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BUILDING AND CONSTRUCTION CASES 2018

A REVIEW OF BUILDING AND CONSTRUCTION CASES AT FIRST INSTANCE AND ON APPEAL DECIDED BY THE SUPREME COURT OF NSW FROM JANUARY TO JUNE 2018

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Manbead Pty Ltd v The Owners – Strata Plan; No 87635 [2017] NSWSC 1629

Coram: McCallum J

Supreme Court of NSW

Date: 28 November 2017

BUILDING CLAIMS – claims by Owners Corporation and individual lot owners in respect of common property – whether Appeal Panel erred in assuming separate claims were maintainable – whether Appeal Panel erred in declining to consider Scott Schedule prepared after consent orders were entered for purpose of determining whether claim exceeded Tribunal's jurisdictional limit

Facts

The proceedings concerned a building development involving the construction of six townhouses in Woonona. On 14 January 2015 the Owners Corporation ("the Owners Corporation") lodged a claim in NCAT alleging defects in construction to which Manbead Pty Ltd ("developer") and Gino D'Amico ("builder") were the respondents.

At some stage in the early stages of the proceedings the Tribunal advised the Owners Corporation that each lot owner within the strata plan had to lodge an individual claim for defects in each unit in addition to the Owners Corporation's claim for common property defects. Six claims were subsequently lodged with NCAT, each claiming $25,000.

On 28 May 2015 all six claims were settled. By consent NCAT ordered the builder to carry out an agreed scope of rectification works. The Tribunal noted an agreement between the parties that the developer would cause the builder to carry out the works and, if he failed to do so, the developer would pay the applicants the reasonable cost of completing the works required by the Work Order.

The scope of works referred to in the Work Order did not include costings for the rectification works.

On 11 February 2016, the Owners Corporation applied to renew the proceedings on the basis of non-compliance with the Work Order as allowed under Schedule 4, Clause 8 of the NCAT Act. The renewal proceedings were supported by a Scott Schedule which claimed that the total cost of the rectification works was $568,000.

Before the renewal proceedings were heard, the developer brought an internal appeal against the consent orders made in May 2015, despite being well outside the 28 days allowed to bring an appeal.

the appeal had very poor prospects of success. The developer sought leave to appeal that decision to the New South Wales Supreme Court on the basis that NCAT had exceeded its jurisdictional limit under section 48K(1) of the *Home Building Act 198*9 (NSW) of $500,000 for building claims. The developer argued that NCAT should have found that notwithstanding the individual applications made by the lot owners, the Owners Corporation was the proper applicant because the defects claimed by the lot owners actually related to common property, not the individual lots, and the award by NCAT for rectification works was not capable of being divided among the Owners Corporation and the lot owners to bring it within jurisdiction.

Decision

The court refused to grant leave to appeal the decision of the Appeal Panel of NCAT.

The developer contended that the claims were all attributable to the Owners Corporation as a single indivisible claim for damage to common property. However, the court did not accept that the Appeal Panel of NCAT should have allowed the developer to seek to identify every element of work relating to common property in the Scott Schedule during the appeal hearing when that evidence had not been adduced before the Work Order was made.

The court found that although the original Work Order was subsequently valued at $568,000 in the Owners Corporation's Scott Schedule and the Owners Corporation might be considered the proper applicant, the other five individual lot owners had filed separate claims and therefore the $500,000 limit applied separately to each lot owner's claim and the Owners Corporation's claim for common property defects.

Further, for the purposes of the application for leave to appeal, the court did not accept that a subsequent valuation of the cost of rectifying the defects under the Work Order in the Scott Schedule could crystallise the quantum of the claim at the earlier point in time when the Work Order was made.

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

Coram: Ward CJ in Eq

Supreme Court of NSW

Date: 19 December 2017

CONTRACT – Interpretation – Whether "urgent" in "urgent injunctive or declaratory relief" is to be read distributively so as also to qualify "declaratory relief"

ESTOPPEL – Equitable estoppels – Promissory estoppel – Relief

Facts

In December 2014, WestConnex entered a contract for design and construction with CPB Contractors Pty Ltd (**'CPB'**) and Rizzani de Eccher Australia Pty Ltd (**'RdE'**). CPB and RdE were parties to an unincorporated joint venture to perform these works (**'the Project'**).

In August 2015, CPD and RdE entered a joint venture deed to formalise their relationship and set out how the parties would perform the design and construction contract. In the joint venture deed there were terms which provided for the following:

- board meetings of the joint venture where binding decisions could be made. The requirements for a binding decision included a quorum of at least one representative from each party and representation in equal numbers to vote; and
- contributions of equal 'called sums' into a bank account controlled by the parties to service debts at an amount and time agreed between the parties to maintain positive cash flow for the Project.

On 19 September 2017, a joint venture board meeting was convened to consider, amongst other things, an item of business reading as follows:

> '*Please urgently meet and agree the Called Sums. The project cannot manage the current situation without certainty of funding*'.

CPB and RdE had different recollections of this meeting, which was held by way of teleconference.

CPB stated that during the meeting the representatives of CPB and RdE agreed each party would pay a called sum of $8.5 million.

RdE maintained Mr Mortoni, one of if its board representatives, left the meeting because he was required to be on another teleconference and as a result he was not present to discuss or vote on the 'Called Sums' contribution.

This meant RdE was only represented by one person, Mr Bagnariol. Mr Bagnariol indicated he did not have the authority to bind RdE. He denied he agreed to the payment of the called sum; he testified his understanding of the situation was CPB would send a resolution after the meeting for RdE's consideration and execution.

Following the meeting one of CPB circulated an email to various people, including Mr Mortoni and Mr Bagnariol which requested that RdE '*please sign the attached and return documenting the JV Board's resolution of today*'.

A document attached to the email was called '*JV Board Resolution*', signed by CPB's attendees, stated '*This paper confirms that the RdE CPB JV Board resolved in a JV Board Meeting held on 19 September 2017 to the payment of Called Sums to the Project Account in the amount of ($8,500,000 AUD from each Party) paid on or before 6 October 2017*'.

Mr Bagnariol replied six minutes later '*Yes, we will do it along with the Minute of Meeting*'.

Conduct after meeting

On 22 September 2017, CPB paid $1,500,000 of the Called Sum and paid $7,000,000 of the Called Sum on 6 October 2017 which was disbursed to creditors by the end of October.

Also on 6 October 2017 Mr Hughes of CPB emailed Mr Mortoni confirming CPB's payment and requested Mr Mortoni advise when RdE would make their payment.

On 9 October 2017 Mr Mortoni responded and indicated there were delays in RdE making their contribution but the RdE contribution could be made 'in the next few days'.

On 12 October 2017, CPB issued a notice of default under the joint venture deed to RdE for failing to pay the called sum. Mr Mortoni rejected the validity of the notice due to the fact RdE was under no obligation to pay the Called Sum given the terms of the joint venture agreement as the provisions for binding decision had not been observed.

On 2 November 2017 CPB commenced proceedings to pursue RdE for payment of the Called Sum.

RdE disputed the obligation to pay the Called Sum and sought to stay the proceedings as the relief sought by CPB was not '*urgent injunctive or declaratory relief*'. RdE alleged this meant the dispute should be referred to arbitration under the terms of the joint venture deed.

Decision

Ward CJ in Eq determined that:

- the nature of CPB's application was for urgent declaratory relief, meaning the court had jurisdiction to hear the application notwithstanding the arbitration agreement; and
- although CPB did not establish there was a binding decision in the 19 September 2017 meeting, CPB established a promissory estoppel, meaning that RdE could not deny that it stood in the '*postulated legal relationship – namely, that envisioned by the … deed*'.

The reason why the relief CPB sought was deemed urgent was due to the fact the Project's director could not certify all subcontractors engaged by the joint venture had been paid. This was a necessary part of the design and construct contract to secure payment from the principal, and therefore required an urgent cash injection.

Her Honour was not persuaded that there was a binding resolution passed at the meeting on 19 September 2017. However, on the alternative claim of promissory estoppel, Her Honour found that the necessary elements of promissory estoppel were made out:

- CPB assumed the execution of the resolution sent by email on 19 September 2017 would give rise to rights and obligations;
- RdE induced this assumption by CPB by dint of RdE's post meeting conduct , which included express representations by both Mr Bagnariol and Mr Mortoni emails and implied representations, being silence after CPB's made its Called Sum payments;
- CPB relied on RdE's conduct when it made its Called Sum payments which was then paid to creditors;

- It was clear to RdE that BPB was functioning under the false pretence that there was an agreement between CPB and RdE about the payment of the Called Sum;

- CPB's action or inaction would cause detriment if RdE was not required to sign the resolution because there was a risk that the contract for design and construction could not be completed without the payment of the Called Sum; and
- RdE did not act to avoid the detriment by signing the resolution or informing CPB that it considered CPB was mistaken as to the board meeting decision.

Leung v Alexakis [2018] NSWCATAP 11

Coram: Principal Member M Harrowell, and Senior Member G Walker

NSW Civil and Administrative Tribunal Appeal Panel

Date: 5 January 2018

HOME BUILDING ACT 1989 - s 48MA - preferred outcome principle, applicability to work done by holder of owner-builder permit.

OWNER-BUILDER PERMIT - Authority conferred, liability to successor in title for breach of statutory warranties, work to which the statutory warranties apply.

DISCRETION - failure to exercise, effect of preferred outcome principle in s 48MA on exercise of discretion.

SECTION 48O - nature and extent of order making power under Home Building Act, effect of s 48O(2) permitting order even if not sought by applicant

Facts

The appellant, Leung was the successor in title to a residential property located in Concord **('the Property')**. The respondent, Alexakis, was the property's previous owner and held an owner builder permit, pursuant to which she had carried out residential building work on the Property from October 2011. Alexakis sold the property to Leung in about September 2014.

The residential building work completed by Alexakis contained a defective stormwater system which had the consequence of a water leak into the basement of the Property. The value of this defect was determined to be $100,000.

Leung sought to enforce the s 18B statutory warranties pursuant to the *Home Building Act 1989* (**'the Act'**) applicable to the residential building work carried out by Alexakis.

At first instance, the New South Wales Civil and Administrative Tribunal ('**NCAT**') ordered Alexakis rectify the defects by engaging qualified personnel to do so.

Leung appealed on the basis that the order made should be substituted for an order for the payment by Alexakis $180,600.97 on the basis that NCAT erred in law in finding that section 48MA of the Act applied to owner builders, including those owner builders who were no longer licensed under the Act.

This meant the central issue on appeal was whether the principle in s 48MA of the Act was restricted only to where a person against whom a claim is made will complete the rectification work.

Leung argued that s 48MA does not apply to owner builders as they are ineligible to otbain home warranty insurance and inspectors are not permitted to issue work orders to home builders; the work order was inappropriate as it required third parties to carry out the rectification work; the language used in s 48MA excluded an order that rectification work be performed by a third party 'on behalf of' the responsible party; an order could not be made for some person other than Alexakis to carry out the work because such an order would mean that the works were not carried out 'by the responsible party'; and an order could not be made in respect of Alexakis as she was no longer qualified or licensed to carry out the rectification works.

Decision

The Appeal Tribunal rejected Leung's arguments. In relation to the issue of whether the principle in s 48MA was limited in application to where the person against whom the claim is made will personally do the rectification work, the Appeal Tribunal referred to two questions:

- does the word 'party' include the holder of an owner builder permit; and
- to what 'work' in the expression 'work by a party to the proceedings' does s 48MA apply?

In relation to the first issue, the Appeal Panel held there was no basis to limit the word ‘party’ or the application of s 48MA to building claims against person who holds a contractor licence and it includes the holder of an owner builder permit against whom a building claim is made.

In relation to the second issue, the Appeal Panel held that s 48MA applies to building claims involving both work done personally by a party to the proceedings and work done on their behalf. To hold otherwise would mean that an owner builder could simply have others physically do the work on their behalf and thereby avoid any liability of the owner builder to a successor in title and defeat the purpose of s 18C of the Act.

Probuild Constructions (Aust) Pty Ltd v Shade Systems Ltd [2018] HCA 4

Coram: Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon, Edelman JJ

High Court of Australia

Date: 14 February 2018

ADMINISTRATIVE LAW – Judicial review – Availability of certiorari – Error of law on face of record – Non-jurisdictional error – Building and Construction Industry Security of Payment Act 1999 (NSW) – Where Act confers entitlement to "progress payment" on persons who undertake to carry out construction work under construction contracts and provides scheme for determining disputed claims – Where first respondent made claim for progress payment – Where claim referred to adjudicator for determination – Where adjudicator made error of law in reasons for determination – Where reasons form part of record – Whether Act ousts jurisdiction of Supreme Court of New South Wales to make order in nature of certiorari to quash determination for non-jurisdictional error of law on face of record.

WORDS AND PHRASES – "clear legislative intention", "error of law on the face of the record", "interim entitlement", "jurisdictional error", "non-jurisdictional error", "order in the nature of certiorari"

Facts

Probuild sought to overturn a determination of an adjudicator appointed pursuant to the NSW Security of Payment Act after it was determined that it was liable to pay Shade Systems a progress payment. Probuild sought;

- judicial review of the adjudicator's decision in the New South Wales Supreme Court, and
- to quash the adjudicator's decision with relief in the nature of *certiorari* pursuant to s 69 of the Supreme Court Act 1970 (NSW).

The trial judge at first instance overturned the adjudicator's decision on the basis that there had been an error of law. Shade Systems successfully appealed to the New South Wales Court of Appeal.

Decision

The High Court unanimously upheld the New South Wales Court of Appeal's decision and held that the NSW Security of Payment Act had been intended to exclude the jurisdiction of the New South Wales Supreme Court to review the decisions of adjudicators for non-jurisdictional error, notwithstanding that there was no explicit ouster of jurisdiction.

The plurality (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) held that an order in the nature of *certiorari* was principally to prevent jurisdictional error, because this enforces the limits of a decision-maker's functions and powers. Unlike the supervisory jurisdiction enforcing the limits of executive and judicial power, the jurisdiction of the Supreme Court to review and to make an order in the nature of certiorari, for non-jurisdictional error can be ousted by statute.

The NSW Security for Payment Act clearly evinced an intention to oust the jurisdiction to conduct judicial review on the basis of non-jurisdictional error for three reasons.

- First, it was intended that the legislation enable parties to know where they stood in relation to payments under dispute and avoid parties engaging in Fabian Tactics.

- Secondly, the statutory scheme is 'interim' and does not finally determine the rights of the parties inter se.
- Thirdly, the procedure under the Act according to which the adjudicator is required to make his determination is intended to be quick and does not involve detailed consideration of the legal issues so as to ensure that cash flow of construction companies is maintained.
- Fourthly, the procedure is intended to be informal and there are various tools at the adjudicators deployment. For instance, the ability to call a conference to be conducted informally and without any entitlement to legal representation.
- Fifthly, other aspects of the scheme reinforce the conclusion that the adjudicator's decision is not subject to judicial review for non-jurisdictional error of law. There is no right of appeal from the determination of an adjudicator under the Act.

The plurality found that it was of some moment that the Act created a statutory entitlement to payment without prejudice to the common law rights of both parties which can be determined in the normal manner at some later date. The Court went further to hold that to permit costly and time-consuming judicial review of non-jurisdictional error would frustrate the purpose of the statutory scheme.

Gageler J and Edelman J agreed with the plurality but delivered separate judgments.

- Gageler J noted that the extent to which superior courts can review the decisions of non-judicial bodies for non-jurisdictional error has been limited. The legislature evinced an intention to empower an adjudicator to make a determination under the Act, notwithstanding that it is legally erroneous, and this cannot be reviewed by a superior court.
- Edelman J noted that courts had generally taken a narrow view of ouster of judicial review but held that it was not necessary for express words to be used. The application of the principle has variable applicability depending on the nature of the statute and in this instance the narrow approach should apply with little force to the Act. It is evident, having regard to the operation of the Act, that jurisdiction to conduct non-jurisdictional review is ousted;
    - First, because Parliament cannot be taken to have intended to create a race to court between the beneficiary of an adjudicator's determination seeking a court judgment and the opposing party seeking that the determination be quashed so that a certificate cannot be issued or filed. and
    - Secondly, there is a strict timetable without any right to appeal. The existence of a jurisdictional error, where the decision maker had no authority to decide, means that no real decision was made. But where a decision was made, with authority to do so, the strict timetable is premised upon the assumption that a decision will not be challenged for error of law.

    Consequently, the Act, by implication based upon a background legislative assumption, was to immunise from judicial review any non-jurisdictional error of law on the face of the record.

***Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5**

Coram: Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon, Edelman JJ

High Court of Australia

Date: 14 February 2018

ADMINISTRATIVE LAW – Judicial review – Building and Construction Industry Security of Payment Act 2009 (SA) – Where subcontract provided for sum to be paid to subcontractor after issue of certificate of occupancy – Where issue of certificate of occupancy required certification from builder that building work performed in accordance with head contract – Where adjudicator appointed to determine disputed payment claim – Where adjudicator determined provisions of subcontract ineffective because pay when paid provisions – Whether adjudicator's determination involved error of law – Whether adjudicator's determination should be quashed.

ADMINISTRATIVE LAW – Judicial review – Availability of certiorari – Error of law on face of record – Whether Building and Construction Industry Security of Payment Act 2009 (SA) ousts jurisdiction of Supreme Court of South Australia to make order in nature of certiorari to quash adjudicator's determination for non-jurisdictional error of law on face of record.

WORDS AND PHRASES – "contingent or dependent on the operation of", "error of law on the face of the record", "order in the nature of certiorari", "pay when paid provision", "retention provisions".

Facts

Maxcon Constructions Pty Ltd (**"the Head Contractor"**) and Mr Vadasz (**"the Subcontractor"**) entered into a subcontract pursuant to which the Subcontractor was to design and construct piling for an apartment development.

The Subcontractor had to provide security by way of a cash retention of 5% of the contract sum. This security would be released when the Certificate of Occupancy (**CFO**) under the Development Act 1993 (SA) was issued.

The Head Contractor deducted retention amounts from the payment schedule. The Subcontractor disputed these deductions in an adjudication.

The adjudicator determined that the Head Contractor was not entitled to deduct the retention sum from the payment schedule and found that the retention regime amounted to 'pay when paid provisions' under the SOP Act.

The Head Contractor commenced proceedings to have the adjudicator's determination set aside on the basis that the adjudicator made an error of law in deciding that the relevant clauses were 'pay when paid' provisions.

Decision

The High Court unanimously dismissed the appeal finding that the adjudicator had not erred in law in determining that the retention provisions were 'pay when paid provisions' under the SOP Act.

The plurality (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) held that the adjudicator had been right to conclude that the provisions of the contract were "pay when paid" provisions because the due dates for payment of the retention sum were dependent on something unrelated to Mr Vadasz's performance, namely, the completion of the head contract, which in turn would have enabled a certificate of occupancy to be issued. Accordingly, there was no error of law, and no need to consider the other issues raised in the appeal.

Gageler and Edelman JJ delivered separate judgments. Both held that the South Australian *Security of Payment Act* did not allow for judicial review for non-jurisdictional error for precisely the same reasons as those expressed in *Probuild*. Finally, the error of law was not a jurisdictional error in any case because there was no suggestion that the authority to adjudicate was conditioned upon a requirement that the adjudicator correctly apply section 12 of the South Australian *Security of Payment Act*.

Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd [2018] NSWCA 33

Coram: Payne JA

NSW Court of Appeal

Date: 28 February 2018

PROCEDURE – release of funds paid into Court – Building and Construction Industry Security of Payment Act 1999 (NSW) – unsuccessful appeal to High Court of Australia – stay of recovery of progress payment on terms that progress payment be paid into Court – whether proceedings should be remitted to Equity Division or progress payment released to successful High Court respondent

Facts

The underlying facts of this case were set out in the summary relating to the decision *Probuild Constructions (Aust) Pty Ltd v Shade Systems Ltd* [2018] HCA 4.

On 23 December 2016, Probuild applied to the Supreme Court for a stay, pending the appeal to the High Court. In *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 3)* [2016] NSWCA 382, Basten JA found, on the evidence, that there was a significant risk that some, if not all of the money, may be dissipated absent an undertaking not to do so, and absent any restraining order on the part of this Court. His Honour held that some form of relief should be granted to Probuild if the subject matter of the litigation, which is the debt owing to Shade Systems, was to be preserved.

On 14 February 2018, the High Court dismissed Probuild's appeal. Accordingly, the restraint upon Shade Systems in the orders made by Basten JA was spent. The sum of $314,504.72 (plus any interest which has accrued), however, remains in the control of the Court.

On 15 February 2018, Shade Systems filed a notice of motion in the Supreme Court seeking orders that the sum of $314,504.72 paid into Court pursuant to Basten JA's orders be released to it. On 15 February 2018, Probuild filed a notice of motion seeking orders that the question of release of the funds paid into Court as a condition of the stay granted by Basten JA be remitted to the Equity Division or in the alternative a stay be granted.

Decision

His Honour accepted that he had a very wide discretion as to whether to grant a stay. It was accepted that there was a real risk that if the funds were released that Probuild may never be able to recover that money even if successful in the proceedings that had been set down to determine each parties contractual rights inter se.

Payne JA went on to find that the evidence discloses a properly articulated claim made by Probuild, supported by evidence. The evidence also discloses a properly articulated response filed by Shade Systems raising (at least two) important legal questions – the existence of a penalty and unconscionable conduct – and one complex question of fact and law – whether by its acts or omissions Probuild caused the failure to complete on time.

His Honour doubted that the discretion he was called upon to now exercise, to release funds paid into Court as a condition of a stay, after an unsuccessful appeal to the High Court, was governed by the same principles as the discretion to stay enforcement of a certificate issued under the *Security of Payments Act* until proceedings about the underlying contractual dispute were resolved.

In deciding against granting a stay and ordering for the release of funds, his Honour relied upon the observations made by the plurality in the High Court in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*, namely the object of the Act and the fact that the Act creates a statutory entitlement to such a payment regardless of whether the Contract makes provision for such payment.

In accepting McDougall J's proposition in *Veolia* that, where it is certain that the party in Probuild's position will suffer irreparable prejudice, it would be a proper exercise of the Court's discretion to grant a stay. It is also no doubt correct that the extent or certainty of the risk of prejudice must be closely examined in each case. His Honour found that, in the instant case, there was a significant risk that the money held by the Court may be dissipated if it is released to Shade Systems. His Honour found, however, that as a matter of policy in the commercial context in which the *Security for Payments Act* applies, that risk must be borne by Probuild.

His Honour was further persuaded to release the funds on the basis that if Shade Systems was not paid the progress claim to which the High Court found it was entitled to, there was a risk that Shade Systems would become insolvent.

The corollary of His Honour's judgment was that if Probuild succeeded in the litigation in the Equity Division, resulting in a finding that the progress payment that was excessive, a restitutionary order would no doubt be made. The risk that Shade Systems may become incapable of meeting such an order is a risk that ought to be, prima facie, assigned to Probuild.

***Trinco (NSW) Pty Ltd v Alpha A Group Pty Ltd* [2018] NSWSC 239**

Coram: McDougall J

Supreme Court of NSW

Date: 6 March 2018

BUILDING AND CONSTRUCTION – Building and Construction Security of Payment Act 1999 (NSW) – whether adjudication determination valid – whether payment claim made on or from a reference date – where subcontract was terminated – where subcontract did not provide for reference dates after termination – whether work was completed under the subcontract or under a separate and later subcontract – whether a payment claim comprising work under two construction contracts is valid – adjudication determination quashed

Facts

Trinco (NSW) Pty Ltd (**Trinco**) and Alpha A Group Pty Ltd (**Alpha**) disputed a determination made by an adjudicator under the SOP Act. The nub of the issue between the parties was whether a payment claim which was served by Alpha was made 'on or from a reference date' as mandated by the SOP Act.

On 6 March 2017, Trinco, the head contractor, and Alpha, the subcontractor, entered a written subcontract for Alpha to perform tiling and silicone work (**"the Subcontract"**). The Subcontract was a 'construction contract' as that term is defined in the SOP Act. The Subcontract stipulated that progress claims were to be made on the 25th day of each month. However, the Subcontract did not provide for reference dates to accrue after termination.

Between 6 June to 8 June 2017 Trinco and Alpha exchanged emails. The parties appeared to agree on 7 June 2017 to terminate the Subcontract; which Trinco 'rejected' on 8 June 2017 but sought to alter Alpha's scope of works without changing any other part of the Subcontract. Alpha continued work between 8 June and 11 August 2017.

Alpha served three progress claims during the course of their engagement with Trinco:

- The first progress claim was dated 25 May 2017 and claimed $12,350.
- The second progress claim was dated 26 June 2017 and claimed an unknown amount.
- The third progress claim was dated 7 September 2017 and was the subject of the adjudication.
    - Mr Alizada of Alpha agreed the sum of $65,875 in the third progress claim was the total amount Alpha claimed *'for work under the Written Subcontract'*.
    - The two remaining amounts claimed under the third progress claim were $120,697.50 for lost profit (which was later withdrawn) and $27,511 for *'extra work'*, for work *'performed by Alpha after 7 June 2017"*

The adjudication

The adjudicator determined, despite the email of 7 June 2017, the work valued at $65,875 claimed in the third progress claim was done pursuant to the Subcontract. The adjudicator found that the claim for extra work was not made out.

Decision

The Court overturned the adjudicator's decision in relation to the third progress claim as there was no available reference date for the amount of $65,875. This made the third progress claim invalid and the adjudicator did not have the jurisdiction to determine the adjudication.

McDougall J found the legal effect of the email exchange between 6 and 8 June was that, on 7 June 2017 there was a mutually agreed termination of the Subcontract and, the email of 8 June 2017 was an offer by Trinco to engage Alpha to perform the work specified in the relevant email on the same terms.

Therefore, Alpha's conduct in returning to the site and performing the works specified in the email was an acceptance of the offer, and thus a new subcontract (**"New Subcontract"**) arose. Accordingly, McDougall J found that the work done by Alpha prior to 7 June 2017 was performed pursuant to the Subcontract and work done from 8 June 2017 pursuant to the New Subcontract.

Was there a reference date?

The Subcontract had no provision for reference dates to accrue after its termination. Therefore, the termination which occurred on 7 June 2017 discharged both Alpha and Trinco from further performance of the Subcontract. It also limited Alpha's rights under the Subcontract to those accrued at the date of termination.

The New Subcontract did make provision for reference dates: reference dates arose on 25 June, 25 July and 25 August 2017. The 25 June reference date could support the second progress claim and the 25 August reference date could be used to support the third progress claim which was dated 7 September 2017, but only for work performed under the New Subcontract.

McDougall J held found the work which was claimed pursuant to the third progress claim was made up of two elements:

- The first was work done under the Subcontract prior to 7 June 2017, which comprised the work claimed at $65,875. That was allowed by the adjudicator.
- The second element was work done under the New Subcontract after 7 June 2017, which comprised the 'extra work' valued at $25,711. That was not allowed by the adjudicator.

McDougall J cited *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 for the principle that service of a valid payment claim is an essential requirement for the existence of an adjudicator's determination.

His Honour found, to the extent the third progress claim was made under the Subcontract, there was no available reference date to support it as the provision for reference dates did not survive termination.

To the extent the third progress claim was made under the New Subcontract, his Honour found there were available reference dates, but the work in question was not performed under the New Subcontract. The absence of a reference date under the Subcontract was fatal to the validity of the third progress claim being considered a payment claim.

Primelime (NSW) Pty Ltd v B.A.E.C. Contracting Pty Ltd [2017] NSWSC 372

Coram: McDougall J

Supreme Court of NSW

Date: 22 March 2018

BUILDING AND CONSTRUCTION – Building and Construction Security of Payment Act 1999 (NSW) – whether adjudication determination valid – whether construction contract existed between the parties to the adjudication application – whether payment claim made on or from a reference date – where contract was terminated – where contract did not provide for reference dates after termination – whether work performed under a subsequent, fresh contract – adjudication determination quashed

Facts

On 9 May 2016, B.A.E.C. emailed Primelime with an email which attached a schedule of rates for the requested works (**"the May email"**). The email did not specify from which B.A.E.C. company (B.A.E.C. Contracting or B.A.E.C. Electrical) was sent, but the attachment indicated the email was sent from B.A.E.C. Electrical.

On 12 July 2016, B.A.E.C. sent another email to Primelime which again did not specify which B.A.E.C. company sent the email. The emails sought to adjust a portion of the rates previously issued (**"the July email"**). The May and July emails together formed the original contract (**"the Contract"**).

B.A.E.C. commenced work on 14 July 2016 under an agreement to issue payment claims every 14 days and that payment was to follow 14 days later. On 22 August 2016, B.A.E.C. Electrical prepared site drawings to assist in the performance of the works. All invoices were issued by B.A.E.C. Contracting.

The parties agreed that on or around 20 January 2017 the Contract was terminated, but did not agreed as to how such termination occurred.

- Primelime claimed B.A.E.C. repudiated the Contract that repudiation was accepted by Primelime.
- B.A.E.C. Contracting claimed the termination was by agreement and referred to a letter it sent to Primelime on 23 January 2017 confirming termination while reinforcing their right to receive payment for works completed prior to the date of demobilisation.

An adjudicator made an adjudication determination under the SOP Act in favour of B.A.E.C. Contracting. Primelime challenged that determination on the basis the adjudicator lacked jurisdiction given B.A.E.C. Contracting was not a party to the Contract and there was no reference date following the termination of the Contract.

Decision

The court allowed the appeal as the adjudicator did not have jurisdiction due to there being no available reference date following the termination of the Contract.

The court thought the better view was B.A.E.C. Electrical, rather than B.A.E.C. Contracting, was the party to the Contract because the schedule of rates accompanying the May email identified B.A.E.C. Electrical. This was notwithstanding the fact invoices were issued by B.A.E.C Contracting, and Primeline's director had made a statutory declaration which stated that he entered into a verbal agreement with B.A.E.C Contracting.

The court found there was nothing which suggested that the reference date in the Contract survived termination. Therefore, applying *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52 the court held there was no statutory right to make a payment claim on or after 20 January 2017.

McDougall J also dismissed B.A.E.C. Contracting's argument a new contract was created between Primeline and B.A.E.C. Contracting based on the 23 January 2017 where B.A.E.C. Contracting purported to retain the right to payment. His Honour noted this letter only conveyed the termination between the parties and B.A.E.C. Contracting's entitlement to payment for works completed; it did not suggest the work was completed under a contract other than the original contract.

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

Coram: Stevenson J

Supreme Court of NSW

Date: 5 April 2018

CONTRACTS – Rectification – Intention – Common intention – where contract comprised formal instrument and additional conditions – where special conditions contained clause purporting to replace clause in formal instrument – where clause in formal instrument was said to be "non-negotiable" prior to agreement – whether contract should be rectified by deleting clause in special condition

BUILDING AND CONSTRUCTION – CORPORATIONS – where subcontractor wound up after obtaining adjudication determination under Building and Construction Industry Security of Payment Act 1999 (NSW) – whether Building and Construction Industry Security of Payment Act remains available to subcontractor – whether subcontractor remains a "claimant" after being wound up – whether decision of Court of Appeal of Victoria on this question is plainly wrong – effect of s 553C of the Corporations Act 2001 (Cth) on subcontractor's rights – whether there should be a stay of any judgment obtained by subcontractor based on an adjudication certificate issued under the Building and Construction Industry Security of Payment Act pending the taking of accounts under s 553C of the Corporations Act

Facts

Seymour Whyte Constructions Pty Ltd (**"Seymour Whyte"**) was a contract who entered a contract with Ostwald Bros Pty Ltd (**"Ostwald"**) who was a subcontractor for Ostwlad to perform road work on the Pacific Highway. The contract contained inconsistent provisions about the time limit to pay after a payment claim was made.

The Subcontract Conditions provided payment was due 'within 30 days of the end of month of claim', while the Special Conditions purported to displace this and provided payment was required within '15 Business Days'.

Seymour Whyte terminated the contract and Ostwald was successful in obtaining an adjudication determination but Seymour Whyte entered voluntary administration and then liquidation. Seymour White commenced an action to obtain a declaration the adjudication determination was void and a stay of judgment from the filing of an adjudication certificate.

The court was saddled with determining whether the contract should be rectified to remove

the inconsistent clause in the Special Conditions; whether Ostwald's adjudication application was made in time; whether Ostwald lost its entitlement as a claimant by dint of Seymour Whyte's liquidation and whether Ostwald's recovery should otherwise be stayed because Ostwald was in liquidation.

Decision

Stevenson J ordered the contract be rectified to the effect that payments were due within 30 days of the end of the month of claim. His Honour made that order as it reflected the actual and common intention of the parties which was ascertained by the pre-contract negotiations between Seymour Whyte and Ostwald. Accordingly, Ostwald's adjudication application was made within time.

His Honour then found that Ostwald therefore remained as a ‘claimant’ pursuant to Part 3 of the SOP Act – stating that *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 was ‘plainly wrong’.

His Honour ordered that all recovery proceedings against Seymour Whyte be stayed until the procedure set out in s 553Cof the *Corporations Act 2001* (Cth) be undertaken.

This means, where a contractor goes into liquidation after receiving an adjudication decision, but before filing the adjudication certificate for enforcement, they remain a 'claimant' under Part 3 of the Act. Any recovery proceedings will nonetheless be stayed under the mandatory set off procedure in the *Corporations Act 2001* (Cth).

Laing O'Rourke Australia Construction Pty Ltd v Monford Group Pty Ltd [2018] NSWSC 491

Coram: Stevenson J

Supreme Court of NSW

Date: 20 April 2018

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payments Act 1999 (NSW) – adjudication determination – whether adjudicator failed to perform statutory function – whether adjudicator failed to determine for himself the construction work that had been carried out whether it constituted a variation and its value

Facts

Laing O'Rourke Australia Construction Pty Ltd (**'the Plaintiff'**) contracted with Monford Group Pty Ltd (**'the Defendant'**) as a subcontractor to perform work on the Transport Interchange Facility Project at Wickham.

A payment claim was served by the Plaintiff on 22 September 2017 for the sum of $3,476,977.33 (**'the Payment Claim'**). The Defendant served a payment schedule on 6 October 2017 and did not propose to make any payment to the Plaintiff pursuant to the Payment Claim.

The Plaintiff sought an adjudication for $2,724,675.05 in relation to the Payment Claim on 20 October 2017 for contract works and variation. On 28 November 2017 an adjudication was made and found the Plaintiff was entitled to a progress payment of $1,173,056.24.

This adjudication was challenged by the Defendant on the basis that the adjudicator failed to perform their statutory function in making an adjudication relating to variations for the value of $590,288.97 without considering the merits of the Defendant's claims.

Decision

Stevenson J held that the adjudication determination was void on the basis that the adjudication determination without jurisdiction because the adjudicator failed to consider the merits of the Defendant's claim. His Honour found that the adjudicator must not simply award the amount of the claim without addressing the claim's merits; the adjudicator has a duty to consider the merits of a claim and form a view as to what is payable.

Of particular relevance in this case, was the adjudicator's statement that his conclusions we relating to the relevant claimed variations to be *'based on the above.*' His Honour noted those words *"should be taken to mean, in relation to each variation considered by the adjudicator, the reasons set forth in the immediately preceding paragraphs concerning that particular variation."*

However, nowhere in the earlier parts of the adjudicator's determination did the adjudicator demonstrate that he had come to a view as to whether the claimant had carried out the work, the value of that work or whether the work that was completed constituted a variation to the contract.

Brefni Pty Ltd v Specific Industries Pty Ltd [2018] NSWSC 578

Coram: McDougall J

Supreme Court of NSW

Date: 27 April 2018

BUILDING AND CONSTRUCTION – Building and Construction Security of Payment Act 1999 (NSW) – whether adjudication determination valid – whether adjudicator erred in considering revised payment schedule – whether adjudicator erred in not having regard to adjudication response – no error disclosed in adjudicator's approach – summons dismissed.

COSTS – Calderbank letters – compromise offered as to costs only – where no evidentiary support for plaintiff's case – indemnity costs ordered – where first defendant represented by senior and junior counsel – such costs limited to costs of competent junior counsel.

Facts

Brefni Pty Ltd (**'the Contractor'**) executed a subcontract with Specific Industries Pty Ltd (**'the Subcontractor'**) pursuant to which the Subcontractor agreed to supply and install of material for a construction project. The Subcontractor made a payment claim which was subsequently responded to with two payment schedules by the Contractor.

The Contractor served two payment schedules in response to a payment claim made by the Subcontractor. In the adjudication, the Contractor neglected to lodge a response to the adjudication application served by the Subcontractor within the time allowed for in the SOP Act. Therefore, the adjudicator was constrained in considering the Contractor's response.

The Contractor commenced proceedings to set aside the adjudicator's determination, arguing that the adjudicator erred by considering the revised payment schedule instead of the first payment schedule served on the Subcontractor. The Contractor also claimed it was misled by a representation made by the Subcontractor into thinking the adjudication application had not been served until four days after the stated date of service.

The Subcontractor served two Calderbank offers after proceedings were commenced. The Subcontractor offered to settle the case on the basis that the adjudicated amount be paid within seven days and the proceedings dismissed with no order as to costs.

Decision

McDougall J found no evidence that the Contractor's explanation for its delayed response to Subcontractor's adjudication application. His Honour found the Contractor's complaint about the adjudicator consideration of the revised payment schedule was unfounded.

McDougall J found the Contractor should have reconsidered its case in light of its receipt of the Subcontractor's Calderbank offers. In relation to the fact the Subcontractor had retained both senior and junior counsel, the court found costs should be payable on an indemnity basis by the Contractor, but in this case senior counsel ought not have been briefed. The court found it *'was a case that could and should have been conducted by competent junior counsel*'. On that basis therefore his Honour ordered that indemnity costs awarded were not to include the costs of senior counsel nor the costs of two counsel. What was allowed were the reasonable costs of briefing junior counsel, to be assessed on the indemnity basis.

Central Projects Pty Ltd v Davidson [2018] NSWSC 523

Coram: Ball J

Supreme Court of NSW

Date: 30 April 2018

BUILDING AND CONSTRUCTION – Progress payments – Effect of omission of information from a supporting statement under *Building and Construction Industry Security of Payment Act 1999* (NSW) s 13(9) – Effect of failure to serve a supporting statement under Building and Construction Industry Security of Payment Act 1999 (NSW) s 13(7)

Facts

Stephen Davidson (**'the Developer'**) contracted with Central Projects Pty Ltd (**'the Contractor'**) for the purpose of building a mixed-use development in Bondi (**'the Contract'**).

On 5 January 2018, during a period when the Developer had suspended works, the Contractor served a progress claim with a supporting document (**'the Payment Claim'**). The supporting document (**'the Supporting Statement'**) contained certain errors, including by:

- Inserting the name of the Developer and not the relevant subcontractor in the Supporting Statement in an area of the Supporting Statement which was directed to identifying the contract with a relevant subcontractor; and
- Failing to list in the subcontractors schedule the subcontractors who supplied goods to the Contractor during the time period referred to in the Payment Claim.

The Developer did not serve a payment schedule in response to the Payment Claim, and the Contractor commenced proceedings seeking judgment under s 15 of the SOP Act.

Decision

Ball J held that the Developer was liable to pay the full amount of the Payment Claim along with interest and costs, because the Supporting Statement was a supporting statement within the meaning of s 13(9) of the SOP Act.

His Honour considered whether the Supporting Statement was a valid supporting statement as it would come within the meaning of supporting statement in s13(9) of the SOP Act. In doing this, Ball J found that for a supporting statement to be valid for the purposes of the SOP Act:

- it must be in the prescribed form; and
- it must contain a declaration required by s 13(9) of the SOP Act, which is to the effect that all subcontractors, if any, have been paid all amounts that have become due and payable in relation to the construction work concerned.

His Honour also surmised that, if it is implicit in s 13(7) of the SOP Act that a supporting statement must be accurate and complete, s 13(8) of the SOP Act (which imposes a penalty for knowing the statement is false or misleading in a material particular) would have no work to do. Therefore his Honour found there is nothing in s 13(9) of the SOP Act that requires a supporting statement to list all of the subcontractors and accordingly the Supporting Statement was valid.

Although it was not necessary for his Honour to determine whether the Payment Claim was validly served on the Developer, Ball J offered some comments. His Honour stated that there has not yet been any authority on the consequences of a supporting statement being invalid the Court would have concluded the failure for a payment claim to be served with a valid supporting statement will not invalidate the payment claim.

However, his Honour did note that was in opposition to the authority of *Kitchen Xchange v Formacon Building Services* [2014] NSWSC 1602which provides that a payment claim will not be validly served if is not accompanied by a supporting statement. Accordingly, Ball J did not provide a final view on this issue.

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

Coram: Basten, Meagher JA and Barrett AJA

NSW Court of Appeal

Date: 21 May 2018

BUILDING AND CONSTRUCTION – adjudication of payment claim – review of adjudicator's decision –content of the reasons to be included in determination – where adjudicator concluded that contractual condition precedent to extension of time was not legitimate or workable because it depended on something happening under another contract – whether the determination failed to include the reasons for the determination – whether the adjudicator departed from the statutory function by so concluding

Facts

On 26 February 2018, Fulton Hogan Construction Pty Ltd (**'Fulton Hogan'**), made an application to the NSW Supreme Court seeking a declaration to set aside an adjudication determination for the sum of $8,189,348.54 which was made in favour of Cockram Construction Ltd ('**Cockram'**), a sub-contractor.

The adjudicator determined that a particular clause in the subcontract was an invalid condition precedent to Cockram's entitlement to an extension of time under the subcontract. Accordingly, the adjudicator determined Fulton Hogan's claim for liquidated damages as set-off to the payment claim failed. The relevant condition precedent was that Fulton Hogan 'received an equivalent extension of time' under its head contract with Transport for NSW and was rejected by the adjudicator on the basis of the pay when paid prohibition in the SOP Act.

At first instance, Ball J concurred with the submissions of Fulton Hogan that the adjudicator's rejection of the set-off claim was void on the basis that the adjudicator had failed to perform her statutory function by refusing to apply what she considered to be the correct construction of the condition precedent clause because she found that it was not 'legitimate'.

Cockram argued the condition precedent was void due to s 12 of the SOP Act. Ball J found the adjudicator did not refer to s 12 and the adjudicator's reasons were speculation. This led his Honour to find the adjudicator fell into jurisdictional error by not complying with s 22(3)(b) of the SOP Act.

Decision on Appeal

On appeal, the Court of Appeal reinstated the adjudication determination and dismissed the first instance decision.

Meagher JA and Barrett AJA joined, held:

- s 22(3)(b) does not require reasons to be adequate according to any objective criterion – the fact the adjudicator based her finding on the premise that the condition precedent depended upon something happening under a different contract and that the clause was not 'legitimate' and 'workable' was sufficient; and
- the descriptions the adjudicator gave the condition precedent were capable of amounting to reasons and were deemed to be consideration of required matters. Accordingly, the adjudicator had not failed to comply with s 22(2) of the SOP Act; regardless of whether the determination was legally correct.

Separately, Basten JA held:

- dismissed Fulton Hogan's primary challenge as placing a 'gloss' on s 22(3) of the SOP Act and being 'misconceived' because it required speculation as to the adjudicator's true reasoning process which is irrelevant to the question of whether the adjudication determination provided constituted written reasons; and
- found that the adjudicator had in fact considered the condition precedent, complying with section 22(2) of the SOP Act. Fulton Hogan's submission required an 'illegitimate assumption' that the adjudication determination was legally incorrect, thereby allowing the conclusion to be made that her reasons were legally inadequate to justify the decision.

SRG Civil Pty Ltd v Brolton Group Pty Ltd [2018] NSWSC 618

Coram: N Adams J

Supreme Court of NSW

Date: 28 May 2018

CIVIL PROCEDURE – Default judgment – Payment by instalment order granted by registrar – Objection – Whether instalment order should remain on foot – Whether full satisfaction of judgment debt more likely through instalment payments

Facts

The defendant, Brolton, contracted with Hanson Construction Materials Pty Limited. (**'Hanson'**) to upgrade Hanson's processing plant located at Bass Point. Brolton subsequently subcontracted part of the construction work to SRG.

On 23 September 2017 SRG served a progress claim, claiming an entitlement to $1,979,797.88 primarily for variations and delay costs. Brolton responded by serving a payment on 13 October 2017 which scheduled to pay an amount of $221,817.05.

Brolton's payment schedule was not served by the statutory deadline, which was 6 October 2017, but it was served within time according to the contract between Brolton and SRG. Accordingly, SRG became entitled to payment of $1,979,797.88 which it sought to enforce by obtaining a judgement for that amount (plus interest). Brolton managed to obtain an order that this amount be paid in monthly instalments of $150,000.00. SRG sought to have this order set aside.

In response, Brolton served evidence that it did not have the financial means to pay the judgment debt in full. SRG served evidence that it would suffer prejudice to its financial position and its ability to grow its business if Brolton did not pay the full judgement amount prior to the end of the financial year.

SRG argued that Brolton had the ability to make a claim under its head contract with Hanson for the amount payable to SRG. This made Hanson, in SRG's submission an "external source". In response, Brolton noted that under its contract with Hanson it was limited to a guaranteed maximum price of $85 million for its work; it was nearing the budged allocated to SRG's part of the work and the contract provided that Hanson was not liable to reimburse Brolton for amounts that were not "properly due" to subcontractors; and Hanson indicated it would not pay the amount claimed by SRG.

Decision

N Adams J noted the relevant principles as set out in in *Hellier Capital Pty Limited v. Albarran* [2009] NSWSC 403, which are:

- whether the judgment debtor has the ability to obtain funds to satisfy the judgment (including whether funds can be drawn from an external source);
- whether the proposed instalments would see the debt paid within a reasonable time;
- the necessary expenses and other liabilities of the debtor;
- whether the proposed instalment order is consistent with the public interest;

- whether unreasonable hardship would be imposed on the judgment creditor as a consequence of the debt being paid in instalments; and
- whether the debtor's financial means are so deficient that the instalments would not be met and the proposed order would thus be futile.

Her Honour was satisfied that Brolton was unable to successfully obtain funds from Hanson given the terms of the contract between Brolton and Hanson and the fact Hanson was not disposed to paying the amount claimed by SRG. Accordingly, Brolton did not have the ability to obtain funds to satisfy the judgement in full.

Her Honour also considered that the prejudice to SRG in not obtaining the funds claimed pursuant to its payment claim before the end of the financial year was outweighed by Brolton's ability to pay the debt in full.

In determining whether the instalment order undermined the purpose of the SOP Act, her Honour determined that the proposed instalment plan was not inconsistent with the purposes of the act given the particular facts of this case. Accordingly, the instalment order was not inconsistent with the public interest.

Kurmond Homes Pty Ltd v Marsden [2018] NSWCATAP 23

Coram: Principal Member M Harrowell, and Senior Member K Rosser

NSW Civil and Administrative Tribunal Appeal Panel

Date: 28 May 2018

HOME BUILDING ACT - s 48MA, preferred outcome principle, relevant considerations.

FAIR TRADING ACT - s 79U - applicability in determination of claims under the Home Building Act - modifications required by Home Building Act - relevance of s 48MA of Home Building Act in application.

DISCRETION - Order making power under s 48O of Home Building Act - application of preferred outcome principle.

Facts

Kurmond Homes Pty Ltd (‘**the Builder’**) into a contract on 25 March 2011 with Marsden (**‘the Homeowner’**) for price of $296,500.00. The Builder commenced work on 21 July 2011 and practical completion was achieved around 22 June 2012. The parties disputed certain defects.

When the case was before the Tribunal, the Builder admitted works should have been completed in accordance with the method of rectification proposed by the homeowners’ expert. Notwithstanding this and the factors which pointed toward a work order being made, the Builder was ordered by the Tribunal to pay the homeowners the sum of $231,770.71.

The builder appealed the decision arguing that the Tribunal erred by making a money order rather than a work order on the basis that there were no factors that would impede a work order being made and the Tribunal should not have considered the builder's prior misconduct on unrelated matters. Alternatively, the Builder argued the evidence did not displace the principal in s 48MA of the *Home Building Act 1989* (‘the Act’) that rectification of defective work by the responsible party is the preferred outcome.

Decision

The Appeal Panel of the Tribunal dismissed the Builder's appeal. The Appeal Panel noted that pursuant to s 79U(2)(g) of the *Fair Trading Act 1987* (NSW) the Tribunal can consider the conduct of the parties in relation to similar transactions when making orders. Further, consumer protection focus of that act and the Act means the continual failures by a builder to comply with its contractual obligations are relevant in determining what form of orders should be made. The Appeal Panel noted the Builders’ conduct demonstrated a continuing attitude to not comply with its contract with the Homeowner

In relation to the issue of the 'preferred outcome' of a work order in s 48MA of the Act, the Appeal Panel noted that section does not mandate that a work order must be made in all cases; and s 48MA operates as a preference, not an absolute right.

AJ Gouros Investments Pty Ltd trading as Adelaide Concrete Polishing & Grinding Pty Ltd v Pongraz [2018] NSWCATAP 129

Coram: Principal Member M Harrowell, and Senior Member F Corsaro SC

NSW Civil and Administrative Tribunal Appeal Panel

Date: 28 May 2018

HOME BUILDING ACT – s 18D(1A) – residential building work – identity of the parties to contract – right of owners to claim for breach of statutory warranties as "non-contracting owners" against direct trade contractor or subcontractor to residential builder

Facts

The respondents, Ms Pongraz and Mr McAlpine (**'the Owners'**) owned a residential property which was built by Simonds Industries Pty Ltd (**'Simonds'**). AJ Gouros Investments Pty Ltd trading as Adelaide Concrete Polishing & Grinding (**'AJG'**), were contracted to polish an exposed concrete floor up to a 'mirror finish' (**'the Polishing Works'**).

Ms Pongraz was employed by Simonds as a sales assistant and the Simonds email logo and email signature to request a quotation for the Polishing Works from AJG. AJG responded to Ms Pongraz's email with a quotation addressed to 'Simonds Homes'. Ms Pongraz personally signed this quotation and returned it.

AJG then issued its terms and conditions for the supply of goods and services to Simonds which were signed by Mr Simonds on behalf of the company (**'the Agreement'**). Ultimately, the Polishing Works were paid for by the Owners.

The Owners subsequently commenced proceedings and claimed the Polishing Works were poorly finished and featured pitting. The Owners claimed that they had a contract with AJG for the Polishing Works and that AJG breached the statutory warranties in s 18B of the Act.

AJG disputed the Owners' claim on the basis that the Polishing Works were carried out properly, but substandard slab construction by others resulted in a poor quality finish; there was no contract between AJG and the Owners in respect of the Polishing Works and therefore the Owners lacked standing to sue.

At first instance it was found that the Owners had the benefit of the warranties under s 18B of the Act as s 18D(1A) extends the warranties to a 'non-contracting owner'. Therefore, the did not make any specific finding as to the identity of the parties to the contract for the Polishing Works and found that AJG had breached the implied warranties.

Decision

The Appeal Panel held that there was no contract between AJG and the Owners for the Polishing Work, but there was a contract between AJG and Simonds. The fact that accompanying documents and Simonds' execution of the Agreement meant the Appeal Panel concluded that there was a contract between AJG and Simonds. The signing by Ms Pongraz of the quote which was not addressed to her was, at its highest, an offer to engage AJG on the same terms as those offered to Simonds and there was no evidence that AJG had made a general offer capable of acceptance by the Owners or that AJG accepted the change of the contracting party to the Owners.

In relation to the issue of whether the Owners non-contracting parties for the purposes of section 18D(1A), the Appeal Panel decided that the Owners fell within the definition non-

contracting owners. Accordingly, the Owners could enforce the section 18B warranties against AJG. The Appeal Panel based this conclusion on the fact that the only contract to perform the Polishing Works was between Simonds and AJG, to which the Owners were not a party.

Pinnacle Construction Group Pty Ltd v Dimension Joinery & Interiors Pty Ltd [2018] NSWSC 894

Coram: Stevenson J

Supreme Court of NSW

Date: 15 June 2018

BUILDING AND CONSTRUCTION – whether adjudication determination under *Building and Construction Industry Security of Payment Act 1999* should be quashed – whether payment claim valid – whether reference date available to support payment claim – whether adjudicator denied procedural fairness to respondent to payment claim

Facts

On 17 January 2017 Pinnacle Construction Group Pty Ltd **('Pinnacle')** who was the head contractor and Dimension Joinery & Interiors Pty Ltd **('Dimension')** who was a subcontractor, entered a contract relating to installation of joinery in a development in Dee Why.

It was a term of the contract that Dimension was to serve on Pinnacle a payment claim on the 15th day of each month with Dimension's valuation of the work it had completed in accordance with the contract. The contract also provided that a payment of money by Pinnacle would not be an admission of satisfactory completion and a maximum of 80% of the subcontract amount will be paid by Pinnacle until all certification is provided in writing by Pinnacle and their nominated Private Certifying Authority.

On 12 December 2017 Dimension served on Pinnacle a payment claim which claimed $144,630.80 with a reference date of 15 November 2017. That figure was arrived at by Dimension totalling previous invoices date 20 February, 18 March, 18 April, 18 May and 25 May 2017 less payments made by Pinnacle to Dimension. Pinnacle responded on 3 January 2018 by serving a payment schedule scheduling a proposed payment of "$Nil".

Following the service of an adjudication application and response, an adjudicator made a determination on 5 February 2018 in favour of Dimension. Pinnacle challenged that determination on the following basis:

- no reference date is available to support the payment claim;
- the adjudicator denied Pinnacle procedural fairness by making unbidden and unheralded "pejorative findings" concerning Pinnacle's conduct; and
- those pejorative findings were not based on rational or reasonable reasoning or on logical connection between the evidence and the finding.

Decision

In relation to the first issue, Stevenson J found against Pinnacle. His Honour pointed to the fact that the payment claim had a reference date of 15 November 2017 and Dimension did work on site between 31 October 2017 and 3 November 2017 and accordingly his Honour did not depart from the clear words of the contract. His Honour did not think the fact the work may have been for defect rectification precluded a payment claim from being served.

In relation to whether Pinnacle was denied procedural fairness, Stevenson J identified the following complaints made by Pinnacle:

- The adjudicator made adverse findings about Pinnacle without giving it an opportunity to be heard and those findings went beyond those sought by Dimension in its adjudication application; and
- Those findings were material because Pinnacle could have made submissions or adduced evidence that might have caused the adjudicator to come a different view, and it was reasonable to apprehend that the impugned findings affected the manner in which the adjudicator dealt with the matter.

In relation to the impugned finding that 'Pinnacle "plucked numbers out of the air in an attempt to substantiate a position that it is not liable to make further payment" his Honour found no procedural unfairness. His Honour referred to the fact the adjudicator merely accepted the submissions of Dimension that Pinnacle was unable to substantiate certain contentions relating to the value of work – the statement did not amount to an imputation of impropriety to Pinnacle.

In relation to the adjudicator's finding that Pinnacle was 'content to hold onto payments for its own cash flow purposes' following Dimension's completion of the works and that 'Pinnacle had to entice Dimension to return to complete works on defects by making further payments', his Honour determined that these findings by the adjudicator were an acceptance of uncontradicted evidence provided by Dimension of emails sent on behalf of Pinnacle. Accordingly, it was not considered that a denial of procedural fairness arose in those cases.

In relation to a finding that 'after the work was completed … Pinnacle suddenly expressed concern about the extent of the work to be completed' His Honour found that the adjudicator was merely accepting the submission of Dimension that Pinnacle's concerns were merely an attempt to recast previous communications regarding completion and ignore Dimension's confirmation that all was completed.

His Honour also rejected the submission that the adjudicator's findings were irrational and unreasonable on the basis that the fast nature of adjudications means rights are determined informally, summarily and quickly and that latitude…and that there was no irrationality or failure to disclose a logical connection between evidence and findings in this case.

Harris v Morabito Holdings [2018] NSWSC 912

Coram: McDougall J

Supreme Court of NSW

Date: 19 June 2018

BUILDING AND CONSTRUCTION – adoption of referee's report – discretion to adopt to be exercised judicially and with regard to the purpose for which discretion to refer is given – where report is factually thorough and reaches conclusions open on the evidence – where most errors complained of involve an attempt to reargue on the merits – exception regarding conclusions on delay and variations where there was a denial of natural justice – referee's report adopted in whole with the exception of conclusions regarding delay and variations.

CONTRACT – interpretation of building contract –distinction between the interpretation of the terms of a contract and standard or extent of performance required to satisfy those terms.

Facts

Harris contracted with Morabito Holdings **('Morabito')** to undertake residential building work on a waterfront home. The contract expressly specified standard statutory warranties implied into contract for residential building work. The dispute between Harris and Marabito related to defects.

A special referee was tasked with determining the extent and value of the defects with the referee determining that Morabito owed Harris the sum of $328,000. Harris opposed the adoption of the special referee's report and argued that the special referee had erred in applying the ordinary standard of workmanship, as contemplated by the warranties, to the building work. Harris argued a higher standard of workmanship should have been applied to consider "matters of context and background known to the parties before the contract was concluded".

Morabito opposed this submission on the basis that Harris did not nominate a higher standard of workmanship, although that option was open to Harris.

Decision

McDougall J adopted the findings of the special referee and held that the special referee's report correctly identified the relevant warranties and accepted Morabito's submission that Harris neglected to apply a different workmanship standard.

His Honour also found that the subjective non-contractual expectations and pre-contractual statements of the parties were not relevant to the contractual obligations and Harris' case was opposed to the usual objective approach to contract construction.

***Goodwin Street Developments Pty Ltd as trustee for Jesmond Unit Trust v DSD Builders Pty Ltd* [2018] NSWSC 984**

Coram: Stevenson J

Supreme Court of NSW

Date: 26 June 2018

BUILDING AND CONSTRUCTION – challenge to adjudicator's determination under the Building and Construction Industry Security of Payment Act 1999 (NSW) – whether plaintiff should pay into court the amount of the determination pending determination of the challenge – where plaintiff a trustee of unit trust – where plaintiff has insufficient cash funds to pay amount of determination into court – where no evidence of financial position of unit holders – whether as a matter of discretion court should not require the amount of determination to be paid into court

Facts

Goodwin Street Developments Pty Ltd **('Goodwin')** sought to quash a determination made in favour of DSD Builders Pty Ltd **('DSD')** for the amount of $265,510.11. The issue before the Court related to whether Goodwin should pay into court the adjudicated amount pending resolution of the dispute.

Goodwin opposed the payment of funds into court on the basis that Goodwin only had assets of $33,000.00 in its bank account.

Decision

Stevenson J noted that Goodwin was the trustee of a unit trust. His Honour further noted that there was no evidence before the court about the financial position of the trust's unitholders nor was there evidence before the court of why those unitholders could not advance funds to Goodwin to comply with the usual obligation to pay money into court.

Accordingly, Stevenson J did not discharge Goodwin of its obligation to pay an amount equal to the adjudication amount into court and set the matter down for hearing.