no notice of the judgement debt or garnishee being paid was given to Fitz Jersey.

Fitz Jersey had commenced proceedings under s69 of the Supreme Court Act challenging the validity of the determination however, it had not sought any interlocutory relief or undertaking from Atlas to not take steps to enforce the order. An application to the Equity Division for the garnishee order to be set aside was dismissed.

Fitz Jersey's case was advanced on the basis that if they had been notified of the actions taken by Atlas in enforcing the adjudication decision, it would have applied for discretionary relief from the Court. The Court considered this but it held little value where the case presupposes the discretionary relief would have been granted.

Decision

The Court of Appeal gave a unanimous judgement dismissing the appeal. The Court held the view that the issue of the garnishee order was "essentially an administrative decision" and "not to be equated with an ex parte application to a judge seeking injunctive or equivalent relief." The Court also held that there was no obligation under statute or common law for Atlas Construction to notify Fitz Jersey that a certificate had been filed, nor was it obliged to inform the Court that Fitz Jersey had commenced proceedings at the time that Atlas applied for a garnishee order. At all stages from the moment that it was served with a copy of the adjudicator's determination, the Fitz Jersey was aware of its legal obligation, within five working days, to pay the amount of the determination, failing which the Atlas would have a right to obtain a judgment merely by obtaining and filing a copy of the adjudication certificate and taking steps to enforce it.

The Court held:

> "By that stage, any developer should be taken to know that it is at risk of the unpaid claimant seeking a certificate, obtaining a deemed judgment and taking ordinary steps by way of execution if the developer fails to make payment and fails to obtain (whether by undertaking or injunction) an assurance that the judgment will not be enforced. Given the tight time limits governing the process leading to the determination, there would ordinarily be no basis to think that the successful claimant would not insist on being paid within the five days mandated by the Act."

El-Bayeh v Bayeh t/as JARS Engineering & Contracting Services [2017] NSWSC 322

Coram: Stevenson J

Supreme Court of New South Wales

Date: 31 March 2017

CONTRACT – project management of construction project – proper construction of agreement – evidence – expert report

Facts

Yousseff El-Bayeh engaged Samir Bayeh to supervise and manage the construction of a warehouse in Huntingwood. A decision was made to vary the ground levels for the works after construction had begun. There was a delay in submitting the required application to the Blacktown City Council (**Council**), and this caused a delay to the project.

The owner claimed that the project manager breached a duty to take reasonable care and skill by failing to ensure that the works were completed within a reasonable time. For the purposes of quantifying damages, the owner sought to rely on an expert report purporting to calculate the loss suffered due to being unable to lease the warehouse from the original completion date.

The project manager denied that there was any such implied term or duty and submitted that, in any event, the claim was statute-barred.

Decision

Stevenson J dismissed the owner's claim. His Honour found that, given the project manager was not himself involved in the actual construction, there was no implied term or duty to ensure that the construction be completed within a reasonable time. His Honour also dealt with the issues of the expert report and the statute of limitations. The expert report was held to be inadmissible as the report failed to provide any explanation for or reasoning behind the conclusions it made about likely lease terms or marketing periods. The report was held to be a clear example of one where it has not been shown that the opinions expressed are wholly or substantially based on the expert's specialised knowledge based on his or her training, study or experience (and so section 79 of the *Evidence Act 1995* (NSW) did not apply).

In finding that the claim was statute-barred, Stevenson J rejected the owner's submission that the project manager was subject to a continuing duty which he breached repeatedly each day he delayed in causing an application to the Council to be made. His Honour relied on Ipp J's statement in *Hammond v Minister for Works* (1992) 8 WAR 505 (cited with approval by the NSW Court of *Appeal in Winnote Pty Ltd v Page* [2006] NSWCA 287) that a breach of an obligation to perform a single act, by a date capable of determination, gives rise to only one cause of action.

AAP Industries Pty Ltd v Rehau Pte Ltd [2017] NSWSC 390

Coram: Davies J

Supreme Court of New South Wales

Date: 21 April 2017

CONTRACT – general contractual principles – terms – implied terms – construction of contracts – whether implication of terms is an aspect of construction – whether implied term of exclusive dealing

Facts

AAP Industries and Rehau entered into a written contract dated 29 September 1999 pursuant to which AAP agreed to supply Rehau with plumbing articles. The contract provided;

- AAP Industries had to reserve production capacity to meet Rehau's requirements and to plan the raw material necessary to ensure Rehau's deadlines were met;
- The quality of the articles subject to this Supply Agreement shall meet Rehau's specifications and instructions.
- AAP Industries had to maintain a minimum buffer stock of two months' free of charge;
- Any failure by AAP Industries to meet a delivery deadline would constitute default of performance, entitling Rehau;
    - to demand later delivery or compensation for non-performance or
    - to withdraw from this Supply Agreement; and
- AAP undertook to keep secret and not supply any customer of Rehau with any business secrets acquired from Rehau unetil two years after termination of the supply agreement.
- The contract was made for one year upon signing the agreement. It was extended by one year each time it was due to expire unless notice of termination was given at least three months before the date of expiry.

For the period 1999 until about 2009 the contracts continued. From 2010, there were discussions between the parties about the price of the Articles supplied by AAP. Rehau pointed out that it could obtain the Articles for lower prices from Europe and China. Th parties engaged in a review process of the design and pricing of articles.

On 6 July 2012, Rehau emailed AAP asking for an indication as to Stock levels of finished goods held, quotes for possible price reductions, and the amount of finished goods available if the raw material stock is to be fully utilised. The ultimate sentence of the email was "we also seek the understanding that until we come to a conclusion to this discussion, production of these articles should not continue in the interim".

Rehau continued to purchase from AAP following the email sent 6 July 2012. The purchases continued until July 2013 at which time Rehau stopped ordering from AAP. On 2 June 2014, AAP sent a letter to Rehau purporting to accepting what it said was Rehau's repudiation of the contract by failing to order and purchase the articles exclusively from AAP in accordance with the terms of the Contract.

Decision

The Court held that Rehau was so obliged under the supply agreement. The Court, however, found that there was no such term in the further supply agreements. The Court looked to a number of express provisions in the supply agreement holding that they would have been unnecessary and a commercial nonsense if there was no term of exclusive dealing; in elucidating this point, Davies J drew specific attention to the following clauses,

- the term requiring AAP to reserve production capacity to meet Rahau's needs
- the term requiring AAP to maintain a 2-month buffer stock
- the term that entitled Rehau to withdraw from the Contract if AAP defaulted and the automatic extension of the Contract unless a notice of termination was given
- the obligation on AAP to keep a two-month supply of the Articles

The Court held that it may not be necessary to imply a term of exclusivity, however, it was prepared to do so to the extent that it was necessary following the proper construction of a contract. The Court reaffirmed that the relevant enquiry was not the conduct of the parties after the agreement was made, rather, it was the text of the agreement itself that was instructive.

The Court rejected Rehau's argument that the email of 6 July 2012 constituted a notice of termination. Davies J held that the email was a request for a temporary pause of the obligations pending resolution of various matters, that, together with Rehau's failure to order from AAP after 11 July 2013, amounted to a repudiation of the Contract.

The Court held that AAP is entitled to recover damages for the breach of the Supply Agreement, including loss of profits, and losses incurred by reason of keeping the stocks of completed product and raw materials pursuant to the Agreement.

Laing O'Rourke Australia Construction Pty Ltd v Kawasaki Heavy Industries Ltd [2017] NSWSC 541

Coram: Stevenson J

Supreme Court of New South Wales

Date: 5 May 2017

CONTRACT – consortium agreement – construction – performance bond – condition precedent to beneficiary's entitlement to call on bond – whether beneficiary agreed not to call on bond unless it was called on to pay bond given by it to head contractor – whether interlocutory injunction restraining beneficiary from calling on bond should be continued

Facts

Laing O'Rourke and Kawasaki were parties to a subcontract with JKC to construct a number of cryogenic tanks. The relationship between Laing O'Rourke and Kawasaki was governed by a Consortium Agreement.

Pursuant to the subcontract, Kawasaki provided an unconditional and irrevocable performance bond on behalf of itself and Laing O'Rourke. In the event that JKC made a call on the bond, the Consortium Agreement provided that both Kawasaki and Laing O'Rourke was required to contribute to that call in proportion to their respective liability under the Consortium Agreement. As part of the Consortium Agreement, Laing O'Rourke was obliged to provide surety bonds to Kawasaki.

Laing O'Rourke agreed to perform certain obligations of the work that fell within Kawasaki's scope. On 12 June 2012, Kawasaki delivered to Laing O'Rourke a purchase order pursuant to which Laing O'Rourke agreed to perform works pursuant to the subcontract. The purchase order required Laing O'Rourke to deliver surety bonds to Kawasaki. Kawasaki attempted to call on the bonds to the value of $52.3 million. The parties are each asserting that the other is liable to it in damages. JKC has not called on the bond provided to it by Kawasaki

Laing O'Rourke was granted an interlocutory injunction restraining Kawasaki from calling on the bond it held. Laing O'Rourke applied to the court seeking to have the injunction continued pending the determination of an arbitral tribunal which had not yet been appointed under the Consortium Agreement

Decision

Stevenson J held that the proper construction of the Consortium Agreement needed to be determined objectively by reference to its text, context and purpose. His Honour held that the Consortium Agreement indicated (though not expressly) that the parties intended that Kawasaki could only call on the bond from Laing O'Rourke if there was a call on it by JKC pursuant to the bond it had provided. The purchase order was not intended to expand the circumstances in which Kawasaki could call on the bond provided by Laing O'Rourke. Accordingly, Lang O'Rourke had a prima facie case sufficient to support the relief sought. Further, as there was no substantial prejudice to Kawasaki, no arbitral tribunal had been established to deal with the underlying dispute, and a call on the bond provided by Laing O'Rourke was likely to adversely affect Laing O'Rourke's prospects of bidding for work on unrelated projects, the balance of convenience favoured the continuation of the injunction

AAI Ltd t/as Vero Insurance v Kalnin Corporation Pty Ltd; Kalnin Corporation Pty Ltd v AAI Ltd t/as Vero Insurance [2017] NSWSC 548

Coram: Stevenson J

Supreme Court of New South Wales

Date: 5 May 2017

CONTRACT - Home Building Act 1989 (NSW) – proper construction of indemnity – meaning of 'structural defect'

Facts

Kalnin developed a property through Kalnin Corporation. Kalnin Corporation entered into a contract with Definite Dimensions to construct the development in Redfern. The builder sought insurance as required by the Home Building Act 1989. The insurance was taken with Vero Insurance that issued the policy on the proviso that Mr Kalnin and the Kalnin Corporation executed an indemnity in Vero's favour covering all claims, payments, costs and any other expenses resulting from the builder's acts or omissions. On 14 August 2002, Kalnin executed the indemnity. On 16 October 2002, Kalnin Corporation entered into a building contract with Definite Dimensions.

The development was completed in 2004 with an occupation certificate issuing on 23 November 2004. In November 2008, the owners corporation notified Vero of allegedly defective work and foreshadowed a claim under the policy. By now, the builder had been placed into liquidation. In March 2009, the owners corporation made a claim against Vero under the insurance policy in relation to allegedly defective work. By this time Vero was only liable to indemnify it in respect of structural defects as defined under the Home Building Act as the two-year period to claim for non-structural defects had passed.

Between May 2009 and February 2013, Vero assessed the work to be carried out to remediate the defective works. Vero ultimately paid $4.232 million in respect of remedial works and sought to recover that sum from Mr Kalnin and the developer under the Indemnity.

Amongst a number of other issues, the court considered whether Vero had satisfied its obligation under clause 6(b) of the Indemnity to notify Mr Kalnin and Kalnin Corporation promptly of the proposed settlement of the owners corporation's claim. It was mutual ground between the parties that compliance with clause 6(b) of the Indemnity was a condition precedent to Mr Kalnin's and the Kalnin Corporation's liability to indemnify Vero.

Decision

The court found that Vero had failed to satisfy the condition precedent in clause 6(b) of the Indemnity and that this was fatal to Vero's claim. The purpose of clause 6(b) of the Indemnity was to give Mr Kalnin and the Kalnin Corporation the opportunity to consider the amount of the proposed settlement and to take steps available to it before any settlement was finally struck.

Stevenson J noted that Mr Kalnin had taken a number of steps in 2009 to arrange for the defective work to be rectified, including engaging a qualified builder to rectify the defects at no cost. Mr Kalnin heard nothing from Vero for over three years between the end of 2009 and February 2013. By the time that Mr Kalnin was notified in 2013, the settlement with the owners corporation had already been agreed.

The Court also considered the meaning of 'structural defect' and 'structural element of a building', as used in Regulation 57AC(1) of the Home Building Regulation. His Honour

departed from the wider definition of a structural element, finding that such an element must contribute to the essential stability of the building, that is, it must be load-bearing. Elements merely connected to a load-bearing structure are not to be considered as structural elements.

In respect of Regulation 57AC(2)(b) of the Home Building Regulation, his Honour similarly adopted a narrow definition by interpreting 'components' to be elements directly connected to the support of the external walls or roof, which in turn support the integral structure of the building.

His Honour rejected Kalnin's submission that the words "continued practical use" must refer to the use of the building, or the relevant part of the building "as designed or intended". His Honour held that if, notwithstanding a "structural defect", the relevant part of the building can still, as a practical matter, be used, this aspect of the regulation is not enlivened.

Port Macquarie-Hastings Council v Diveva Pty Limited [2017] NSWCA 97

Coram: Beazley ACJ, Simpson and Payne JJA

Supreme Court of New South Wales Court of Appeal

Date: 12 May 2017

CONTRACT – proper construction of option – calculation of damages for breach of contract

Facts

In 2011 Diveva successfully tendered and entered into a contract with Port Macquarie-Hastings Council for the supply and laying of asphalt. The contract contained an option clause that provided the period of the contract was from 1 August 2011 to 31 July 2013 with a further 12-month option available.

In August 2011, Diveva undertook asphalt works on Ocean Drive, Lake Cathie. Those works showed signs of failure. In May 2012, Council excavated and reconstructed the area on Ocean Drive. Diveva again laid the asphalt. In late 2012, Ocean Drive again showed signs of failure.

In respect of the 2012 works, the Council alleged that Diveva was responsible for the failure because it had not carried out testing for in situ voids, which the Council asserted was required under the specifications in the Contract.

On 11 March 2013, the Council advised Diveva that it had reviewed the current tender contract specification and determined that the option to extend the 2011 agreement would not be exercised. On 4 April 2013, Diveva gave notice of its exercise of the option. The Council responded on the same date, asserting that the option could only be exercised by mutual agreement.

The Council invited tenders for the period after 31 July 2013, identifying different specifications to be included in the further contracts. Diveva did not participate in the tender. No further work was offered to Diveva by the Council under the 2011 agreement after 27 May 2013.

Diveva brought proceedings against the Council seeking damages for breach of the Contract. The primary judge found that the Council had breached the Contract and awarded Diveva $247,443 in damages.

The primary judge's key findings were:

- on its proper construction, the Contract conferred an option on Diveva which it could exercise unilaterally to extend the Contract for a further 12 months; and
- the Contract did not contain a specification requiring Diveva to carry out testing for in situ voids.

The Council appealed to the NSW Court of Appeal, arguing that the primary judge's findings as to the construction of the Contract were incorrect and that his Honour's award of damages was incorrect.

Decision

The Court of Appeal agreed with the primary judge that the proper construction of the option clause conferred a unilateral right to exercise the option on Diveva.

Payne JA explained this conclusion by holding that;

- primacy must be given to the language used in the agreement that was tolerably clear. The words 'twelve (12) month option available' indicated that the extension was offered by the Council to the successful tenderer. The option clause did not qualify the right to exercise the option, whereas several other clauses in the Contract did contain qualifications.
- Council, but not Diveva, had a right to terminate the agreement other than for repudiation or breach of an essential term tended against the construction contended for by Council and supported the view that the commercial purpose of the option was to permit Diveva to extend the term of the Contract.
- the commercial purpose of the option was as an inducement to tenderers;
- Diveva needed to arrange its affairs to ensure it had sufficient resources to comply with the Contract. It is inconsistent with that commercial context that the successful tenderer would need to put itself in a position to fulfil a commercial contract in circumstances where the Council had reserved to itself a unilateral option simply to submit the matter for a further tender at the completion of the initial period
- the option was not exercisable solely by mutual agreement, as contended by the Council. The use of the word 'option' indicated that it was not an agreement to agree, which would have no real content.

On the issue of damages, the Council argued that Diveva had failed to mitigate its loss by refusing to participate in the tender process for the subsequent contract. The Court of Appeal found that Diveva's conduct in failing to tender was not unreasonable. This was particularly so in circumstances where Council had taken an adverse view of Diveva based on the arrant view that Diveva failed to comply with the specifications in the performance of the works at Ocean Drive. The Court of Appeal held that in these circumstances it was reasonable for Diveva not to participate in the futile and expensive process of tendering for the 2013 contract.

The Council also argued that the primary judge was incorrect to award damages to Diveva to compensate Diveva for lost opportunities to participate in future tenders. Payne JA held that it was not correct to analyse the conduct of the Council as being relevant to damages only in respect of the option. It was equally important to considering the course of conduct leading to the Council's repudiation of the Contract. Had Council not held an incorrect view of what was required to meet specifications in respect of testing for in situ voids that ultimately led to the dispute involving the Ocean Drive, the option would have been exercised and Diveva would likely have succeeded in its subsequent tenders to the Council.

West Tankers Pty Ltd v Scottish Pacific Business Finance Limited [2017] NSWSC 621

Coram: Hammershlag J

Supreme Court of New South Wales

Date: 19 May 2017

CONSTRUCTION - *Building and Construction Industry Security of Payment Act 1999* (NSW) – payment withholding request under section 26A – assignment of debt owed – plaintiff obtained adjudication determination and debt certificate

CONTRACT - *Contractors Debts Act 1997* (NSW) – section 8(1) – competing claims

Facts

West Tankers is engaged in the supply of diesel fuel. Scottish Pacific Business Finance Pty is a financier. West Tankers supplied fuel to Ealwin to the value of $236,363.79. Ealwin supplied fuel and associated services to McConnell Dowell OHL Joint Venture to the value of $184,128.71.

West Tankers provided an invoice to Ealwin but Ealwin failed to make payment. West Tankers sought to rely upon the SOP Act and the Contractors Debt Act to recover the sum.

In 2009, Ealwin had entered into a facility agreement with Allianz under which Ealwin sold the debts owed to it to Allianz. The debts purchased by Allianz included the debt owed by McConnell Dowell OHL Joint Venture to Ealwin. Allianz then assigned its rights under the agreement to GE Commercial who then assigned those rights to Scottish Pacific.

West Tankers served a payment claim on Ealwin on 18 February 2016. On 17 March 2016 West Tankers applied for adjudication of its payment claim and served a payment withholding request on McConnell Dowell OHL Joint Venture pursuant to section 26A of the SOP Act.

On 31 March 2016, GE gave notice to McConnell Dowell OHL Joint Venture that it had been assigned a debt that McConnell Dowell OHL Joint Venture owed to Ealwin.

On 11 April 2016 West Tankers obtained an adjudication determination which was filed as a judgment debt in the sum of $241,813.02. A debt certificate was subsequently issued to West Tankers, following which, on 5 may 2016 it served a claim on McConnell Dowell OHL Joint Venture pursuant to section 6 of the Contactors Debt Act.

Scottish Pacific argued that it was the legal owner of the Ealwin by reason of the legal assignment to it under the facility agreement perfected by GE's notice of assignment to the McConnell Dowell OHL Joint Venture that was served on 31 March 2016. West Tankers argued that, by operation of section 8(1) of the Contractors Debt Act, it was entitled to the money as the assignee of the debt owed to Ealwin by McConnell Dowell OHL Joint Venture.

Decision

The court held that Scottish Pacific was entitled to the money. GE became the legal owner of the debt owed to Ealwin upon the assignment being perfected upon gibing notice of the assignment to McConnell Dowell OHL Joint Venture.

If it is accepted that section 8(1) of the Contractors Debt Act operated to assign to West Tankers the obligation on McConnell Dowell OHL Joint Venture to Ealwin, that occurred on 5 May 2016, a date that was later in time. By that time, there was no debt owed to Ealwin as it had already been assigned to GE.

That McConnell Dowell OHL Joint Venture was served with a notice pursuant to section 26A of SOP Act was of no moment. Section 26B of the SOP Act merely obliged McConnell Dowell OHL Joint Venture to retain money until an event described under s26B(3) occurred. It created no obligation on McConnell Dowell OHL Joint Venture to pay West Tankers or create any interest equitable or otherwise over the money that it was obliged to hold under s26A of SOP Act.

As the assignment to Scottish Pacific was effective and there was no assignment to the West Tankers, the money should be paid to Scottish Pacific.

Regal Consulting Services Pty Ltd v All Seasons Air Pty Ltd [2017] NSWSC 613

Coram: McDougall J

Supreme Court of New South Wales

Date: 19 May 2017

CONSTRUCTION - *Building and Construction Industry Security of Payment Act 1999* (NSW) - fixed reference date – adjudication – whether jurisdictional error.

Facts

On 8 June 2015, Regal Consulting and All Seasons Air entered into a subcontract pursuant to which All Seasons Air undertook to perform mechanical ventilation and air conditioning work for Regal Consulting. The subcontract fell within the definition of construction contract as defined in SOP Act.

The subcontract provided that progress claims should be made on the 20th day of each month, and that progress claims made before the 20th day of any month shall be deemed to have been made on the date for making that claim.

On 12 July 2016, All Seasons made a progress claim seeking payment of $44,500. The progress claim purported to also be a payment claim under SOP Act.

Regal Consulting provided a payment schedule disputing liability for the whole of the claim on the basis that All Seasons had already served a payment claim based on the reference date of 20 June 2016, and the next reference date of 20 June 2016 had not accrued at the time that All Seasons served the payment claim.

All Seasons referred to the dispute to adjudication. The adjudicator concluded that she had jurisdiction to deal with the dispute and determined that the adjudicated amount was the claimed amount, being $44,500. All Seasons subsequently obtained a judgment for debt for the amount certified.

Regal Consulting brought proceedings in the NSW Supreme Court contending that the adjudicator lacked jurisdiction to deal with the payment claim on the basis that there was no available reference date to support it. Regal Consulting relied on the recent decision of the High Court of Australia in *Southern Han Breakfast Point Pty Ltd (In Liq) v Lewence Construction Pty Ltd* [2016] HCA 52.

Decision

The court determined that, in the absence of a reference date having arisen, there was no valid payment claim and the adjudicator had no jurisdiction to make a determination under the Act. This lies at the heart of the decision of *Southern Han.*

The Court further held that the deeming provision was a contractual payment regime, intended to aid in the administration of the contract. It did not and could not override the operation of section 8 of the Security of Payment Act.

The entitlement to a progress payment given by section 8 of the Security of Payment Act arises not only because the claimant has undertaken to carry out construction work but also because a reference date has arisen. If no reference date has arisen, there is no statutory entitlement to a progress payment.

Abergeldie Contractors Pty Ltd v Fairfield City Council [2017] NSWCA 113

Coram: Beazley ACJ, Basten and Meagher JJA

Supreme Court of New South Wales Court of Appeal

Date: 26 May 2017

BUILDING AND CONSTRUCTION — Building and Construction Industry Security of Payment Act 1999 (NSW) — Progress payments scheme — Requirement of valid reference date under contract — Date of practical completion — Whether payment claim valid.

CONTRACTS — Construction of contract — Meaning of "date of practical completion" — Whether practical completion dependent on building superintendent's opinion, or objective existence of state of facts — Whether "date of practical completion" is the date of certificate of completion.

Facts

In 2015, Fairfield City Council sought to undertake major road works in Wetherill Park. The Council and Abergeldie Contractors entered into a contract on 18 August 2015. Both parties accepted the existence of a valid reference date so defined in s8(2) of the Act as a precondition to the service of a valid payment claim.

The contract provided that after practical completion there were two reference dates. The first being the 28th day of the month after completion. The project manager for the contractor advised that practical completion had been achieved on 16 September and requested the Council's superintendent issue a certificate of practical completion.

On 26 November 2016, the superintendent issued the certificate which indicated completion on 16 November 2016. On the same day, the contractor sent a payment claim to the super intendent. On 7 December 2016, the Council issued a payment schedule advising no amount would be paid as there was no valid reference date which permitted a claim to be made in November.

The Court declared there was no reference date in November 2016, the payment claim was invalid and quashed the favourable determination of the adjudicator in the contractor's favour. The question to be determined by the Court of appeal was when did practical completion of the work occur?

If it was found that practical completion occurred on 16 September 2016, as Fairfield City Council contended, the relevant reference date was 28 September 2016.

If it was found that the practical completion occurred on 25 November 2016 as Abergeldie contented (being the date on which the certificate of practical completion was issued by the superintendent, the relevant reference date was 28 November 2016.

Decision

The Court, on appeal, considered which date was the date for practical completion as this informed the correct reference date.

The Court held the structure and language of clause 34.6 of the contract was consistent with the conclusive event being the issuing of a certificate of practical completion, which depends upon a contemporaneous opinion of the superintendent.

The contract specifically referred to a certificate of practical completion as evidencing the date of practical completion as distinct from stating the date of practical completion was a fortiori.

The achievement of practical completion was dependent upon the superintendent forming an opinion regarding whether practical completion had been achieved and not on the existence of the underlying elements of practical completion. The claimant could not know whether practical completion had been reached until it received the certificate of completion.

The date of practical completion was the date of the certificate of practical completion, namely, 25 November 2016. Pursuant to the contract, the relevant reference date was 28 November 2016. The payment claim was made prior to that date, and was therefore valid. Accordingly, the appeal was allowed.

Bayside Council v V Corp Constructions Pty Ltd [2017] NSWCA 120

Coram: Basten, McFarlan and Ward JJA

Supreme Court of New South Wales Court of Appeal

Date: 31 May 2017

CONTRACTS – breach of contract – negligence – developer required by contract to 'procure replacement' of above ground electricity cables with underground cables in accordance with Energy Australia's requirements – Energy Australia refused permission to undertake the works

Facts

In October 2004, Bayside Council granted consent for the construction of a four-storey mixed use development at 1-3 Elizabeth Avenue, Mascot. One of the consent conditions required V Corp to enter into an agreement with the council to provide for the replacement of existing above ground power cables with underground cables to the standards of Energy Australia. Under the relevant statute, replacing the cables without Energy Australia's consent would have been unlawful.

The council and the developer entered into a contract on 30 May 2006 that required the developer to replace the existing above ground power cables with underground cables in accordance with the standards and requirements of Energy Australia.

On 24 July 2006, Energy Australia wrote to the Council stating that it refused to approve the laying of underground cables. Following negotiations between the council and V Corp, it was agreed that V Corp would pay the council $10,000 in lieu of replacing the cables. On the development being substantially completed, the certifier issued an interim occupation certificate.

On 5 July 2013, following correspondence between the parties in which V Corp asserted that the terms of the contract had been varied by the payment of $10,000, the Council commenced proceedings against the developer for breach of the contract, and against the certifier in negligence for issuing the occupation certificate when the underground cabling works had not been undertaken. Both claims were dismissed at first instance and the questions on appeal were whether:

- given the refusal of Energy Australia to consent to underground cabling, the developer still had an obligation under the contract to carry out the works; and
- the certifier was negligent in issuing the occupation certificate in these circumstances.

Decision

The court upheld the trial judge's decision and dismissed the council's appeal on both claims.

The court held that it was appropriate to imply additional words into the contract such that the developer was obliged to procure the replacement cables '*with the approval of and*' in accordance with the standards and requirements of Energy Australia. In so holding, the Court held that it was '*necessary and obvious*' to imply such a term so as to exclude from the scope of the contractual obligation work which would be unlawful.

Ward JA noted that the same outcome would be reached by general principles of contractual interpretation, that is, where words of a contract are capable of two meanings, only one of which is lawful, the lawful interpretation should be preferred.

The Court of Appeal upheld the primary judge's finding that the council had not suffered any loss. If Energy Australia were not willing to consent to the work being undertaken and that work could not be undertaken without its consent then it could not be said that the council had suffered any loss because the expenditure would not take place.

As no loss could be established, the claim against the certifier met the same fate.

Home Site Pty Ltd v ACN 124 452 786 Pty Ltd (Formerly Known (As Nahas Construction (NSW) Pty Ltd)) **[2017] NSWSC 698**

Coram: Ball J

Supreme Court of New South Wales

Date: 5 June 2017

Facts: The plaintiff, Home Site, entered into a contract dated 22 December 2009, with Nahas. Home Site engaged Nahas to undertake the construction of, and perform certain design work for, the development of a 44-unit residential development in Waverly St, Bondi for $13.5 million. This included a provisional sum of $1.3 million in respect of acoustic design and works regarding sewer design as well as to cover variations as a contingency.

On 14 August 2012 with work substantially complete, Nahas went into voluntary administration. Home site, consequently terminated the contract on 20 February 2013.

On 21 August 2013, Nahas made an application for adjudication under the SOP Act in respect of a progress claim (21) for $1,052,036.15 that it had served on 29 July 2013. This was asserted to comprise the release of a retention amount of $640,000 and variations of $131,614.

By a determination dated 10 September 2013, the adjudicator determined the amount payable in respect of Payment Claim 21 as $557,697.09.

Home site commenced proceedings on 22 November 2013 seeking leave to proceed against Nahas pursuant to s 440D of the Corporations Act 2001 (Cth) (which was required because Nahas was in administration) and an injunction restraining Nahas from enforcing a District Court judgment Nahas had obtained on the basis of the adjudication determination. On 3 December 2013, Hammerschlag J granted that leave and the injunction on condition that Home Site provide to the court an unconditional bank guarantee in the sum of $651,041.07.

Home Site maintained that, at the time of the appointment of the administrators, it owed nothing to Nahas and that, in fact, amounts were owing to it by Nahas. Home Site accepted that, as a result of the DOCA, it was not entitled to recover those amounts. Instead, it sought declarations to the effect that no further amount is payable by it, with the result that the bank guarantees it had provided to the court should be returned to it.

Home Site agreed to give up its claim for liquidated damages in consideration for the amendment of PC 19.

Decision

The Court looked at the Deed signed between the parties and the operation of the contract. It held that the mechanism in the deed for payment of liquidated damages did nothing to remove the operation of extension of time or other operative clauses in relation to practical completion.

The Court looked at deductions and entitlements of Nahas with respect to delays due to inclement weather and held that they were reasonable however, Home Site was entitled as a result to liquidated damages for 20 days.

The Court held that Nahas would have been entitled to $12,269,175 (excluding GST) on a quantum meruit basis — that is, $13,496,092.50. However, Home Site was entitled to deduct from the amount it owes $13,751,004.57. It follows that, even on Home Site's alternative case, Nahas is not entitled to recover any more than it has already been paid and that Home Site is entitled to the relief that it seeks.

Ball J was critical of Nahas' approach to the quantum meruit claim. Nahas calculated the quantum meruit claim by estimating the amount another builder would have charged for undertaking the work set out in the relevant drawings. Nahas, through an expert quantity surveyor failed to take into account the actual costs incurred. His Honour re-iterated that *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 is instructive when assessing the amount recoverable for work performed under an unenforceable contract; namely, fair value for the benefit provided. This is to be calculated at a reasonable rate for the work actually done or fair market value for materials provided.

Nahas was ordered to pay costs of the proceedings. Home Site was entitled to relief sought.

The Owners Strata Plan No 66375 v Suncorp Metway Insurance Ltd (No 2) **[2017] NSWSC 739**

Coram: Ball J

Supreme Court of New South Wales

Date: 9 June 2017

BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – statutory warranties – whether owners corporation entitled to statutory warranties – whether loss and damage claimed in respect of defects resulted from breaches of statutory warranties - whether defendants were “developers” within the meaning of s 3A.

Facts

David and Gwendoline King owned real estate upon which a mixed residential and commercial development took place. They were also sole directors of the developer, Meridian Estates. Meridian Estates engaged Beach Constructions to construct the development. Suncorp Metway provided home warranty insurance under the Home Building Act 1989 in respect of the development.

The Owners Corporation brought a claim for various defects that exist within the development. The three questions to be determined by the Court were whether the Kings fell within the meaning of ‘developers’ as set out in the Home Building Act. Whether the Kings were liable for the defects. Whether the King’s liability extended to the defects that were the subject of the claim.

Decision

The court held that the Kings were not 'developers' within the meaning of the Home Building Act. Section 3A of the HBA defines that a developer is 'an individual, a partnership or a corporation on whose behalf residential building work is done in the circumstances set out in subsection (2)'.

The Owners Corporation argued that it should be inferred from the evidence, that the Kings signed the Formal Instrument of Agreement and, by doing so, became parties to the building contract. The Court rejected this argument. The Court further held that the subsequent conduct of the parties was consistent with the contracting party being Meridian and not the Kings, namely;

- the Builder issued invoices to Meridian,
- the architect issued payment certificates which named Meridian as 'The Proprietor' and
- an occupation certificate was issued in the name of Meridian.

The agency argument was rejectd by the Court on two grounds. If the parties intended Meridian to act as agent to the Kings then the documents would have said so, but remained silent. Secondly, if Meridian was acting as agent of the Kings, the agency was not disclosed. An exception to the principle that an undisclosed principal may sue and be sued on a contract exists where the relevant contract prevents an assignment without consent. The AS2124 contract contains such a prohibition against assignment without consent and the court accepted that Meridian was not acting as agent for the Kings when it engaged the Builder.

Accordingly, the Kings were not liable for the defects complained of by the Owners Corporation.

AGL Energy Limited v Jemena Gas Networks (NSW) Ltd [2017] NSWSC 765

Coram: Hammershlag J

Supreme Court of New South Wales

Date: 14 June 2017

Arbitration – *Commercial Arbitration Act 2010* (NSW) – sections 7(1) and 8(1) – whether arbitration agreement exists – where referral to arbitration made before commencement of litigation

Facts

Jemena Gas Networks operates a gas distribution network. AGL Energy provides gas services to consumers. Jimena and AGL Energy entered into an agreement which specified how the distributor would supply its services to the retailer. Clause 30 of the Agreement was a dispute resolution clause.

A dispute arose between the parties under the agreement.

On 29 July 2016, AGL Energy issued a written notice of dispute to Jemena. Under the supply agreement, the parties were required to convene in an attempt to resolve the dispute. It articulated the Dispute as a claim based on losses arising from the defendant's failure to complete meter reads on time and a claim based on losses arising from its failure to advise the plaintiff of the quantity of gas taken at each delivery point, within the time periods provided for in the Agreement.

The parties met pursuant to a mechanism contained in clause 30.4 of the Agreement. The dispute was not resolved. On 13 October 2016 Jemena referred the dispute to mediation. This was also unsuccessful in resolving the dispute.

On 28 March 2017, Jemena gave notice that it had referred the dispute to arbitration. On 12 May 2017, AGL Energy commenced litigation in the New South Wales Supreme Court.

Jemena applied to the court for a stay of the proceedings under section 8(1) of the *Commercial Arbitration Act 2010* (NSW) (CAA), arguing that the supply agreement contained an 'arbitration agreement' within the meaning of the CCA. To be an 'arbitration agreement' under s7(1) of the CAA, the agreement in question must make binding provision for compulsory arbitration, whether as a result of an election or otherwise.

Clause 30.5(a) of the supply agreement provided:

> "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 clause 30.5(a) restricted the parties' recourse to arbitration or litigation until after mediation and this necessarily implied that after mediation the parties would have that recourse. Given that there was no other express reference to arbitration in the Agreement, clause 30.5(a) had no effective content with respect to arbitration unless it is regarded as a binding arbitration agreement.

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. Those authorities were namely *Manningham City Council v Dura (Australia) Constructions Pty Ltd* [1999] VSCA 158 and *Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd* [2001] QCA 471.

In *Manningham*, the Victorian Court of Appeal considered whether a written building contract contained an arbitration agreement under an old version of the *Commercial Arbitration Act 1984*(Vic). Clauses 13.01 and 13.02 of the contract in question provided that if there was a dispute regarding the contract, either party may give notice to the other identifying the dispute which would be a condition precedent to the commencement of the proceeding. Parties would confer within ten days to attempt to resolve the dispute.

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. His Honour held that the parties to this agreement had agreed to go to arbitration if the procedure was followed.

In *Mulgrave* the Queensland Court of Appeal considered a contract containing provisions that were almost identical to those contained in the contract considered in *Manningham*. That contract included provisions which were almost identical to clauses 13.02 and 13.03 in *Mulgrave* but no corresponding clause 13.04.

Both contracts 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. The Court found 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

Decision

Hammershlag J found that a reasonable person in a position of the parties would not have understood from the language of the clause, that it was committing itself to compulsory arbitration. That is, there was no binding agreement to arbitrate. There was no 'critical' provision in the supply agreement for either party to refer the dispute to arbitration or litigation. It was this aspect of the instant Agreement that rendered them distinguishable from the Agreements considered in the two decisions referred to above.

In so finding, his Honour noted that clause 30.5(a)

- contained no words of election or words giving one party the right to compel the other in one direction; the clause contemplates that there might be arbitration or litigation but embargoes both until after mediation
- provided no indication that arbitration had primacy over litigation; and
- did not confer any right to litigate or any contractual right to force a compulsory arbitration.

Accordingly, the court dismissed the distributor's application finding that clause 30.5(a) did not constitute an arbitration agreement within the meaning of the CAA.

UGL Rail Pty Limited v Trox (Australia) Pty Limited [2017] NSWSC 770

Coram: McDougall J

Supreme Court of New South Wales

Date: 15 June 2017

BUILDING AND CONSTRUCTION – whether sound attenuators designed and supplied by the defendant for the Lane Cove Tunnel Project were defective – rectification

Facts

Alstom was contracted to design and construct the mechanical ventilation system for the Lane Cove Tunnel Project. Alstom subcontracted Trox to design and supply the necessary sound attenuators with a minimum design life of 20 years.

On 2 June 2005, Alstom sold its business to UGL Rail. The sales agreement required Alstom to assign or novate all 'Contracts' to UGLR or provide the benefit of those Contracts by subcontracting or otherwise.

The Trox Subcontract was not assigned to UGLR until 12 March 2013. Before the assignment took place, UGLR attempted to enforce Alstom's rights under the Trox Subcontract in respect of defective attenuators. UGLR argued that the sound attenuators did not have a design life of 20 years and that it was entitled to require Trox to rectify the sound attenuators.

The basis of UGLR's argument was that the Sales Agreement provided that, until the assignment, UGLR was obliged to perform the obligations of Alstom under the Trox Subcontract, and accordingly, that provision gave rise to an implied trust, entitling UGLR to exercise such rights against Trox.

Decision

The court found that UGLR had no rights against Trox regarding compelling Trox to complete the rectification works. This was so because UGLR was not a party to the Trox Subcontract and UGLR did not have authority to act on Alstom's behalf in relation to it.

Whilst the Sales Agreement gave UGLR limited rights of agency in respect of performing Alstom's obligations under the Trox Subcontract, no agency existed to permit UGLR to exercise Alstom's powers under it.

The Court did not imply a trust, holding that primacy must be given to the language used in the document, and the parties in this case had not used the language of a trust, nor was there any reason based on commercial necessity to do so. This objective could have been achieved simply by assigning or novating the Trox Subcontract.

The Court further held that the defect notices given did not adequately identify the supplies which needed to be rectified. A general direction to repair of modify assets cannot trigger an obligation to repair, modify or replace supplies that, at the time of giving the notice, were not known to be defective.

Quasar (Constructions) Commercial Pty Ltd v Trilla Group Pty Ltd [2017] NSWSC 860

Coram: McDougall J

Supreme Court of New South Wales

Date: 22 June 2017

Facts

The plaintiff, Quasar as head contractor and the first defendant, Trilla as a sub-contractor were parties to a construction contract for a development at Forest Lodge. Trilla undertook to complete hydraulic work for Quasar.

Trilla served a payment claim on the Quasar on 31 January 2017 for $861,000. Quasar responded with a payment schedule asserting a nil amount to be paid due to liquidated damages. The dispute was referred to adjudication. Trilla argued that time was at large due to the respondent's acts of prevention in failing to issue a revised construction program and appoint a superintendent to manage the works. The respondent's defence was that the prevention principle had no effect where the contract contained an extension of time clause. An adjudication determination was made in Trilla's favour for $462,000. The adjudicator determined that Quasar could not claim a sett off because the because Trilla was unable to assess if the delay had an impact on the critical path because Quasar had not provided an updated construction program.

Quasar sought a declaration that the adjudicator's determination was void for the reason it was decided on a basis for which neither party had contended and as such was a denial of natural justice. Quasar also sought a a stay of enforcement of the adjudication determination until such time as its liquidated damages claim could be heard and determined by the court.

Decision

The Court held there was no substantial or material denial of natural justice. It was Quasar itself that put cl 34.3 into issue, as an answer to Trilla's claim insofar as that claim relied on the prevention principle. Trilla had no ability to respond to Quasar's submissions on that point. It was up to the Adjudicator to wrestle with the issue as best he could. The issue having been raised, it was incumbent upon the adjudicator to deal with it as best he could on the material provided.

Further the application for stay failed. Trilla is a solvent company and despite the facts that it's records show it would not have the ability to repay the cross claim by Quasar does not defeat the policy of the Act. His Honour looked to Victorian case law in his reasoning. In particular, his Honour noted the case of *Façade Treatment Engineering Pty Limited (In Liq) v Brookfield Multiplex Construction Pty Limited* there their Honours said that ordering a stay was apt where the builder may be teetering on the edge of insolvency but had not yet fallen over. Their Honours said that as a matter of policy, permitting the builder to recover, so that it could be rescued from possible insolvency and allowed to continue to trade, was justifiable having regard to the fundamental policy underlying the Victorian equivalent of the Act. However, their Honours said, that rationale could not apply once the winding up process had commenced.

Accordingly, the proceedings were dismissed and the money paid into court by Quasar was ordered to be released to Trilla. Trilla was ordered to pay Quasar's costs of and thrown away by reason of previous adjournment.

Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd [2017] NSWCA 151

Coram: Beazley ACJ, McColl and Macfarlan JJA

Supreme Court of New South Wales Court of Appeal

Date: 23 June 2017

BUILDING AND CONSTRUCTION — Subcontract for renovation works — Payment claim under Building and Construction Industry Security of Payment Act 1999 (NSW) — Where variations directed by principal after Date for Practical Completion — Where Date of Practical Completion 114 days late — Where principal sought to reduce payment claim to nil by way of set-off based on liquidated damages claim for delayed completion.

ADMINISTRATIVE LAW — Procedural fairness — Where adjudicator rejected liquidated damages claim — Whether adjudicator applied prevention principle — Whether application of prevention principle denial of procedural fairness.

Facts

Probuild Constructions was the head contractor for the renovation of the Tank Stream Hotel in Hunter Street, Sydney. Probuild subcontracted with DDI Group. That subcontract included an extension of time regime with a discretionary power for the respondent to direct EOT.

DDI completed the project 144 days after the date of completion. It had not made any requests for extension of time and had not followed the procedures under the SOP Act, nor did it adhere to the relevant contractual provisions that dealt with time extensions.

On 27 July 2015 DDI served a Payment Claim on Probuild for an amount of $2,175,267 (including GST) pursuant to s 13 of the SOP Act. Probuild claimed liquidated damages under cl 42.1 and its entitlements under cl 48.6 and 42.2(a) to deduct that amount from monies otherwise due to DDI. The matter went before an Adjudication. Probuild argued that underpinning the adjudicator's rejection of its liquidated damages claim was the application of the prevention principle. That principle disentitles a principal from obtaining liquidated damages where its conduct has been the cause of the delay which underpinned that claim.

Probuild commenced proceedings in the Supreme Court seeking an order in the nature of certiorari quashing the adjudicators purported determination. Probuild's essential complaint was that the adjudicator rejected the claim for liquidated damages by applying the prevention principle, an argument which neither party had advanced. The corollary of this fact was that the adjudication determination was therefore infected by a denial of procedural fairness.

The Court considered the line of cases dealing with the prevention principles as it applies to construction contracts and came to the conclusion that Probuild was obliged to exercise the reserve power to grant extensions conferred by cl 41.9 honestly and fairly having regard to the underlying rationale of the prevention principle to which I have earlier referred or, if necessary, because there is an implied duty of good faith in exercising the discretion cl 41.9 conferred.

At first instance, Meagher JA, dismissed Probuild's summons, holding that the adjudicator had dealt with Probuild's argument as made.

Decision

Having regard to the documents which were before the adjudicator, the Court held that the prevention principle was squarely in issue because Probuild, in its adjudication response, sought to avoid the operation of the prevention principle by submitting, in effect, that it was the

claimant's failure to claim Extensions of Time which resulted in its liability to pay liquidated damages. For this reason, Probuild was not denied procedural fairness.

In respect of the prevention principle, the Court of Appeal confirmed the previous line of authority that, in the context of construction contracts, the prevention principle may preclude an owner recovering liquidated damages for delay where that delay has been caused by that owner. The discretionary power to grant Extensions of Time must be exercised honestly and fairly otherwise this may considered to enliven the prevention principle disentitling a principal from claiming liquidated damages.

PND Civil Group Pty Ltd v Bastow Civil Constructions Pty Ltd [2017] NSWCA 159

Coram: McColl, Gleeson JJA and McDougall J

Supreme Court of New South Wales

Date: 27 June 2017

CONTRACT – defect rectification – management expenses – damages

Facts

Bastow entered into a contract with Energy Australia to undertake work that involved constructing trenches in public roads, installing cable ducts in those trenches and backfilling and sealing the trenches. Bastow subcontracted some of that work to PND Civil Group Pty Ltd.

When the work was complete or nearly complete, Energy Australia claimed that portions of the work were defective. Gosford City Council became involved. Some rectification works were done. Bastow retained Coffey Geotechnics to investigate and draft a report.

On 23 March 2013, Bastow commenced proceedings in the District Court of New South Wales against the subcontractor for the cost of the defect rectification works. In the wake of an aborted settlement that occurred on the first day of hearing, the matter was set down for hearing to proceed in August 2016.

The primary judge found that the work done by PND Civil was defective and quantified Bastow's loss at the cost of rectification in the amount of $269,355. In reaching that figure, the primary judge excluded an amount of $43,669 claimed by Bastow for the cost of management time that its employees spent in connection with the defects and their rectification, on the basis that there was no evidence that the allocation of this time resulted in any additional cost to Bastow'.

PND Civil appealed the decision, arguing that the trial judge erred in finding that Bastow was entitled to damages and ought to have found that the parties were bound by an agreement to settled reached on the first day of the first hearing in May 2015. PND also argued that there was no evidence to ground a finding that the proposed rectification work was reasonable and necessary.

In its cross appeal, Bastow challenged the primary judge's conclusion that there was no evidence that the allocation of this time resulted in any additional cost.

Decision

The Court of Appeal unanimously dismissed the appeal on the grounds advanced by PND Civil. The Court of Appeal also found against Bastow in respect of its ground of the cross-appeal, concluding that there was no evidence that the contractor had:

- incurred any additional management expenses as a result of the subcontractor's defective work;
- paid staff overtime, or any other compensation or additional remuneration;
- employed additional staff or other contractors to deal with the subcontractor's defective work and its consequences.

McDougall J found that the primary judge was correct in finding that there was no evidence to support a claim for the losses claimed in relation to the above expenses.

Watpac Constructions (NSW) Pty Ltd v Charter Hall Funds Management Ltd [2017] NSWSC 865

Coram: McDougall J

Supreme Court of New South Wales

Date: 30 June 2017

BUILDING AND CONSTRUCTION — Validity of payment claim — Object and application of the Building and Construction Industry Security of Payment Act 1999 (NSW), s 13 — Where construction work identifiable — Where there was an available reference date — Building and construction — Whether estoppel defence available — Where plaintiff did not influence defendant's understanding or actions — Building and construction — Consumer law — Whether misleading and deceptive conduct defence available — Where plaintiff did not influence defendant's understanding or actions.

Facts: The plaintiff, Watpac claimed the defendant, Charter Hall owed it in excess of $13.55 million with respect to a contract to undertake the design and construction of a building at 331-333 George St Sydney. The debt was alleged to be owed because Watpac served Charter Hall a payment claims pursuant to the SOP act and did not receive a payment schedule in response.

Charter Hall contended that it did not owe the moneys as alleged as the document relied upon was not a valid payment claim pursuant to the Act and in the alternative, relies on various estoppels. Further in the alternative, Charter Hall alleged that Watpac engaged in misleading or deceptive conduct.

The payment claim was asserted to be void as it failed to comply with s13(2)(a) that requires the document to identify the construction work to which it relates. Charter Hall further asserted that the payment claim did not contain a reference date. There was no contractual requirement for Watpac to serve a payment claim under the SOP Act. However, cl 9.1(d)(v) recognised that this could be done.

The first 32 progress claims were made with the wording "this payment claim is made under the NSW Building and Construction Industry Security of Payment Act 1999." These claims were sent assessed and certified before being sent via tax invoice to Charter Hall for payment. However, there were no documents sent with any tax invoice to identify the construction work to which it related rather they merely referred to "Value of Work completed to date" and "Variations." Accordingly, these documents were not valid progress claims under the Act.

Further, the next 4 progress claims were contentious as Charter Hall refused to pay these asserting the amount should be offsets to millions of dollars owing to it in liquidated damages. These progress claims stated the claim and the amount contained thereon were described as a "Payment Claims", but did not contain the statement required by s 13(2)(c) of the Security of Payment Act. The certified amount to be paid was $0.00 due to the offset of liquidated damages.

For claims 33 to 35, Watpac did not provide a document purporting to be both a tax invoice and a payment claim under the Security of Payment Act following Charter Hall's provision of a payment schedule. However, after the Charter Hall had provided a payment schedule for claim 36, Watpac did serve such a document. It is that document, which formed the disputed payment claim, that was the subject of the case.

Decision

The Court referred to Basten JA said in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*, in holding that the overall purpose of the Act may be seen to be "to provide a speedy and effective means of ensuring that progress payments are made during the course of the administration of a construction contract, without undue formality or resort to the law".

Further, the Court held the view that considering the disputed payment claim as a whole, there was no ambiguity and no confusion. Each party knew the work that was done for which payment had not been made, and what was the assessed value of that work and consequently, the disputed payment claim did not fail to comply with the Act.

McDougall J held that the requirements of the Act are not to be read as rules of court designed to regulate civil litigation. His Honour considered the formal and technical approaches adopted by courts in recent cases to be antithetical to the objects of the Act.

With respect to the estoppel claim, the Court found that the clear picture that emerged from the evidence was that the parties were seeking to follow the procedure laid down by cl 9 of the Contract for the making, assessment and payment of progress claims. The case falls well short of establishing that an estoppel existed. Further, the defence based on misleading and deceptive conduct relied largely on the estoppel case whereby Watpac was silent in informing Charter Hall of its correct rights and obligations, this defence failed.

Watpac was ordered to have judgment in its favour for amount claimed and interest.

***Arconic Australia Rolled Products Pty Limited v McMahon Services Australia Pty Ltd* [2017] NSWSC 1114**

Coram: McDougall J

Supreme Court of New South Wales

Date: 17 August 2017

BUILDING AND CONSTRUCTION — Building and Construction Industry Security of Payment Act 1999 (NSW) — Where multiple payment claims, adjudication applications and adjudication determinations — Whether issue estoppel — Whether abuse of process.

Facts

Arconic, engaged McMahon to decommission an aluminium plant. The contract was a construction contract that fell within the ambit of contracts to which of the SOP Act applies. McMahon made regular payment claims for the purposes of the Act. Three payment claims; 13, 14 and 15 had given rise to four adjudication applications. The contentious element of each payment claim had been for delay costs or variations relating to the discovery of hazardous material. The amount of the claim in each of the payment claims and adjudication applications included an amount of $2,344,000 for indirect costs.

Arconic brought an application to the Supreme Court on the basis that the claimant was issue estopped from re-agitating the fourth adjudication application and the repetitious re-agitation of the disputed claim constituted an abuse of process. McMahon argued that the disputed claim had never been determined and therefore issue estoppel was irrelevant and there could be no abuse of process.

Decision

The Court considered the decision of the Court of Appeal in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* which established that the determinations of adjudicators may attract the principle of issue estoppel, and that repetitious re-agitation of claims may be construed as an abuse of process.

The Court dismissed Arconic's claim, noting that there was no issue estoppel. This was so because the Adjudicator looked at the issue but came to the conclusion that that it was not open to him to consider the claim as it had been framed and consequently did not decide the case on the merits of whether McMahon was entitled to be paid for the variation claim and what amount to which it would be entitled.

The Court's view was that the authorities on this point demonstrate that what lies at the heart of abuse of process, in the context of adjudications under the SOP Act, is the repetitious re-agitation of a claim that has already been decided on its merits, using different bases or pretexts to justify the reconsideration of the same claim.

Although McMahon had taken Arconic to much trouble and expense in attempting to agitate the issues before the adjudicator there had been no abuse of process. Section 13(6) of the SOP Act expressly provides that a claimant may make a claim for amounts that have been the subject of prior payment claims.

As the instant claim had not been decided on its merits, there was no abuse of process.

Mt Lewis Estate Pty Ltd v Metricon Homes Pty Ltd [2017] NSWSC 1121

Coram: Hammerschlag J

Supreme Court of New South Wales

Date: 24 August 2017

BUILDING AND CONSTRUCTION — Building and Construction Industry (Security of Payment) Act 1999 (NSW) (the Act) — Whether the defendant's payment claim dated 16 December 2016 complied with the requirements of ss 13(7) and (9) as being accompanied by a compliant supporting statement — Whether the supporting statement which accompanied the claim complied with the requirements of ss 13(7) and (9) and the Regulation

Facts

The parties entered into a building contract for the construction of a project involving building 87 villas for a sum of $16.975 million. On 16 December 2016, Mt Lewis Estate was served by e-mail a payment claim for $3,316,584.32 accompanied by a series of supporting documents. On 3 February 2017, Mt Lewis Estate served a payment schedule stating the total amount it proposed to pay was nil. On the 17 February 2017, the defendant made an adjudication application.

The case challenged an adjudication determination dated 10 March 2017 made by the adjudicator against Mt Lewis for $1,830,537 in favour of Metricon pursuant to the SOP Act.

The grounds of challenge were that the payment claim was not validly served and consequently did not invoke the machinery of the Act because it was not, as required by s13(7) accompanied with a supporting statement complying with s13(9) and that it was outside the time limit. (s21(3)(a)).

Decision

The Court held that the Act provides for a claimant to make a payment claim for a progress payment on the person who, under a construction contract, is or may be liable to make the payment (s13(1)). The respondent to a claim may reply by providing a payment schedule, which must indicate the amount of the payment (if any) that the respondent proposes to make (s 14). Where no payment schedule is served, the claimant may recover the unpaid portion of the claimed amount as a debt due in a court of competent jurisdiction, or make an adjudication application in relation to the claim (s 17). It is not uncommon for a respondent to indicate a nil amount.

A payment claim, under s 13(1), is a document. Section 13(2) requires that document to identify the construction work to which it relates and to indicate the claimed amount. If at the time a head contractor makes a payment claim to a principal under a construction contract an amount is owed to a subcontractor or supplier then the provisions require the head contractor to confirm that these payments have been made. His Honour held that section 13 of the SOP Act specifically contemplates that a declaration, which relates to a payment claim which is actually in existence at the time the declaration, is made and identifies the work to which the claim relates. A declaration cannot logically or rationally be made that all amounts have been paid to subcontractors, when the payment claim to which it relates has not yet been made.

As to the second aspect of the challenge, His Honour found that the claim was out of time. Section 31(1) is facilitative in nature in that it permits service in a number of ways which are not exclusive. Further, a notice out of time does nothing to indicate the invalidity of a determination made on that basis. In so finding the Court relied on McDougall HJ's findings in *MPM Constructions v Trepcha Constructions* [2004] NSWSC 103.

The Court held that, having regard to the fact that no valid payment claim was served, the machinery of the Act was not successfully invoked by Metricon with the consequence that the determination is void.

Quickway Constructions Pty Limited v Paul J Hick [2017] NSWSC 830

Coram: Hammerschlag J

Supreme Court of New South Wales

Date: 24 August 2017

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) – requirement for adjudicator to afford claimant and respondent natural justice – procedural fairness – necessity for absence of real of apprehended bias

Facts

Quickway Constructions was a party to a number of adjudication proceedings with Electrical Energy in connection with electrical cabling at a substation in Canterbury ($24,725.25) and another one in Leichhardt ($41,250). The claims were not paid and Electrical Energy made adjudication applications to an authorised nominating authority under the Act.

On 14 July 2017, an adjudicator accepted the appointment and made determination in both case on 28 July 2017. On 4 August 2017, Quickway initiated proceedings in the Supreme Court challenging the validity of the adjudication determination. The challenge proceedings were heard by Parker J on 15 August 2017.

On 18 July 2017, Electrical Energy served the payment claim on Quickway for the work at Bateau Bay. Quickway served a payment schedule on 1 August 2017. On 15 August 2017, Electrical Energy made an adjudication application to the same nominating authority.

On 21 August 2017 the nominating authority notified Electrical Energy and Quickway that the adjudicator had accepted appointment as the adjudicator for the Bateau Bay claim.

The individual who accepted appointment as the adjudicator for the Bateau application was the same adjudicator who had determined the previous two adjudication applications. Quickway asserted that the adjudicator's interest as a party to the challenge proceedings gave rise to a conflict of interest or a perceived apprehension of bias.

Decision

The court found in favour of Quickway and made orders to disqualify the adjudicator from the Bateau Application.

The adjudicator's functions mimic the judicial function. Concepts of natural justice and procedural fairness are to be afforded to both parties by an adjudicator who must perform duties in the absence of the actuality or appearance of bias. The essential elements of natural justice include fairness and detachment.

Quickway did not assert the presence of actual bias. Rather, Quickway relied on the test reiterated in Michael Wilson & Partners Limited v Nicholls (2011) 244 CLR 427 and suggested that a 'fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide'.

Whilst the Act does not contemplate or require that a proposed adjudicator will give the parties an opportunity to be heard on whether she or he should accept or decline an appointment, there is nothing to inhibit a proposed adjudicator from requesting the authorised nominating

authority to make enquiry as to whether there is any objection to her or his appointment in cases of doubt. The Court made orders disqualifying the adjudicator from the Bateau Bay adjudication and to accept undertakings which will permit the adjudication applications otherwise being dealt with expeditiously under the Act.

The Owners — Strata Plan 84741 v Nazero Constructions Pty Ltd [2017] NSWSC 1134

Coram: Stevenson J

Supreme Court of New South Wales

Date: 29 August 2017

BUILDING AND CONSTRUCTION — Whether quantification of defect rectification costs reasonable — Whether plaintiff entitled to pre-judgment interest on quantification of defect rectification costs.

PRACTICE AND PROCEDURE — Whether second defendant should have leave under UCPR r 31.28(3) to rely on expert report served by former cross-defendant — Whether exceptional circumstances shown.

Facts

On 12 July 2011, Iris Diversified Property Pty Ltd entered into a building contract with Nazero Construction to construct a residential block of six units in Clovelly. A director of Nazero, Mr Younan, executed the contract as a guarantor.

On 13 September 2012, construction was completed and occupation certificate granted. The Owners Corporation (the plaintiff) alleged defects in building's structural elements and in his hydraulic, mechanical and electric services as well as other key components.

On 16 October 2015, Owners Corporation obtained judgement for $1,452,419.32. 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 key issue in the present case was the quantification of damages that were calculable by reference to reasonable rectification costs.

The Owners Corporation's claim for the reasonable cost of rectifying the defects in the buildings was $1,173,909 comprising various trade costs totalling $734,221 and various add on-costs totalling $439,688. In demonstrating the loss, the Owners relied on the report of its quantity surveyor, Mr Zakos, that it had served on Diversified Property in 2015.

Initially, Diversified Property did not intend to lead evidence on quantum, it instead filed a cross-claim against Mr Younan seeking a declaration that he was liable as a guarantor. In response, Mr Younan served a quantity surveyor report of Mr Madden. This led to a conclave between Mr Zakos and Mr Madden that culminated in the creation of a joint report.

In August 2017, Mr Younan indicated that he would not be relying on Mr Madden's report at trial. Mr Younan and Diversified settled. Diversified then wrote to the Owners Corporation confirming that it would be relying upon Mr Madden's evidence and formally served the report. Diversified Property applied for leave to rely upon the evidence under the UCPR.

Decision

The Court was satisfied that there were exceptional circumstances warranting leave in the instant case. Accordingly, the Court held that Diversified Property could rely upon Mr Madden's report. In so holding, Stevenson J distinguished *Cummins Generator Technologies Germany GmbH v Johnson Controls Australia Pty* In that case, the Court of Appeal (Beazley P, with whom Gleeson and Leeming JJA agreed) refused to interfere with the decision by McDougall J that, in the circumstances of that case, "exceptional circumstances" were not established merely because a party had abandoned part of its case at trial and decided, during

the course of the trial, not to call certain evidence. First, unlike the party in the corresponding position to Iris in *Cummins*, Iris has served Mr Madden's report. Second, unlike the situation in *Cummins,* Mr Madden has not relied upon other expert reports which did not go into evidence.

The Court then went through various items that were still in dispute, 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. The Court further noted that if there is a range it is perfectly reasonable that the Diversified Property be required to pay for loss found at the upper end of this range. The Court consequently adopted 75% of the figure Mr Zakos recommended.

***Lipman Pty Ltd v Empire Facades Pty Ltd (formerly known as Empire Glass and Aluminium Pty Ltd)* [2017] NSWCA 217**

Coram: McColl, Macfarlan and Gleeson JJA

Supreme Court of New South Wales Court of Appeal

Date: 31 August 2017

CONTRACTS – dispute resolution clause – final and binding expert determination – where right to litigate in relation to the dispute if 'the determination of the expert does not resolve the dispute' – no precondition that only an invalid expert determination will not 'resolve' the dispute

Facts

On 21 November 2014, Empire Glass entered into a contract pursuant to which it agreed with Lipman to design, supply, construct and undertake associated works for the refurbishment of a lobby of premises at 580 George Street Sydney for a contract price of $3,750,000.

Clause 42 of the contract contained a dispute resolution mechanism pursuant to which, following the service of a notice of dispute, if the dispute was not resolved by negotiation between senior executives, the dispute was to be referred for expert determination. A clause in the form of an expert agreement in the contract stated that the expert's determination is 'final and binding' on the parties unless provided otherwise under the contract.

Clause 42.11 of the contract provided that the determination of the expert will be final and binding unless a party gives notice of appeal to the other party within 15 business days of the determination and the determination is reversed, overturned or otherwise changed in litigation.

Clause 42.12 of the contract provided that 'if the determination of the expert does not resolve the dispute, then subject to clause 42.11, either party may commence proceedings in relation to the dispute'.

Disputes arose between Empire and Lipman concerning the performance and subsequent termination of the Contract. Notices of dispute were issued by the parties pursuant to the dispute resolution clause in the Contract. In accordance with clause 42, the disputes were referred to senior executive negotiation and subsequently to expert determination.

The expert appointed under the Contract entered into an agreement with the parties dated 4 October 2016. Two expert determinations were made by the expert on 29 November 2016. After off-setting the amounts the subject of those awards, the expert found in favour of Lipman in an amount of $106,943.63. Empire subsequently gave notice of appeal in accordance with clause 42.11 of the contract and commenced proceedings seeking to re-agitate the same issues considered by the expert.

Lipman applied to dismiss the proceedings on the grounds that the disputes had been resolved by the expert determination and it was not open for the contractor to re-agitate those issues. Lipman contended that if the determination of the dispute has been made by an expert in accordance with the requirements of the contract or expert agreement, it must follow that the determination does '*resolve the dispute*' for the purpose of clause 42 of the contract and therefore neither party is entitled to litigate the dispute.

In response, Empire argued that the precondition is to be interpreted as saying that, by triggering the appeal process, a dispute is not 'resolved' for the purposes of the contract and consequently either party may commence litigation.

Ball J held that the parties had made it clear that they intended the appeal process to involve a rehearing by a court, and that the interpretation advanced by Lipman does not sit well with the words of the contract and does not really provide for a right of appeal at all.

Decision

The NSW Court of Appeal unanimously agreed with the primary judge and dismissed the principal's appeal.

Gleeson JA found that, ordinarily, the meaning conveyed by the expression “determination of the expert” is a valid determination in the *A Hudson* sense, that is, a determination in accordance with the terms of the contract. By contrast, acceptance of Lipman’s argument would give the expression “determination of the expert” in clause 42.12 an unusual meaning because a purported determination not done in accordance with the terms of the contract is not a determination at all.

His Honour held that nothing in clauses 42.11 or 42.12 of the contract suggests that reversing, overturning or otherwise changing the outcome of the determination of the expert is contingent upon the prior agreement of the parties or a finding by a court that the determination of the expert is a nullity.

In the circumstances, contrary to Lipman’s contention, there is nothing unbusinesslike in giving effect to the bargain that the parties have chosen and giving primacy to the words of the dispute resolution clause.

Quickway Constructions Pty Ltd v Electrical Energy Pty Ltd [2017] NSWSC 1140

Coram: Parker J

Supreme Court of New South Wales

Date: 31 August 2017

BUILDING AND CONSTRUCTION – construction contracts – issuance of invoices for construction works – Building and Construction Industry Security of Payment Act 1999 (NSW), ss 8, 13 – construction – statutory right to progress payments – assignment of right to payment – availability of statutory procedure to seek adjudication determinations

Facts

In March 2017, Quickway engaged Electrical to undertake electrical cable hauling works at a substation in Canterbury and at a substation in Leichhardt.

On 22 April 2017, Electrical sent the plaintiff an invoice in the sum of $24,725.25 for works done at Canterbury as well as an invoice in the sum of $41,250 for works done at Leichhardt. Electrical had previously entered into a factoring agreement entitled "Full Service Factoring Agreement" with Bibby Financial Services that is now called Scottish Pacific. Pursuant to the Agreement, each invoice contained a notation that it "had been assigned" to Bibby Financial Services, and asked that payment be made directly to Bibby Financial Services.

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.The invoices remain unpaid.

Quickway paid the amounts specified in the adjudication determinations into Court and obtained an interlocutory injunction preventing Electrical from taking any enforcement action under those determinations pending the result of Supreme Court proceedings it commenced seeking to quash the adjudication determinations. It did so on two bases;

- that the SOP Act adjudication process was not available to Electrical as it had assigned the underlying right to payment to Bibby Financial Services;
- in relation to the Leichhardt invoice, the adjudicator failed to afford Quickway natural justice.

Decision

The Court ruled against Quickway's challenge to the two adjudication determinations based on the assignment of the underlying obligations to Bibby, however Quickway's challenge to the Leichardt adjudication succeeded on the second basis advanced by Quickway, that is, that it was denied natural justice.

In so ruling, Parker J found that a debt arising under the SOP Act was assignable as a judgment debt. His Honour noted, however, that the assignment of the debt did not also assign the statutory rights afforded to Electrical by SOP Act. Bibby Financial Services thus could not enforce the statutory rights in its own name. Accordingly, the debt that was assignable at law came into existence only after there was an adjudication determination. The claim had to be pursued in the name of Electrical, though Bibby Financial Services was entitled to obtain the fruits of the process.

Quickway also argued that section 13(2)(b) of the SOP Act requires the payment claim to direct payment to the claimant, in this case Electrical. Parker J rejected this argument and, in so doing, his Honour emphasised that the SOP Act 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.

Parker J accepted Quickway's argument that the payment claim was not valid under the SOP Act as identifying the correct reference date was an essential element and the language "for example 28 April 2017" was insufficient to support a payment claim. 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.

The Court therefore held that the adjudicator denied Quickway natural justice. Accordingly, Parker J discharged the interlocutory injunction and quashed the adjudication determination.

Falco's Pty Ltd v AB Developments (Australia) Pty Ltd [2017] NSWSC 1320

Coram: McDougall J

Supreme Court of New South Wales

Date: 14 September 2017

Building and construction — Building contracts — Payment claims — Adjudication

Facts

The parties entered into contract pursuant to which AB Developments agreed to supply concrete for project being conducted by Falco's. The contract was an informal one consisting of a schedule of rates quotation date 10 July 2016 and an acceptance endorsed on it dated 13 July 2016.

AB Developments submitted progress claims to Falco's. Those progress claims were said to be also payment claims for the purposes of SOP Act.

Falco's deducted retentions from amounts claimed by AB Developments. This was not authorised by terms of contract. Amounts were back charged to AB Developments for alleged defects to the works said to have occurred by dint of the concrete supply.

AB Developments sent a number of documents comprising both progress claims and payment claims to Falco's. One of those made a claim for formwork, steel fixing and pouring concrete. The next one appears to have resubmitted that claim, but in a slightly different amount. There was a third one claiming $6,000 for formwork, steel fixing and concrete pour in a walkway. The third one was not served until 25 May 2017. Service was effected by an email of that date attaching "our tax invoice for walkway" totalling $6,600.

On 26 May 2017, AB Developments sent a further progress claim/payment claim to Falco's, which claimed outstanding amounts under earlier invoices, amounts that had been withheld for retention, and amounts withheld for allegedly defective or incomplete work and other back charges.

Falco's provided a response by email dated 30 May 2017.

AB Developments took the view that there had been no payment schedule served and proceeded to make an adjudication application under SOP Act. After inviting parties to make submissions as to whether the adjudication application had been served, the adjudicator found that AB Developments was entitled to amount claimed, together with interest.

In challenging the adjudication determination, Falco's relied on s13(5) of SOP Act, arguing that AB Developments had acted in derogation of the Act by purporting to serve more than one payment claim in respect of each reference date under construction contract. Falco's also argued that it had been denied procedural fairness.

Decision

The Court held that, in this case, there could only have been one available reference date: 30 April 2017. No work was done after April 2017. The contract made no express provision for reference dates. Section 8(2)(b) of the Act therefore applied.

The uncontested facts are, therefore, that two payment claims were served in May 2017; the only reference date available to support them was 30 April 2017; and the payment claim that went to arbitration and was the subject of the adjudicator's determination was the one served later in point of time.

It follows inevitably that there was no right to make the adjudication application and the adjudicator had no power to consider it.

In those circumstances, the Court quashed the adjudication determination.

Castle Constructions Pty Ltd v Ghossayn Group Pty Ltd [2017] NSWSC 1317

Coram: Stevenson J

Supreme Court of New South Wales

Date: 29 September 2017

BUILDING AND CONSTRUCTION — Building contracts — Payment claims — Adjudication determination

Facts

In May 2016, Castle Constructions entered into an oral construction contract with Ghossayn Group for bulk excavation, piling, anchoring and shoring works. Some of the terms of the contract were recorded in writing. The respondent is the sole shareholder of Castlenorth Pty Ltd, the second plaintiff in these proceedings and owner of the land upon which the project took place.

Throughout the course of construction, Ghossayn submitted progress claims to Castle Constructions on three occasions without dispute. Ghossayn Group made progress claims on Castle Constructions on 30 June 2016 (for $323,319.34), on 4 August 2016 (for $240,733.47) and on 31 August 2016 (for $136,523.99). Each was expressed to be under the SOP Act. Castle Constructions paid each of them

On 30 September 2016, Ghossayn made a fourth and final payment claim in the sum of $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 required by the contract had been performed. Castle Constructions contended that, as at 30 September 2016, work at the site was not complete. There is no dispute, however, that no engineer or surveyor had signed off on completion of work in accordance with approvals.

Ghossayn made an application for an adjudication determination. The authorised nominating authority then sent notification of the adjudicator's acceptance by registered post addressed to Castle Construction at its ordinary place of business, however, the notice was deposited in Castle Construction's neighbour's mailbox by error on 5 December 2016.

The neighbour found the letter and deposited the notice in Castle Constructions' mailbox at on 7 December 2016. Castle Constructions lodged its adjudication response on 12 December 2016. The adjudicator disregarded Castle Constructions' 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 Castle Constructions pay Ghossayn the amount claimed.

Castle Constructions applied to the New South Wales Supreme Court to have the adjudication determination quashed. In so doing, Castle Constructions argued that the adjudicator had no jurisdiction to make a determination as:

- no 'reference date' had arisen as the engineer and surveyor had not provided the sign-off required under the contract;
- the claimant was a head contractor and did not serve a supporting statement with the payment claim; and
- the adjudicator wrongly concluded that the respondent did not provide an adjudication response within time.

Decision

The court found in favour of Castle Constructions, quashing the adjudicator's determination for jurisdictional error on the basis that the claimant was a head contractor and failed to provide a supporting statement.

Section 8 of the SOP Act entitles the claimant to progress payment on and from each reference date. Stevenson J found that the term of the contract requiring sign-off by an engineer and surveyor before the claimant could make a final payment claim was void under section 34 of the Act and so could not be used to determine the reference date. As such, the last day of the month was the valid reference date.

Relying upon various pieces of evidence, the court found that a construction contract did not exist between Castlenorth and Castle Constructions. Ghosayn was therefore a head contractor and had failed to serve a valid payment claim with a supporting statement in breach of section 13(7) of the Act.

Section 31(2) of the Act states that service of a notice is effected when the notice is received at that place. The court found that there was no requirement under section 31(2) that the notice be received at that place during normal office hours. Therefore, as the adjudicator's notice was delivered to the respondent's address after business hours on 7 December 2016, the response was required to be lodged within 2 business days, being 9 December 2017. The response was lodged on 12 December 2016 and was not validly served.

All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd [2017] NSWCA 289

Coram: Leeming, Payne and White JJA

Supreme Court of New South Wales — Court of Appeal

Date: 10 November 2017

BUILDING AND CONSTRUCTION — Contractor served claim under Building and Construction Security of Payment Act 1999 (NSW) — Claim filed before reference date — Whether claim valid — Whether clause in building contract deemed claim to have been served on reference date.

Facts

In 2015, the parties entered into a contract pursuant to which All Seasons undertook to perform mechanical ventilation and air-conditioning work on a residential development at Waitara. The agreed sum for the works was $558,360 excl. GST. The contract was based on AS 4903-2000 to which minor amendments had been agreed.

Clause 37.1 dealt with progress claims as follows

> "The Subcontractor shall claim payment progressively in accordance with Item 37. An early progress claim shall be deemed to have been made on the date for making that claim.
>
> Each progress claim shall be given in writing to the Subcontract Superintendent and shall include details of the value of WUS done and they include details of other monies then due to the Subcontractor pursuant to provisions of the Subcontract."

All Seasons made progress claim no 10 on 20 June 2016. It rendered a further claim on 12 July 2016 for $43,216.96, following the completion of the entire project. The invoice was different but stated it was a payment claim made under the SOP Act.

Regal Consulting supplied a Payment Schedule dated 26 July 2016 which asserted it had no obligation to pay as there was dispute whether practical completion had been reached. Further, the payment claim dated 12 July 2016 was a second payment claim in respect of the 20 June 2016 claim and was in contravention of s13(5) of the Act.

An Adjudicator accepted the applicant's submission for the reference date for the 12 July 2016 claim was 20 July 2016 (as progress payments were due 20th of each month) and was therefore satisfied it was a valid payment claim.

Regal Consulting brought proceedings in the NSW Supreme Court contending that the adjudicator lacked jurisdiction to deal with the payment claim on the basis that there was no available reference date to support it. Regal Consulting relied on the recent decision of the High Court of Australia in *Southern Han Breakfast Point Pty Ltd (In Liq) v Lewence Construction Pty Ltd* [2016] HCA 52.

At first instance, the court determined that, in the absence of a reference date having arisen, there was no valid payment claim and the adjudicator had no jurisdiction to make a determination under the Act. This lies at the heart of the decision of *Southern Han*

Decision

On appeal, the NSWCA upheld McDougall J's decision and dismissed the claimant's appeal.

Leeming J and Payne JJA, in reliance on the High Court's judgment in *Southern Han*, held that entitlement under section 8(1) and service of a payment claim under section 13(1) of the SOP Act can only occur, at the earliest, 'on or from each reference date'.

Their Honours agreed with McDougall J that clause 37.1 of the contract operated to start the subcontractor's contractual, as opposed to statutory, rights to payment on the 20th day of the month, even if the claim was served earlier.

At the time that the applicant' served its payment claim dated 12 July 2016 it had no entitlement to a progress payment."

Accordingly, the appeal was dismissed with costs.

Elias v Alloha Formwork & Construction Pty Ltd [2017] NSWSC 1546

Coram: Ball J

Supreme Court of New South Wales

Date: 17 November 2017

BUILDING AND CONSTRUCTION — Home Building Act 1989 — Statutory warranties — Breach — Calculation of damages for cost of rectification of defects — Calculation of delay costs.

CONSUMER LAW — Australian Consumer Law s 18 — Misleading or deceptive conduct — Whether defendants made representations — Whether representations were misleading or deceptive — Whether plaintiffs relied on representations.

CONTRACTS — Breach of contract — Consequences of breach — Right to damages — Whether plaintiff entitled to costs of rectifying defects in building or cost of demolition and rebuild.

Facts

The plaintiff, Elias' operate a bakery. Their native language is Arabic and their English is limited. The family home was a cottage in Greenacre bought in 2000. They decided to knock down the dwelling and rebuild in 2010. Elias engaged 'Architeks' to prepare plans. Architeks submitted plans to the Bankstown City Council for demolition and rebuild. The consent was granted in January 2011.

In 2012, at Architeks suggestion, Elias engaged the third defendant Farah to prepare structural drawings and hydraulic plans. Elias engaged with the first defendant 'Alloha' for the construction of the dwelling for a total price of $512,000.

The demolition work commenced in August 2013 and work on the new house commenced shortly before November 2013 and continued until May 2014. The basic fabric of the house was largely complete but substantial work had yet to be complete. In these proceedings, Elias was claiming costs of engaging another builder to rectify a large number of defects with the existing building work.

Decision

The Court found Elias was entitled to claim against the first defendant for the delay in the completion of the home which was the whole fault of the first defendant. Elias' loss took the form of rent payable by the plaintiff because they were unable to move into their new home.

The claim against the second defendant took the form of misleading and deceptive conduct in breach of s18 of the ACL. The second defendant represented that Alloha was licenced to carry out residential building work and had obtained the relevant insurances and warranties and further that the second defendant would complete work once certain monies of progress payments had been paid.

The final claim succeeded against the third defendant in relation to the certificates provided by Farah with respect to the structural drawings and plans for the design of the new home not meeting the required legislative standard.

The Court ruled in favour of plaintiff against the first defendant ($804,703.55), second defendant ($477,013.45) and third defendant ($467,950.00).

Kawasaki Heavy Industries, Ltd v Laing O'Rourke Australia Construction Pty Ltd [2017] NSWCA 291

Coram: Meagher, Payne and White JJA

Supreme Court of New South Wales Court of Appeal

Date: 17 November 2017

CONTRACT — Construction — Construction contracts — Performance bonds — Injunction — Serious question to be tried — Balance of convenience.

INTERNATIONAL ARBITRATION — Interlocutory relief where underlying dispute to be determined by arbitral tribunal.

Facts

Laing O'Rourke and Kawasaki were parties to a subcontract with JKC to construct a number of cryogenic tanks. The relationship between Laing O'Rourke and Kawasaki was governed by a Consortium Agreement.

Pursuant to the subcontract, Kawasaki provided an unconditional and irrevocable performance bond on behalf of itself and Laing O'Rourke. In the event that JKC made a call on the bond, the Consortium Agreement provided that both Kawasaki and Laing O'Rourke was required to contribute to that call in proportion to their respective liability under the Consortium Agreement. As part of the Consortium Agreement, Laing O'Rourke was obliged to provide surety bonds to Kawasaki.

Laing O'Rourke agreed to perform certain obligations of the work that fell within Kawasaki's scope. On 12 June 2012, Kawasaki delivered to Laing O'Rourke a purchase order pursuant to which Laing O'Rourke agreed to perform works pursuant to the subcontract. The purchase order required Laing O'Rourke to deliver surety bonds to Kawasaki. Kawasaki attempted to call on the bonds to the value of $52.3 million. The parties are each asserting that the other is liable to it in damages. JKC has not called on the bond provided to it by Kawasaki

Laing O'Rourke was granted an interlocutory injunction restraining Kawasaki from calling on the bond it held. Laing O'Rourke applied to the court seeking to have the injunction continued pending the determination of an arbitral tribunal which had not yet been appointed under the Consortium Agreement

A first instance, Stevenson J held that the proper construction of the Consortium Agreement needed to be determined objectively by reference to its text, context and purpose. Lang O'Rourke had a prima facie case sufficient to support the relief sought. Further, the balance of convenience favoured the continuation of the injunction.

Kawasaki appealed to the Court of Appeal. The issues on appeal were:

(i) whether there was a serious question to be tried that, on the proper construction of the Consortium Agreement and the LORAC Subcontract, Kawasaki was not entitled to call on the surety bonds until JKC had called on the Kawasaki bonds;

(ii) whether the primary judge should have determined the proper construction of the Consortium Agreement and the LORAC Subcontract "as if on a final basis"; and

(iii) whether the primary judge erred by finding that the balance of convenience favoured the continuation of the interlocutory injunction.

Decision

The Court held that there was a serious question to be tried about whether Kawasaki was entitled to call upon performance bonds on behalf of Laing O'Rourke under the Consortium where JKC had not made a call upon the Kawasaki bonds.

The primary judge was not asked to determine this case "as if" on a final basis. The primary judge's conclusion that he should determine the case on the basis of a serious question to be tried was correct

The primary judge did not err in determining that the balance of convenience favoured the continuation of the interlocutory injunction. In particular, it was not shown that the primary judge gave insufficient weight to the matters relied upon by Kawasaki in opposition to the grant of the injunction

The fact that the undertakings in *Simic* were addressed by the High Court using the same rules of construction as those which govern commercial contracts stands against Kawasaki's submission that *Clough* establishes a separate rule of construction about contracts which provide for the issue of performance bonds.

Appeal dismissed

Bouygues Constructions Australia v Southern Cross Electrical [2017] NSWSC 1665

Coram: Stevenson J

Supreme Court of New South Wales — Equity — Technology and Construction List

Date: 30 November 2017

BUILDING AND CONSTRUCTION — Determination under Building and Construction Industry Security of Payment Act — Whether serious question to be tried that adjudicator acted beyond jurisdiction.

Facts

The defendant South Cross Electrical, entered into three contracts with the plaintiff, Bouygues Construction, to provide electrical services in respect of three solar farms near Dubbo, Griffth and Parkes.

On 25 September 2017, Southern Cross served three payment claims pursuant to the SOP Act on the plaintiff, one for each subcontract.

On 11 October 2017, Bouygues served a payment schedule in response of the three claims and Southern Cross made an application for adjudication of the claims on the 24 October.

On 17 November 2017, the adjudicator determined the amounts due by Bouygues to Southern Cross was $4,152,146.69 comprising:

- (a)$667,516.17 for the Dubbo contract;
- (b)$1,521,741.95 for the Griffith contract; and
- (c)$1,962,888.57 for the Parkes contract.

On 27 November 2017, Bouygues sought a declaration that the determination of the adjudicator was void and or an order quashing those determinations. Bouygues sought relief restraining Southern Cross until the final hearing from requesting the provision of an adjudication certificate pursuant to s24(1) of the Act, filing the certificate as a judgement for debt in any Court pursuant to s25 of the Act and/or serving a notice on Bouygues pursuant to s24(1)(b) of the Act.

Decision

The Court determined that it was satisfied to grant the injunction as there was a serious case of liquidated damages to be tried. Cl 13.7 of the relevant contracts provided that if Southern Cross failed to reach completion by the date of completion, they were liable to pay Bouygues the “delayed liquated damages rate” for every day up to and including the completion date.

It was before the adjudicator that Bouygues was entitled to offset these liquidated damages from the amounts it owed on account of these liquidated damages.

There was a statement given by Southern Cross implying at an earlier meeting there was an agreement to not deduct the liquidated damages rate although no substantive evidence was provided. The adjudicator appeared to have accepted this statement as confirming an agreement that it would not set off despite the lack of evidence. Consequently, the Court determined it was satisfied that there is a serious question to be tried that this decision by the adjudicator was legally unreasonable in the sense discussed by the High Court in *Minister for Immigration & Citizenship v Li* [2013] HCA 18; 249 CLR 332, such as to bespeak jurisdictional error.

Further, the Court held that the adjudicator suggested incorrectly that that a miscalculation of the liquidated damages owed resulted in the plaintiff not being entitled to any damages.

Finally, there was a s20(b) question that required hearing as the adjudicator's reasons show that she erroneously refused to consider certain material as a result of her misconstruction of s 20(2B) and thereby acted without jurisdiction.

In those circumstances, the Court made the interlocutory injunction sought by Bouygues.

Quickway Constructions Pty Ltd v Electrical Energy Pty Ltd [2017] NSWCA 337

Coram: Macfarlan, Gleeson and Leeming JJA

Supreme Court of New South Wales — Court of Appeal

Date: 18 December 2017

BUILDING AND CONSTRUCTION — Claims for progress payments under Building and Construction Industry Security of Payment Act 1999 — Underlying contractual debts assigned — Whether payment claims valid — Whether adjudication determinations valid.

Facts

In March 2017, Quickway engaged Electrical to undertake electrical cable hauling works at a substation in Canterbury and at a substation in Leichhardt.

On 22 April 2017, Electrical sent the plaintiff an invoice in the sum of $24,725.25 for works done at Canterbury as well as an invoice in the sum of $41,250 for works done at Leichhardt. Electrical had previously entered into a factoring agreement entitled "Full Service Factoring Agreement" with Bibby Financial Services that is now called Scottish Pacific. Pursuant to the Agreement, each invoice contained a notation that it "had been assigned" to Bibby Financial Services, and asked that payment be made directly to Bibby Financial Services.

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.The invoices remain unpaid.

Quickway paid the amounts specified in the adjudication determinations into Court and obtained an interlocutory injunction preventing Electrical from taking any enforcement action under those determinations pending the result of Supreme Court proceedings it commenced seeking to quash the adjudication determinations. It did so on two bases;

- that the SOP Act adjudication process was not available to Electrical as it had assigned the underlying right to payment to Bibby Financial Services;
- in relation to the Leichhardt invoice, the adjudicator failed to afford Quickway natural justice.

The Court ruled against Quickway's challenge to the two adjudication determinations based on the assignment of the underlying obligations to Bibby, however Quickway's challenge to the Leichardt adjudication succeeded on the second basis advanced by Quickway, that is, that it was denied natural justice.

On appeal Quickway contended that declarations that the adjudication determinations were invalid should have been made at first instance. In support of its contention it argued that the purported payment claims upon which the determinations were based were not payment claims within the meaning of s 13 of the Act. Quickway argued:

- first that the invoices were not claims made by Electrical. Quickway relied on the fact that the invoices required payment to Scottish.
- secondly, that the invoices were not payment claims within s 13 because they required payment to Scottish, rather than to Electrical.

- thirdly, then argued that the invoices were not payment claims within the meaning of s 13 because Electrical's entitlements to payment had been assigned to Scottish.

Decision

The majority of the Court of Appeal (constituting Gleeson and Leeming JJA) allowed Quickway's appeal, setting aside the first instance decision insofar as it pertained to the Canterbury adjudication application. The Court of Appeal quashed the Canterbury adjudication determination, ordering that Electrical repay Quickway with interest.

The SOP Act provides that a person who undertakes to carry out construction work or undertakes to supply related goods and services, who is or who claims to be entitled to a progress payment, may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

The Court of Appeal found that:

1. as soon as the invoices in question were assigned to Scottish Pacific, and upon notice of that assignment being given to Quickway, that assignment had become effective at law; and

2. at the moment of receipt of the invoices stating that the debt had been assigned to Scottish Pacific, Electrical ceased to be a creditor of Quickway; and

3. although the invoices had been sent on Electrical's letterhead, the statement of assignment within the invoice was unequivocal in its assertion that the invoice had been assigned to Scottish Pacific; and

4. it is not part of the object of the SOP Act to give a party to a construction contract a right to receive progress payments from someone who is not a party.The right to enforce payment under the terms of the construction contract remained unaffected.

Quickway was ordered to file notice of appeal in form of draft notice of appeal but confined to Canterbury determination. Appeal allowed and adjudication determination of the second respondent quashed. Order that the amount be paid to Electrical be repaid with interest and that Electrical pay Quickway's costs at first instance and on appeal.