BUILDING AND CONSTRUCTION CASES 2023

A REVIEW OF BUILDING AND CONSTRUCTION CASES AT FIRST INSTANCE AND ON APPEAL DECIDED IN NEW SOUTH WALES FROM JANUARY TO DECEMBER 2023

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A-Civil Aust Pty Ltd v Meso Solutions Pty Ltd [2023] NSWSC 372

Coram: Richmond J
Court: Supreme Court of New South Wales
Date: 17 April 2023

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) ("the Act") – adjudication determination – whether s 17(2) notice valid – whether clause requiring certain documents to be attached to payment claim in contract is void pursuant to s 34 of the Act

CONSUMER LAW — misleading or deceptive conduct — whether representations were made

Facts

A-Civil Aust Pty Ltd ("**A-Civil**") challenged the validity of a payment claim issued by Meso Solutions Pty Ltd ("**Meso**") under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "**SOP Act**") on 30 May 2022 (Claim 16), as well as the subsequent adjudication determination made on 12 August 2022 regarding that payment claim. A-Civil argued that Meso had made representations to A-Civil, that it could ignore Claim 16, that there was no need to respond to it with a payment schedule, and that Meso would not proceed to adjudication. A-Civil claimed that by pursuing adjudication contrary to these representations, Meso engaged in misleading and deceptive conduct, violating section 18 of the Australian Consumer Law ("**ACL**"), or alternatively, in unconscionable conduct under sections 20 and 21 of the ACL. As a result, A-Civil sought injunctive relief or damages under the ACL.

A-Civil also presented an alternative argument, asserting that the adjudication determination was affected by jurisdictional error. Specifically, A-Civil contended that the amounts claimed in Claim 16 were not yet due and payable under the construction contract at the time Meso issued the notice under section 17(2) of the SOP Act, rendering the determination invalid.

The background to the dispute involved a contract between A-Civil and Meso for sheet piling, anchoring, dewatering, and permanent basement wall works at a car park construction site in Parramatta. Although the formal contract was signed on 28 June 2021, the parties had reached an understanding regarding the work and pricing as early as December 2020, and Meso commenced work on 17 December 2020. The contract included a clause requiring specific documents to accompany payment claims, a requirement that became central to A-Civil's argument that the determination was invalid.

Meso issued nine payment claims before the contract was formalised and six more after the contract was signed, including Claim 16. A-Civil did not issue any payment schedules in response to these claims, and Meso did not pursue adjudication until Claim 16. A-Civil made partial payments to Meso but eventually ceased payments, leading to repeated attempts by Meso to follow up on the outstanding amounts. A-Civil argued that delays in its payments to Meso were largely due to delays in payments from Paynter Dixon Constructions Pty Ltd, the principal contractor for the project. The case ultimately revolved around whether the adjudication determination was valid and whether Meso's conduct in pursuing adjudication was misleading or unconscionable.

Decision

The court dismissed A-Civil's application challenging the adjudicator's decision, as well as their claim of misleading or deceptive conduct under the ACL. The court found that no relevant misrepresentations had been made by Meso.

Regarding the payment claim, the court held that while payment was made "under the construction contract," the date it became "due and payable" was governed by section 11(1B) of the SOP Act. The court determined that the failure to meet the contract's condition precedent did not strip the contractor of its right to payment under the Act.

The court therefore upheld the adjudicator's finding that the payment claim was valid, despite A-Civil's argument that the contract required 16 specific documents to accompany the claim, and agreed with the adjudicator that these provisions did not need to be complied with, and alternatively, the clause might be void under section 34.

A-Civil Aust Pty Ltd v Ceerose Pty Ltd [2023] NSWCA 144

Coram: Payne JA; Simpson AJA; Basten AJA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 29 June 2023

APPEALS – interlocutory appeal – leave to appeal – procedural order – notice to produce financial records – whether error demonstrated – whether issue of principle raised – purpose for which records sought not pursued – failure of judge to advert to lack of purpose – production otherwise not justified – practice of interlocutory stays likely to undermine statutory scheme

BUILDING and CONSTRUCTION – adjudication of payment claim – payment of amount of adjudicator's determination – injunction pending determination of contractual dispute – policy of *Building and Construction Industry Security of Payment Act 1999* (NSW) – risk of insolvency of claimant – onus of proof – production of financial records of claimant

Facts

The applicant, A-Civil Aust Pty Ltd ("**A-Civil**"), was a subcontractor engaged by Ceerose Pty Ltd ("**Ceerose**"), the respondent, for two separate development projects in Sydney. A-Civil served Ceerose with payment claims under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "**SOP Act**") on 25 and 30 May 2022 respectively, both of which were contested by Ceerose. Subsequent adjudications were conducted, leading to determinations that required Ceerose to pay significant sums to A-Civil. Ceerose challenged these determinations in the Technology and Construction List of the Supreme Court, alleging jurisdictional errors, and deposited the contested sums into the court.

On 20 March 2023, Justice Darke ruled that the determinations were partially affected by jurisdictional error, setting them aside in part on 20 April 2023. Ceerose sought a stay of payment to A-Civil pending the resolution of potential contract proceedings under section 32 of the SOP Act and the outcome of an appeal against Justice Darke's decision.

Amidst ongoing interlocutory disputes, Ceerose requested extensive financial documentation from A-Civil to assess its solvency, which A-Civil resisted. On 15 May 2023, the primary judge ordered A-Civil to produce comprehensive electronic financial records, subject to confidentiality measures. A-Civil sought leave to appeal this order, arguing that the production of such extensive documentation was unwarranted.

Decision

The Court of Appeal ultimately granted leave to appeal and allowed the appeal, setting aside the previous order that required A-Civil to produce its MYOB financial records to Ceerose.

The court's decision was based on several key principles. It emphasised that the SOP Act is designed to ensure that contractors receive progress payments without the risk of being unable to recover funds should they later be found to owe money back to the principal. This risk is borne by the principal, with only companies in liquidation excluded from the benefits of the SOP Act. While the court acknowledged its authority to stay payments or grant injunctions pending the resolution of related proceedings, it stressed that such powers must align with the statutory intent of the SOP Act.

The court further noted that the appeal was warranted due to the general importance of the principles at stake, particularly regarding the unusual nature of ordering a party not bearing the onus of proof to produce extensive financial records. The court found that the primary judge had erred by failing to consider that A-Civil did not rely on the documents in question, and therefore Ceerose was not entitled to probe A-Civil's solvency based on those documents. Additionally, the court declined to admit further evidence from Ceerose, stating that it would not have altered the outcome and that withholding evidence until the hearing is not condoned.

Upon re-exercising its discretion, the court concluded that no order should be made for the production of A-Civil’s complete financial records. Ceerose failed to demonstrate a real likelihood that it would be unable to recover any overpayment, and therefore did not justify the extensive document production sought.

Overall, the decision underscores the court's commitment to upholding the statutory purpose of the SOP Act while ensuring that requests for financial disclosure are justified and relevant to the case at hand.

Acciona Infrastructure Projects Australia Pty Ltd v EnerMech Pty Ltd [2023] NSWSC 1565

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 14 December 2023

BUILDING AND CONSTRUCTION – adjudication – judicial review – whether purported payment claim and adjudication determination under Building and Construction Industry Security of Payment Act 1999 (NSW) affected by jurisdictional error – where call on security by principal – where contractor procured unconditional bank guarantee – where purported payment claim and adjudication application by contractor took into account amount received by principal following call on security

BUILDING AND CONSTRUCTION – contract – whether provisions in contract concerning recourse to security and unpaid monies void by reason of s 34 of Building and Construction Industry Security of Payment Act 1999 (NSW) – where provisions authorised plaintiffs to have recourse to security and unpaid monies

CIVIL PROCEDURE – separate questions – determination of separate questions

Facts

The case involves a dispute between Acciona Infrastructure Projects Australia Pty Ltd, Samsung C&T Corporation, and Bouygues Construction Australia Pty Ltd (collectively referred to as "**Acciona**"), and EnerMech Pty Ltd ("**EnerMech**") regarding the construction of the WestConnex M4-M5 Link in Sydney. Acciona, as part of a joint venture, subcontracted EnerMech in June 2020 to perform electrical installation works under a contract valued at approximately $75.6 million. The contract required EnerMech to provide security, which was done via an unconditional undertaking from a bank amounting to $9,230,157.40.

EnerMech submitted two payment claims in 2022, which were disputed by Acciona. However, adjudications under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "**SOP Act**") both ruled in favour of EnerMech, and Acciona paid the determined amounts.

In May 2023, Acciona called on the security provided by EnerMech, obtaining the full security amount from the bank. Shortly thereafter, EnerMech issued a further payment claim ("**Payment Claim 29**") seeking an amount of $10,180,582.60, which included previously certified amounts, a small variation claim, and interest, adjusted to account for the security amount drawn by Acciona. Acciona contested this payment claim, arguing it was not a valid "payment claim" under the SOP Act, as it did not pertain to construction work or related services, but rather sought a credit for the security amount.

An adjudicator, however, ruled in favour of EnerMech, determining that Payment Claim 29 was valid under the SOP Act. Acciona then sought judicial review in the Supreme Court, arguing that the adjudicator's decision was made without jurisdiction because Payment Claim 29 did not constitute a proper payment claim under the SOP Act.

The case thus raises significant questions about the interpretation and application of the SOP Act, particularly concerning the validity of payment claims that involve adjustments related to security amounts rather than direct claims for construction work or services.

Decision

Justice Stevenson ruled in favour of Acciona, determining that EnerMech's Payment Claim 29 was not a valid "payment claim" under the SOP Act.

His Honour noted that while Payment Claim 29 included some items related to construction work, such as a variation claim and interest on a previous correction, these amounted to only $18,611.67, which was a minor portion (18%) of the total claimed amount. The majority of the claim was essentially for a credit equal to the security amount paid by HSBC to Acciona, not for construction work performed by EnerMech. Therefore, Payment Claim 29 did not meet the requirements of the SOP Act, which mandates that a payment claim must relate to construction work or related goods and services.

In reaching this conclusion, His Honour referred to the case of *Grocon (Belgrave St) Developer v Construction Profile* [2020] NSWSC 409, emphasising that the characterisation of a payment claim must be assessed in both substance and form. He found that, in substance, Payment Claim 29 was primarily a claim for recovering the security amount rather than a claim for construction work.

Furthermore, Stevenson J found that the adjudicator lacked jurisdiction not only because Payment Claim 29 was not valid under the SOP Act but also because the adjudicator could not determine their own jurisdiction. The adjudicator's authority is confined to the provisions of the SOP Act, which did not extend to claims for the recovery of security.

On the issue of whether the Contract was void under section 34 of the Act, which prohibits contractual provisions that exclude or modify the SOP Act, His Honour rejected EnerMech's argument. Acciona's call on the security did not modify or restrict the operation of the SOP Act. The SOP Act had been properly applied in relation to EnerMech's 2022 payment claims, and the contractual rights to call on the security were considered separate from the security of payment process.

Bhatt v YTO Construction Pty Ltd [2023] NSWCA 318

Coram: Mitchelmore JA; Kirk JA; Adamson JA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 15 December 2023

BUILDING AND CONSTRUCTION — adjudication — adjudication application — misleading deceptive conduct for purpose of s 18 of Australian Consumer Law — whether representations made by claimant to adjudicator in application is conduct in trade or commerce

Facts

YTO Construction Pty Ltd ("**YTO**") was the principal contractor for a commercial and residential development in Ashfield, Sydney. In July 2017, YTO subcontracted Innovative Civil Pty Ltd ("**Innovative**"), whose sole director was Mr Bhatt, to perform certain civil works, including the excavation and removal of organic material from the Ashfield site.

On 11 January 2018, Innovative issued a payment claim under section 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "**SOP Act**"). This claim included a variation amount of $490,000 (plus GST) for the removal of 70 loads of excavated general solid waste ("**GSW**") material, which was later revised to 66 loads, at a rate of $7,000 per load. Following a disputed payment schedule from YTO, Innovative lodged an adjudication application under section 17 of the SOP Act. On 22 February 2018, the adjudicator determined that YTO owed Innovative a total of $1,535,377.51 (inclusive of GST), including $462,000 (plus GST) for the removal of 66 loads of GSW.

YTO contested this decision and, on 28 March 2018, initiated proceedings in the Supreme Court seeking to set aside the adjudicator's determination, alleging fraud. On 10 August 2018, Justice Rein found that YTO had failed to establish fraud and was precluded from relying on certain closing submissions that deviated from their original claim. On 15 May 2019, the Court of Appeal partially upheld YTO's appeal, noting that Rein J had not addressed YTO's allegations regarding Innovative's misrepresentation about the number of GSW loads or whether Innovative knowingly

made false statements. The Court ordered Innovative to pay $399,000 (plus GST and interest) into the Court, but Innovative failed to comply and was placed into external administration on 14 October 2019.

Subsequently, on 24 May 2020, YTO commenced new proceedings in the District Court against Mr Bhatt. District Court judge, Russell SC, found that Mr Bhatt's representations to the adjudicator constituted misleading or deceptive conduct under section 18 of the Australian Consumer Law ("**ACL**") and that these representations influenced the adjudicator's decision. The Court awarded YTO damages of $306,763.10 (including interest).

This appeal raised two primary issues: whether the District Court judge erred in finding that Mr Bhatt's conduct was in trade or commerce under section 18 of the ACL, and whether YTO was barred from pursuing the claim in the District Court due to principles from *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45, abuse of process, or issue estoppel.

Mr Bhatt also contested the procedural fairness of the proceedings and the assessment of damages under the ACL.

Decision

The Court (Mitchelmore JA, Kirk JA, and Adamson JA agreeing) determined that the representations made to the adjudicator did not constitute conduct "in trade or commerce" as defined by section 18 of the ACL. Although the adjudication process is used to enforce payment entitlements under the SOP Act and is prevalent in the construction industry, not all conduct associated with this process is considered trading or commercial. The adjudicator's role is statutory and involves resolving disputes, not engaging in commercial transactions. Therefore, the representations made during the adjudication process were not inherently part of commercial activities or transactions. The Court referenced several cases to support this view, including *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 and *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9, among others.

Given the Court's conclusion on the primary issue, it was not necessary to address the second main issue concerning Anshun estoppel, abuse of process, and issue estoppel. The complexities raised by these issues during oral submissions and their lack of prior discussion meant the Court

did not need to address them further. Similarly, Grounds 7 and 8, related to procedural fairness and damages assessment, were also deemed unnecessary to resolve.

In summary, the appeal was allowed because the Court found that the representations made to the adjudicator did not fall within the scope of "conduct in trade or commerce." This case highlights the limitations of using misleading and deceptive conduct claims in contexts where the conduct in question occurs solely within adjudication processes rather than commercial transactions. For deliberate deceptions, pursuing an action for fraud might be a more suitable remedy to circumvent these issues.

Castle Constructions Pty Ltd v Napoli Excavations and Civil Pty Ltd [2023] NSWSC 348

Coram: Darke J
Court: Supreme Court of New South Wales
Date: 5 April 2023

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) ("the Act") – adjudication determination – whether adjudication determination is affected by jurisdictional error – whether the adjudicator failed to consider all submissions duly made – held that the adjudicator failed to consider a submission duly made in support of the payment schedule as required by s 22(2)(d) of the Act – held further that the failure was material – jurisdictional error established – declaration made that adjudication determination is void and of no effect

Facts

Castle Constructions Pty Ltd (the "**plaintiff**") filed a Summons on 15 December 2022, seeking a declaration that an adjudication determination made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "**SOP Act**") was void and of no effect. The adjudication determination (the "**Determination**"), which was served on 8 December 2022, directed the plaintiff to pay Napoli Excavations and Civil Pty Ltd (the "**first defendant**") the sum of $48,362.05 plus interest. The adjudicator, Mr Callum Campbell of Adjudicate Today Pty Ltd (the "**second defendant**"), had issued this determination.

Following the Determination, the plaintiff did not make the payment, leading to an order on 16 December 2022, restraining the first defendant from seeking an adjudication certificate. The plaintiff was ordered to pay $54,088.31 into Court, covering the adjudicated amount, interest, and adjudicator's fees. This injunction was extended until 3 February 2023.
On 3 February 2023, the Summons was set for hearing, and directions were issued for the plaintiff to file necessary documents. Although the second defendant had filed a submitting appearance, the first defendant did not enter an appearance. Service of the Summons and associated

documents on the first defendant was carried out via email to Mr Antonio Guerrera, the sole director of the first defendant. Although this email service did not constitute personal service, it was deemed sufficient. Mr Guerrera acknowledged receipt of the documents and was aware of the proceedings. No formal appearance was entered by the first defendant, and they did not obtain leave to participate in the proceedings.

The adjudication in question involved a payment claim from the first defendant dated 30 September 2022. This claim was the fourth made following the cessation of work under the relevant contract in May 2022. The third claim, identical in amount, was made on 31 August 2022. The plaintiff's payment schedule served on 23 October 2022 rejected the claim, arguing that the first defendant was not entitled to repeat claims and that the adjudication application was invalid due to its timing.

The adjudicator had ruled that the payment schedule was valid, which the plaintiff contested. The plaintiff argued that the contract had been terminated on 6 May 2022, restricting the first defendant to only one payment claim post-termination. The plaintiff contended that the adjudicator failed to consider this submission, which constituted a jurisdictional error under section 22(2)(d) of the SOP Act.

Decision

The Court found that the adjudicator did not address the plaintiff's argument regarding the contract's termination. The failure to consider a submission related to a jurisdictional matter was deemed a significant oversight. Consequently, the Court declared the adjudication determination void and of no effect. The Court ordered the return of the funds paid into Court to the plaintiff and awarded costs of the proceedings to the plaintiff, with no costs ordered against the second defendant.

Ceerose Pty Ltd v A-Civil Aust Pty Ltd [2023] NSWSC 239

Coram: Darke J
Court: Supreme Court of New South Wales
Date: 20 March 2023

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) ("the Act") – adjudication determinations – whether adjudication determinations are affected by jurisdictional error – whether the adjudicator failed to meet essential requirements for the existence of a valid adjudication determination under the Act – whether the adjudicator failed to consider all submissions duly made – whether the adjudicator failed to address the merits of claims made – whether the adjudicator failed to afford the parties procedural fairness – jurisdictional errors found in respect of parts of the adjudication determinations – appropriate relief to be given where the Court has the power to set aside the whole or any part of the adjudication determinations pursuant to s 32A of the Act

Facts

Ceerose Pty Ltd and A-Civil Aust Pty Ltd were involved in two separate proceedings regarding adjudications under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "**SOP Act**"). The disputes arose from building contracts entered into between the parties.

Proceeding 2022/236818:

Ceerose and A-Civil entered into a subcontract for work at 32-36 York Street, Sydney, on or about 6 October 2021, with a subcontract sum of $2,900,000 plus GST. On 30 May 2022, A-Civil served a payment claim for $3,556,466.80 excluding GST. Ceerose's payment schedule, dated 14 June 2022, rejected this amount and asserted a payment of $895,565.50 excluding GST was due from A-Civil.

A-Civil made an adjudication application on 28 June 2022. Mr John Tuhtan was appointed as the adjudicator and issued a determination on 2 August 2022, requiring Ceerose to pay $2,045,453.97

including GST. Ceerose challenged this determination, claiming it was affected by jurisdictional error on nine grounds.

Proceeding 2022/217806:
A separate subcontract was executed for work at a site in Elizabeth Bay, with a contract sum of $780,896 plus GST, entered into on or about 2 December 2021. A-Civil served a payment claim for $327,492.67 excluding GST on 25 May 2022. Ceerose's payment schedule, dated 1 June 2022, rejected the claim entirely.

An adjudication application was made by A-Civil on 21 June 2022. Mr Tuhtan issued a determination on 11 July 2022, requiring Ceerose to pay $349,324.36 including GST.
Ceerose challenged this determination on five grounds, alleging jurisdictional errors in relation to specific components.

Decision
The central issue in both proceedings was whether the adjudications should be invalidated in their entirety due to jurisdictional errors.

Justice Darke ruled that while the adjudications contained jurisdictional errors, it was appropriate to apply section 32A of the SOP Act. This section allows the Court to sever and set aside only the parts of the determination affected by jurisdictional errors, while confirming the unaffected parts.

Proceeding 2022/236818: The Court determined that although jurisdictional errors were present, it was suitable to uphold the valid parts of the determination. The Court allowed the appeal but struck down only the parts of the determination that were affected by the errors, rather than invalidating the entire determination.

Proceeding 2022/217806: Similarly, the Court found that substantial portions of the determination were unaffected by the alleged jurisdictional errors. The Court confirmed these parts and set aside only the affected sections.

This decision demonstrated how the Court could address jurisdictional errors by preserving valid portions of an adjudication determination, thereby providing strategic advantages for parties defending against appeals.

Ceerose Pty Ltd v A-Civil Aust Pty Ltd (No 2) [2023] NSWSC 345

Coram: Richmond J
Court: Supreme Court of New South Wales
Date: 6 April 2023

BUILDING AND CONSTRUCTION — adjudication — whether adjudication determination was affected by jurisdictional error — whether the adjudicator failed to afford the parties procedural fairness — jurisdictional error in respect of part of the adjudication determination in relation to retention monies — where the Court has the power to set aside the whole or part of the adjudication determination pursuant to s 32A of the Act

Facts

This summary assumes familiarity with the facts of *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* [2023] NSWSC 239 at page 19.

A-Civil sought adjudication under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "**SOP Act**"). The adjudicator determined that A-Civil was entitled to the retention monies, disregarding Ceerose's claim for set-off and finding the relevant contractual clauses void. In this matter, Ceerose challenged the adjudicator's determination, alleging procedural fairness was denied, as the adjudicator's conclusion was based on grounds not advanced by either party.

Decision

Justice Richmond found that the adjudicator had committed a jurisdictional error by deciding on a basis not raised by either party, thereby denying Ceerose procedural fairness. The Court held that when an adjudicator introduces an issue that neither party could have reasonably anticipated and does not provide an opportunity to respond, procedural fairness is compromised, constituting a jurisdictional error. Consequently, the court set aside the portion of the adjudicator's determination related to the retention monies but upheld the remainder of the decision.

The Court also exercised its authority under section 32A of the SOP Act to remove the amount awarded in breach of procedural fairness but noted it had no power to adjust the adjudicator's fees.

Ceerose Pty Ltd v A-Civil Aust Pty Ltd (No 2) [2023] NSWSC 401

Coram: Darke J
Court: Supreme Court of New South Wales
Date: 20 April 2023

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) ("the Act") – adjudication determinations – where adjudication determinations are affected by jurisdictional error – where the Court has the power to set aside the whole or any part of an adjudication determination pursuant to s 32A of the Act – meaning and operation of s 32A of the Act – consideration of how adjudicated amounts which are affected by jurisdictional error may be reduced pursuant to s 32A of the Act – consideration of the extent to which the Court may or should exercise its power pursuant to s 32A of the Act in relation to the reasons for an adjudication determination – consideration of whether determinations of liability for adjudicator's fees are affected by jurisdictional error

Facts

This summary assumes familiarity with the facts of *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* [2023] NSWSC 239 at page 19.

In *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* [2023] NSWSC 239, the Court found that the adjudicator had committed jurisdictional errors in five instances related to the York Street determination and one instance related to the Elizabeth Bay determination. For the York Street site, the errors pertained to specific payment claim items, leading to disputes over the adjudicated amounts related to demolition works, render removal, and other contractual obligations.

In this matter, the plaintiff argued that these errors should result in the entire adjudicated amounts being set aside, while the defendant contended that only the specific erroneous parts should be severed and set aside. Regarding the Elizabeth Bay site, the jurisdictional error concerned the adjudicator's rejection of a set-off claim for concrete saw cutting costs, which the plaintiff also argued should invalidate the entire determination.

The Court was therefore tasked with interpreting and applying the provisions of section 32A of the SOP Act.

Decision

The Court held that under section 32A of the SOP Act, it has the discretionary power to set aside only the parts of an adjudicator's determination that are affected by jurisdictional error while confirming the unaffected parts. For the York Street site determination, the Court ordered that the erroneous components related to the disputed payment claim items be severed and set aside, reducing the adjudicated amount accordingly. The Court rejected the plaintiff's argument that the entire adjudicated amounts should be set aside, emphasising that only the specific parts affected by the errors should be addressed.

For the Elizabeth Bay determination, the Court found that the adjudicated amount should be reduced by $4,114 to reflect the impact of the jurisdictional error concerning the set-off claim. Additionally, the Court concluded that the adjudicator's determination of liability for fees and expenses, which was based on the relative success of the parties, was also affected by jurisdictional error and should be set aside. Consequently, the parties were ordered to share the adjudicator's fees and expenses equally.

The Court's approach underscored the importance of severing only the parts of a determination affected by jurisdictional error, rather than invalidating the entire adjudication, to ensure fair and just outcomes in line with the statutory purpose of the SOP Act.

Ceerose Pty Limited v A-Civil Aust Pty Ltd (No 5) [2023] NSWSC 1012

Coram: Ball J
Court: Supreme Court of New South Wales
Date: 24 August 2023

BUILDING AND CONSTRUCTION — Adjudication of payment claim under Security of Payment Act — Stay of judgment — Whether judgment based on an adjudication determination should be stayed pending determination of an appeal that has been heard — Whether judgment should be stayed pending determination of proceedings under the construction contract — Whether unfavourable inferences should be drawn regarding the claimant's financial position — Where evidence falls short of proving claimant will be unable to repay amounts if it is unsuccessful in the contractual proceedings

Facts

This summary assumes familiarity with the facts of *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* [2023] NSWSC 239 at page 19 and subsequent decisions at pages 22-25 above. This matter involves another appeal of the initial determination.

The matter at this instance addresses the issues surrounding the interlocutory injunctions obtained by Ceerose to restrain A-Civil from enforcing the adjudication determinations, and outlines subsequent procedural developments, including appeals and the initiation of new proceedings by Ceerose to recover the adjudicated amounts.

Decision

Justice Ball ultimately came to the conclusion that he could not make orders until the Court of Appeal hands down its decision in relation to Ceerose's appeal, and instead, proposes to make orders consistently with this judgment and with the decision of the Court of Appeal.

His Honour merely ordered at this instance that the parties to apply on two business days' notice, as soon as the Court of Appeal hands down its decision.

Ceerose Pty Ltd v A-Civil Aust Pty Ltd [2023] NSWCA 215

Coram: Ward ACJ; Payne JA; Basten AJA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 12 September 2023

ADMINISTRATIVE LAW – Judicial review – content of obligation "to consider" – whether failure specifically to refer to a matter reveals failure to consider that matter – scope of obligation to consider under *Building and Construction Industry Security of Payment Act 1999* (NSW), s 22(2)

BUILDING AND CONSTRUCTION – adjudication – judicial review – whether adjudication affected by jurisdictional error – principles of jurisdictional error under *Building and Construction Industry Security of Payment Act 1999* (NSW) -– whether jurisdictional error to fail to investigate "true merits" of a payment claim – where adjudicator's task limited to deciding dispute on restricted materials

BUILDING AND CONSTRUCTION – adjudication – judicial review – setting aside part of determination – meaning and operation of s 32A of the *Building and Construction Industry Security of Payment Act 1999* (NSW) – whether adjudicator entitled to fees after making adjudication affected by jurisdictional error – whether adjudicator's decision to apportion costs affected by jurisdictional error

Facts

This summary assumes familiarity with the facts of *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* [2023] NSWSC 239 at page 19 and its subsequent decisions at pages 22-27 above.

Ceerose challenged the adjudication determinations in the Supreme Court, alleging jurisdictional errors. The Supreme Court held that both determinations were partially affected by jurisdictional error and set aside only those parts. Dissatisfied, Ceerose appealed to the New South Wales Court of Appeal, arguing that the adjudicator failed to independently assess agreed matters, that the

entire determination should have been set aside, that the adjudicator was not entitled to fees given the jurisdictional error, and that the refusal to award liquidated damages was incorrect.

Decision

The New South Wales Court of Appeal dismissed Ceerose's appeal and allowed A-Civil's cross-appeal, addressing several key legal issues.

Firstly, on the scope of an adjudicator's duty under the *Building and Construction Industry Security of Payment Act 1999* (the "**SOP Act**"), the Court held that under section 22(2), an adjudicator is only required to consider submissions that are duly made and relevant. The Court emphasised that consideration is a private mental process, and a failure to explicitly refer to a matter in the adjudicator's written decision does not necessarily indicate a failure to consider it.

Secondly, the Court clarified that an adjudicator is not required to investigate the "true merits" of each payment claim or the "true construction" of the contract. The adjudicator's role is to decide the dispute based on the limited matters the SOP Act requires, and only those reasons for resisting payment that are included in the respondent's payment schedule should be considered.

Thirdly, regarding the primary judge's use of section 32A(2) to sever and set aside only portions of the adjudicator's determinations affected by jurisdictional error, the Court upheld this approach. The Court reasoned that if only part of a payment claim was disputed, any jurisdictional error would affect only that disputed portion, and the adjudicator's decision should be confirmed for the undisputed amounts.

On the issue of setting aside adjudicator's decisions, the Court determined that section 32A allows for setting aside the adjudicator's decision regarding the payment amount, due date, and interest rate, but does not necessitate setting aside the adjudicator's reasoning.

Regarding the liquidated damages claims for both developments, the Court found no jurisdictional error in the adjudicator's determinations. The Court concluded that the adjudicator correctly limited their consideration to the reasons for resisting payment that were included in Ceerose's payment schedule.

The Court also addressed whether fees are payable to an adjudicator whose determination is affected by jurisdictional error. The Court ruled that the adjudicator is entitled to payment for their services, as the fact of adjudication creates legal consequences regardless of any error.

In the cross-appeal, the Court found that the primary judge erred in identifying a jurisdictional error regarding a time-bar clause in the York Street contract. The Court noted that the adjudicator was not obliged to sift through extensive material to find support for Ceerose's argument, particularly when it was not clearly articulated in the payment schedule.

Finally, the Court considered the issue of adjudication costs and determined that the adjudicator's apportionment of costs could indeed be affected by jurisdictional error. However, the Court found that in this case, the remaining jurisdictional errors had only a minimal impact on the overall monetary success of A-Civil, and therefore, the apportionment of costs would likely remain unchanged.

In conclusion, the Court upheld the primary judge's decisions in most respects, while correcting specific errors identified in the cross-appeal, thereby reinforcing the limits on adjudicators' duties under the Act and the proper application of section 32A.

Ganghui Pty Ltd v YTO Construction Pty Ltd [2023] NSWSC 729

Coram: Stevenson J
Court: Supreme Court of New South Wales
Date: 28 June 2023

BUILDING AND CONSTRUCTION – multi-storey residential development – dispute between developer and builder – whether there was an "arrangement" or "further arrangement" outside the contract – whether developer engaged in misleading or deceptive conduct – developer's claim under "handwritten agreement" – whether developer's final payment certificate effective – whether director of developer appointed as developer's principal's representative – purported variations – whether work in question was within scope of works under the contract

EVIDENCE – witness evidence – interpreter – where interpreter reported that plaintiff's director's translator had advised director as to the evidence he should give in their native tongue during court adjournment – whether such conduct is established

Facts

On 18 September 2017, Ganghui Pty Ltd (the "**Developer**") entered into a contract with YTO Construction Pty Ltd (the "**Builder**") to construct an apartment complex in Ashfield, comprising 91 residential units and seven retail lots, at a contract price of $32.5 million. The development involved two buildings: a three-storey tower and an eight-storey tower. The contract stipulated that practical completion was to be achieved by 25 February 2019. The Builder had provided a "Tender Submission" on 10 March 2017, and work commenced following a "Letter of Intent" executed on 12 July 2017, with an initial deposit of $800,000 paid by the Developer. The contract, executed on 18 September 2017, applied retrospectively to all work performed before the execution date.

On 22 March 2019, the parties entered into a further handwritten agreement. The contract also included provisions for payment, with clause 37.4 allowing the Builder to submit a Final Payment Claim and for the Developer's Principal's Representative to respond with a Final Payment

Certificate. On 27 May 2020, the Builder submitted a Final Payment Claim for $6.256 million, but the Developer responded with a Final Payment Certificate stating that no payment was owed and instead claimed $1.89 million from the Builder. Subsequently, the Developer sued the Builder for debts arising from the handwritten agreement and the amounts claimed in the Final Payment Certificate.

The Builder contested the existence of what it described as "the Arrangement" and "the Further Arrangement", arguing that these agreements estopped the Developer from denying its claims. Additionally, the Builder accused the Developer of making five misleading or deceptive representations, in violation of section 18 of the Australian Consumer Law ("**ACL**") and sought to recover alleged loans totalling $751,157.40. The Builder also claimed entitlement to a quantum meruit.

Decision

The Court ruled in favour of the Developer regarding its claims under the handwritten agreement, finding that the Final Payment Certificate issued by the Developer was not effective. The Builder's claims concerning the alleged Arrangement and Further Arrangement, as well as its claims under the ACL, were dismissed.

The Court determined that the Builder had not established a valid basis for these claims beyond what was already provided for under the contract and the handwritten agreement. The Builder's claim for quantum meruit was also rejected, as was its claim for the repayment of purported loans.

The judgment concluded that one of the purported loans was a payment under the existing contractual arrangements, and the Builder had already been credited for the other. The Court instructed the parties to make submissions on the appropriate orders to give effect to its judgment.

H & M Constructions (NSW) Pty Ltd v Golden Rain Development Pty Ltd (No 4) [2023] NSWSC 925

Coram: Stevenson J
Court: Supreme Court of New South Wales
Date: 9 August 2023

BUILDING AND CONSTRUCTION – design and construct contract – practical completion – superintendent to issue certificate of practical completion or give reasons for not doing so – superintendent issued "conditional" certificate of practical completion – purported retrospective date of practical completion on satisfaction by builder of specified conditions – contractual status of conditional certificate – whether Court can in any event determine when practical completion took place

CONTRACTS – "prevention principle" – whether developer took over builder's obligations and prevented builder from performing those obligations

ESTOPPEL – whether developer induced builder to understand that effect of conditional certificate was to fix time for determination of liquidated damages and delay costs

UNCONSCIONABLE CONDUCT – whether developer engaged in unconscionable conduct

Facts

Golden Rain Development Pty Ltd (the "**Principal**"), engaged H&M Constructions (NSW) Pty Ltd (the "**Contractor**") under a Design and Construction Contract dated 20 October 2015 to build high-rise apartments, terraces, and public roads on a contaminated site in Erskineville, New South Wales. The contract allocated all risks related to site remediation to the Contractor. By July 2018, the Contractor claimed to have completed the works, despite an auditor's report indicating continued contamination and additional remediation requirements.

On 24 September 2018, the Superintendent issued a 'conditional' Certificate of Practical Completion, dated 7 September 2018, which acknowledged practical completion but was contingent upon the resolution of several outstanding issues, including the issuance of an Occupation Certificate. Following this, the Contractor ceased claiming extensions of time and delay costs.

The Principal argued that the Conditional Certificate did not meet the contractual requirements for Practical Completion and that completion could only be confirmed once the specified conditions were fulfilled. The Contractor, on the other hand, contended that the Conditional Certificate, if found to be ineffective, should estop the Principal from claiming liquidated damages or accessing security.

Decision

The Court determined that the Conditional Certificate issued by the Superintendent had no contractual effect because the contract did not authorise the issuance of such a certificate. The contract only permitted the issuance of an unconditional Certificate of Practical Completion or written reasons explaining why Practical Completion had not been achieved. The Conditional Certificate was deemed invalid as it left the matter of Practical Completion unresolved and created uncertainty regarding the actual date of Practical Completion.

The Contractor's claims based on estoppel, unconscionable conduct, and the prevention principle were unsuccessful. The Court found that the Contractor's misunderstanding of the Conditional Certificate's effect was not induced by the Principal but resulted from the Contractor's own misinterpretation. Consequently, the Principal was entitled to liquidated damages and to access the security.

The case underscored the importance for superintendents and parties to adhere strictly to contractual terms and to explicitly address any deviations from these terms.

Heather v Taylor Building Industries Pty Ltd [2023] NSWSC 968

Coram: Rees J
Court: Supreme Court of New South Wales
Date: 18 August 2023

BUILDING AND CONSTRUCTION – Grosvenor or Brodyn stay – couple enter into contract for home renovation – payment claim for variations – adjudication determination and judgment in favour of builder – principles at [45]-[46] – cashflow problems natural consequence of principal withholding payment – not satisfied of "certainty" that judgment sum not recoverable if plaintiffs succeed in substantive proceedings.

Facts

Andrew Heather and his wife engaged in a renovation of their Balmain home under a fixed price building contract with a builder, which had a value of approximately $1.5 million. This contract, however, allowed for adjustments in the price and variations. The builder removed provisional sums and prime cost items from the contract as requested by Mr Heather, potentially to satisfy the requirements of their lender, Macquarie Bank. Disputes arose regarding whether Mr Heather agreed orally to cover reasonable costs outside the contract.

Throughout 2022 and 2023, various claims for variations were submitted by the builder. Payment issues emerged, and Mr Heather expressed concerns about the financial strain of adhering to the builder's payment requests. Despite ongoing communications and attempts to resolve these payment issues, a significant sum remained outstanding. On 1 May 2023, the builder issued a payment claim for variations totalling $169,101.76, which was contested by the plaintiffs.

On 15 May 2023, the builder lodged an adjudication application, and a determination was issued on 5 June 2023, favouring the builder. This led to a District Court judgment on 15 June 2023 for $176,914.19. The plaintiffs subsequently sought to stay enforcement of this judgment, arguing that paying the adjudicated amount would be detrimental if the builder was found insolvent in the substantive proceedings.

Decision

The application for a stay of enforcement was evaluated in light of the statutory policies under the *Building and Construction Industry Security of Payments Act 1999* (NSW) (the "**SOP Act**"). The Court held that the risk of insolvency of the contractor, which might affect the ability to recover funds if the plaintiffs succeeded in their claim, was a risk that SOP Act placed on the plaintiffs rather than the builder. The Court emphasised that SOP Act aims to maintain the flow of money to subcontractors and temporarily places the risk of insolvency on the principal.

Despite acknowledging that the builder's financial position was tenuous and that insolvency risk was present, the Court found no certainty that the funds would be irrecoverable if the plaintiffs were successful in their claim. The builder had been in business for a decade, had ongoing projects, and had other financial resources. The potential for insolvency, while real, did not meet the threshold required to grant a stay, which would contravene the SOP Act's primary purpose.

The application for a stay was therefore dismissed, and the Court ordered the judgment sum, held in Court, to be paid to the builder forthwith, along with costs for the application.

Heavy Plant Leasing Pty Ltd (In Liquidation) v McConnell Dowell Constructors (Aust) Pty Ltd (No 3) [2023] NSWSC 634

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 14 June 2023

DAMAGES – defendant's claim against plaintiff for cost to complete – where defendant settled claim against its principal – whether a component of that settlement duplicated defendant's claim against plaintiff – whether now open to plaintiff to contend that the entire settlement amount be deducted from defendant's claim against it – how the settlement amount is to be taken into account

Facts

In the judgment delivered on 21 December 2022, the Court addressed a dispute between MacDow and HPL concerning the termination of a contract and the subsequent calculation of damages. The central issue was MacDow's entitlement to terminate the contract and the computation of the costs to complete the work. The contract was terminated by MacDow on 18 March 2013. Following the termination, MacDow made a claim against its principal, Fluor, for reimbursement of delay and disruption costs amounting to $108.7 million. This claim was settled when Fluor paid MacDow $17.5 million.

The judgment established that MacDow was entitled to terminate the contract and that the damages were to be calculated based on Clause 26.5 of the Contract. The calculation involved three key figures: the amount paid to HPL prior to termination, the cost incurred by MacDow to complete the works, and the adjusted contract sum that would have been paid to HPL.

This dispute arose due to concerns on how the $17.5 million settlement from Fluor should be accounted for in assessing MacDow's cost to complete.

Decision

The Court concluded that the entire $17.5 million payment from Fluor should be deducted from MacDow's claim for overheads and management costs. It was determined that MacDow had not discharged its burden of proving that the Fluor payment did not overlap with its claim against HPL. The court found that HPL could not now argue that the entire $17.5 million should be deducted from MacDow's total cost to complete claim, as this was not raised during the trial. The judge noted that it was improbable that the entire settlement amount was attributable solely to HPL's work, given that HPL's scope was only a fraction of the overall project.

Justice Stevenson rejected MacDow's proposal to pro-rate the settlement amount and found that MacDow had not met the evidentiary burden to demonstrate that the Fluor payment was not compensatory for its overheads and management claim. Consequently, the payment of $17.5 million was to be offset against MacDow's overheads and management costs claim, which was agreed to be $1,215,663.63.

Kennedy Civil Contracting Pty Ltd (subject to a Deed of Company Arrangement) v Total Construction Pty Ltd [2023] NSWDC 325

Coram: Abadee DCJ
Court: District Court of New South Wales
Date: 18 August 2023

BUILDING AND CONSTRUCTION – whether a sub-contractor's claim for payment constituted a valid 'payment claim' – Building and Construction Industry Security of Payment Act 1999 (NSW), s 13 – whether claim properly characterised as a 'letter of demand' (only) – whether multiple claims – whether sub-contractor engaged in misleading or deceptive conduct or committed an abuse of process – relevance of contractual requirements for progress claims to assessment of statutory requirements under s 13

CIVIL PROCEDURE – anticipatory stay application in the event subcontractor obtains judgment for statutory debt – subcontractor concedes serious issues to be tried from contractor's muted claim - significance of Deed of Company Arrangement providing for proceeds from judgment being held on trust

Facts

This case involved a progress claim by Kennedy Civil Contracting Pty Ltd ("**Kennedy**"), a subcontractor now subject to a Deed of Company Arrangement ("**DOCA**"), against Total Construction Pty Ltd ("**Total**"), the contractor, concerning a construction project in Arndell Park. Kennedy and Total entered into a subcontract on 22 February 2022 for various construction works, which Kennedy carried out until August 2022. On 25 October 2022, Kennedy claimed a payment of $545,353.18, asserting it was a statutory payment claim under section 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "**SOP Act**"). Total contested the claim, arguing it did not meet the statutory requirements and was invalid.

Kennedy alleged that Total issued a payment schedule late on 9 November 2022, outside the ten-day period prescribed by the Act, thus becoming liable to pay the claimed amount by 22 November 2022. As Total did not pay the amount, Kennedy sought to enforce its claim, including

interest under section 11(2)(a) of the SOP Act. Total's defence included arguments that the payment claim was invalid, Kennedy engaged in misleading conduct, and that the claim amounted to an abuse of process by "rebadging" previous claims.

Decision

The Court addressed whether Kennedy's payment claim constituted a valid statutory claim under the SOP Act. The determination hinged on whether Kennedy's claim met the statutory requirements of section 13. The Court found that the payment claim, as presented on 25 October 2022, was a valid claim under the SOP Act. Total's late issuance of a payment schedule confirmed its liability to pay the claimed amount by 22 November 2022, and as the payment was not made, a statutory debt arose under section 15(2)(a) of the SOP Act.

Regarding Total's application for a stay of judgment, the Court considered Total's argument that it had a substantial offsetting claim against Kennedy. Despite acknowledging the serious questions raised about Total's claim, the Court found that the provisions of the DOCA sufficiently protected Total's interests. The Court noted that Kennedy's DOCA ensured that any payment made under the judgment would be held on trust and subject to the final determination of Total's claim. Therefore, the stay was deemed unnecessary, and Kennedy's claim was upheld.

The Court did not address Total's further defences and cross-claims as they were not pertinent to the statutory debt claim and stay application.

Kennedy Civil Contracting Pty Ltd (Subject to a Deed of Company Arrangement) v Total Construction Pty Ltd (No.2) [2023] NSWDC 403

Coram: Abadee DCJ
Court: District Court of New South Wales
Date: 3 October 2023

COSTS – building and engineering contracts – dispute whether a valid payment claim was served – successful sub-contractor's application for partial indemnity costs based on contractor's rejection of a rules offer – whether the judgment was no less favourable than the terms of the offer satisfied – Uniform Civil Procedure Rules 2005 (NSW), r 42.14

COSTS – subcontractor's application for gross sum costs order – Civil Procedure Act 2005 (NSW), s 98(4)(c)

Facts

On 18 August 2023, judgment was rendered in favour of the plaintiff, Kennedy Civil Contracting Pty Ltd ("**Kennedy**"), against the defendant, Total Construction Pty Ltd ("**Total Construction**"). Kennedy was awarded a monetary judgment amounting to $545,353.18 plus interest, and Total Construction was ordered to pay Kennedy's costs. Subsequently, Kennedy filed a notice of motion on 1 September 2023, seeking two variations to the costs order. First, Kennedy requested that Total Construction pay its costs up to 12 December 2022 on a standard basis and on an indemnity basis thereafter. Second, Kennedy sought an order for Total Construction to pay its costs as a specified gross sum rather than through assessment.

Kennedy's application for indemnity costs was based on a rule 20.26(2) *Uniform Civil Procedure Rules 2005* (NSW) ("**UCPR**") offer made on 12 December 2022, wherein Total Construction had proposed to settle by paying $450,000 inclusive of interest plus costs. Kennedy argued that it obtained a more favourable outcome with the judgment amount exceeding the offer and thus was entitled to indemnity costs from the date of the offer. Total Construction contested this claim,

arguing that Kennedy did not achieve a more favourable outcome due to an undertaking obtained from Kennedy's administrator and citing an additional offer made on 27 June 2023.

Regarding the specified gross sum for costs, Kennedy provided evidence of its incurred costs and disbursements totalling $141,928.50, excluding disbursements, and estimated additional costs for the motion. Total Construction opposed this application, presenting a costs expert's opinion suggesting a detailed costs assessment was preferable over a gross sum order.

Decision

The Court determined that rule 42.14(1) of the UCPR applied, entitling Kennedy to indemnity costs from 12 December 2022. The judgment amount of $545,353.18 was deemed no less favourable than the offer of $450,000, with the undertaking received by Total Construction from Kennedy's administrator not affecting this comparison.

However, the Court refused Kennedy's application for a specified gross sum for costs. It found that while Kennedy's costs submissions were detailed, the opposing expert's analysis provided a more rigorous examination of costs, suggesting that a detailed assessment was more appropriate. Consequently, the court was not satisfied it could fairly determine a gross sum amount.

Regarding the costs of the motion itself, the court ordered that the parties bear their own costs of Kennedy's notice of motion dated 1 September 2023. This decision reflected the mixed outcome of Kennedy's successful partial indemnity costs application against Total Construction's opposition and the insufficient detail provided for a gross sum order.

Ultimately, Kennedy was awarded costs on an indemnity basis from 12 December 2022, but the application for a specified gross sum for costs was denied, and each party was ordered to bear its own costs for the motion.

King River Digital Assets Opportunities SPC v Salerno [2023] NSWSC 510

Coram: Rees J
Court: Supreme Court of New South Wales
Date: 16 May 2023

COMMERCIAL ARBITRATION — plaintiff is customer of digital asset trading company — arbitration agreement between customer and company — customer entrusts US$20.4m to company — company goes into administration — customer sues company director for accessorial liability for misleading and deceptive conduct of company — director will defend claim on basis that company did not engage in such conduct — director initially seeks transfer and security for costs – director becomes aware of ability to seek stay — s2 Commercial Arbitration Act 2010 (NSW) — whether a person claiming "through or under" party to the arbitration agreement — director taking stand on same ground as that available to company — essential element of defence vested in or exercisable by company – whether claim is subject of arbitration agreement — whether agreement inoperative by abandonment.

Facts

King River Digital Assets Opportunities SPC ("**King River**") entered into a Master Purchase Agreement ("**MPA**") with Trigon Trading Pty Ltd ("**Trigon**"), a company engaged in digital asset trading and led by Mr Salerno as its sole director. The MPA, executed on 23 February 2022, included an arbitration clause mandating that disputes be resolved through arbitration under the Australian Centre for International Commercial Arbitration ("**ACICA**") rules. It also specified that the MPA would be binding on the parties and their successors or assigns.

King River entrusted Trigon with funds for purchasing digital assets from the international exchange, FTX Trading Limited ("**FTX**"). Following the collapse of FTX in November 2022, which halted withdrawals and led to substantial financial losses, King River initiated court proceedings against Mr Salerno personally. This action was based on allegations of accessorial liability under Australian Consumer Law for Trigon's misleading and deceptive conduct involving FTX.

On 22 December 2022, Mr Salerno sought to stay the court proceedings and have the dispute referred to arbitration as stipulated by the MPA, invoking section 8(1) of the *Commercial Arbitration Act 2010* (QLD) ("**CAA**").

The central issue was whether Mr Salerno, though not a direct party to the MPA, could be considered a party to the arbitration agreement.

Decision

The Court examined whether Mr Salerno, as a sole director of Trigon, was a party to the arbitration agreement within the meaning of section 2 of the CAA, which defines a party as including anyone claiming "through or under" a party to the arbitration agreement. The Court determined that Mr Salerno was indeed a party to the arbitration agreement, given his role and defence in the proceedings.

The Court also evaluated whether the claim brought by King River was a matter covered by the arbitration agreement. The principles of kompetenz-kompetenz and a broad interpretation of arbitration clauses guided this assessment, leading to the conclusion that King River's claim fell within the scope of the MPA's arbitration provision.

Furthermore, the court addressed King River's argument that the arbitration agreement was inoperable due to abandonment or waiver. The court reinterpreted this as questioning whether Mr Salerno had relinquished his right to seek a stay of proceedings. Finding no such abandonment, the Court acknowledged that Mr Salerno had promptly sought the stay upon recognising the applicability of the arbitration agreement.

This decision underscores the Australian courts' nuanced approach to arbitration, particularly in insolvency contexts, and highlights the expansive interpretation of who may be considered a party to an arbitration agreement.

Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. [2023] HCA 11

Coram: Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ
Court: High Court of Australia
Date: 12 April 2023

Public international law – Foreign State immunity – Immunity from jurisdiction – Proceedings for recognition and enforcement of arbitral award – Where respondents obtained arbitral award under Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) ("ICSID Convention") – Where respondents sought to enforce award in Australia under s 35(4) of International Arbitration Act 1974 (Cth) – Where s 9 of Foreign States Immunities Act 1985 (Cth) ("Act") provides that a foreign State is immune from jurisdiction of Australian courts – Where appellant asserted foreign State immunity from jurisdiction – Whether appellant waived foreign State immunity from jurisdiction under s 10 of Act by submitting to jurisdiction by agreement – Whether entry into ICSID Convention and agreement to Arts 53, 54 and 55 constituted waiver of immunity from jurisdiction – Whether "recognition", "enforcement" and "execution" in Arts 53, 54 and 55 of ICSID Convention have separate and different meanings – Whether inconsistency arises between English, French and Spanish texts of ICSID Convention.

Words and phrases – "arbitral award", "enforcement", "execution", "exequatur", "explicature", "express", "foreign State immunity", "immunity from jurisdiction", "implicature", "implied", "inference", "international law principles", "recognition", "treaty interpretation", "waiver of immunity".

Facts

This case stemmed from Spain's appeal against a decision of the Full Federal Court, which had earlier upheld an order for recognition and enforcement of an ICSID arbitral award.

The dispute originated from Spain's decision to withdraw subsidies for renewable energy investments following the global financial crisis, which significantly impacted several foreign investors, including Infrastructure Services Luxembourg S.à.r.l. ("**Infrastructure Services**") and

Energia Termosolar BV (**"Energia Termosolar**"). These investors had invested approximately €265.5 million in Spain's renewable energy sector and claimed that Spain's actions breached the Energy Charter Treaty ("**ECT**"). Consequently, they sought arbitration under the ICSID Convention, resulting in awards of €101 million and €128 million, respectively.

Spain resisted the recognition and enforcement of these awards in Australia, arguing that it was immune under section 9 of the *Foreign States Immunities Act 1985* (Cth) ("**FSIA**"). The central issue was whether Spain's accession to the ICSID Convention constituted a waiver of its immunity from the jurisdiction of Australian courts for the purposes of recognising and enforcing the awards.

Decision

The High Court upheld the Full Federal Court's decision, affirming that Spain had waived its immunity from jurisdiction for the purposes of recognising and enforcing ICSID awards. The Court interpreted Spain's accession to the ICSID Convention and its agreement to Articles 53, 54, and 55 as a sufficient waiver of immunity concerning recognition and enforcement but not for execution.

The Court clarified the distinctions between 'recognition', 'enforcement', and 'execution' as outlined in the ICSID Convention. Recognition refers to acknowledging an award as binding, enforcement involves applying legal processes to ensure compliance with the award, and execution is the implementation of enforcement measures against a state's assets. The High Court confirmed that Spain's immunity under Article 55 of the ICSID Convention, which preserves immunity from execution, remained intact, and thus did not extend to execution of the award.

The decision reinforced Australia's position as a pro-arbitration jurisdiction and clarified that while ICSID awards must be recognised and enforced as if they were final judgments, the execution of such awards remains subject to domestic law on state immunity. This distinction is critical for investors seeking to execute awards against sovereign states, as it affects the practical realisation of awarded sums.

Marques Group Pty Ltd v Parkview Constructions Pty Ltd [2023] NSWSC 625

Coram: Rees J
Court: Supreme Court of New South Wales
Date: 13 June 2023

CIVIL PROCEDURE — summary disposal — security of payment (SOPA) — principles at [14]-[17] — summary judgment sought in the amount of payment schedules as a statutory debt — defendant claims payment schedules only issued as a consequence of plaintiff's misleading and deceptive representations in subcontractor's statement as to payment of employees and solvency — Bitannia v Parkline Constructions — defence not so clearly untenable that it cannot possibly succeed.

Facts

The plaintiff, Marques Group Pty Ltd ("**Marques Group**"), sought summary judgment against Parkview Constructions Pty Ltd ("**Parkview Constructions**"), the defendant, under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "**SOP Act**"). Marques Group was engaged as a subcontractor to provide formwork for projects in Woolooware and Parramatta under two contracts valued at $22.7 million and $14.665 million, respectively. Both contracts allowed the subcontractor to submit monthly payment claims, conditional upon compliance with specific contractual terms, including providing statutory declarations confirming payment of all workers and subcontractors.

On 25 October 2022, Marques Group submitted payment claims for both projects, accompanied by the requisite statutory declarations. Parkview Constructions responded by issuing "DRAFT" payment schedules, proposing to pay $1,785,492.84. However, the contractor failed to make any payments, leading Marques Group to initiate proceedings, initially arguing that the "DRAFT" payment schedules were invalid under SOPA.

Decision

The Court ultimately dismissed Marques Group's application for summary judgment. The Court noted that there was a real question to be tried regarding whether Marques Group's statutory declarations, which allegedly contained misleading and deceptive statements about its solvency and payment of workers, invalidated the payment claims under SOP Act. The contractor argued that had it known the true financial position of the subcontractor, it would not have issued the same payment schedules.

The Court acknowledged the importance of SOP Act in ensuring cash flow for subcontractors but held that the contractor's defence, based on alleged misleading conduct, was not so clearly untenable that it could not possibly succeed. Consequently, the motion for summary judgment was dismissed, and the matter was set for further directions in the Technology and Construction List.

Martinus Rail Pty Ltd v Qube RE Services (No 2) Pty Ltd [2023] NSWSC 1550

Coram: Rees J
Court: Supreme Court of New South Wales
Date: 20 December 2023

COMMERCIAL ARBITRATION — Interim measures — Contractor provides security by unconditional undertakings from bank — Principal yet to make demand to bank — Principles at [3]-[9] — Contractor obtains ex parte injunction restraining principal from making demand to bank — Whether interlocutory measure should be made pending arbitration — Whether right to call on bank guarantee a 'risk allocation device' — principal entitled to call on guarantee at an early stage in the dispute

BUILDING AND CONSTRUCTION — Where adjudication determinations rendered — Whether right to call on bank guarantees in construction contract void under s 34 of the Building and Construction Industry Security of Payment Act 1999 (NSW) — Case law review at [94]-[102] — Adjudication determination does not stand in the way of the principal making a demand on security

INTERLOCUTORY INJUNCTION — Whether serious question to be tried as to principal's right to have recourse to bank guarantee — Principal required to "act reasonably" — No serious question to be tried as to whether the principal was "acting reasonably" in forming the view that the principal was entitled to terminate for cause — Balance of convenience favours principal.

Facts

The dispute in this matter centred around the principal, Qube RE Services ("**Qube**"), calling upon bank guarantees provided by the contractor, Martinus Rail Pty Ltd ("**Martinus**"), under an AS4000-1997 contract valued at approximately $140 million. The contract was related to the Moorebank Intermodal Project, a national transport infrastructure development. In accordance with the contract, Martinus furnished security in the form of bank guarantees totalling $7,029,849, issued as unconditional undertakings by the bank in August 2022.

The crux of the dispute arose when Qube sought to draw upon these guarantees, alleging breaches of contract by Martinus. Martinus, in turn, sought an interlocutory order to restrain Qube from doing so, arguing that the call on the guarantees should be prevented pending the resolution of the underlying contractual disputes.

Decision

Justice Rees dismissed Martinus' application to restrain Qube from calling on the bank guarantees. The Court determined that the contractual regime, as reflected in both the terms of the contract and the nature of the bank guarantees, was designed as a "risk allocation device." This established a "pay now, argue later" framework, permitting Qube to call on the guarantees at an early stage of the dispute, regardless of whether the contractor was ultimately found to be in default. Justice Rees further clarified that the existence of an adjudication determination in favour of Martinus did not impede Qube's right to access the guarantees, provided the contractual requirements for recourse were met.

The decision underscores the importance of carefully examining the purpose of bank guarantees within contractual agreements, particularly in determining whether they serve as security or as a mechanism for risk allocation.

McLachlan v Edwards Landscapes Pty Ltd [2023] NSWSC 532

Coram: Chen J
Court: Supreme Court of New South Wales
Date: 19 May 2023

BUILDING AND CONSTRUCTION – jurisdiction of NSW Civil and Administrative Tribunal under the Home Building Act 1989 (NSW) – where claim substantively concerns breach of statutory warranty

APPEALS – leave to appeal – whether leave required – interlocutory decisions – where matter transferred from Local Court to NSW Civil and Administrative Tribuna

Facts

This matter involved an appeal to the Supreme Court of New South Wales against an interlocutory decision by the Local Court. The dispute originated when the defendant, Edwards Landscapes Pty Ltd, requested the Local Court to transfer the proceedings to the New South Wales Civil and Administrative Tribunal ("**NCAT**"), pursuant to section 48L of the *Home Building Act 1989* (NSW) (the "**HBA**"). The plaintiffs' claim incorporated multiple causes of action, including negligence, breaches of the HBA, the *Design and Building Practitioners Act 2020* (NSW) (the "**DBP Act**"), the Australian Consumer Law, and contract law.

The Local Court determined that the claim principally revolved around the breach of statutory warranties under the HBA, which warranted a transfer to the NCAT. The plaintiffs opposed this transfer, arguing that their case extended beyond the HBA and included causes of action under the DBP Act that were out of time for the Tribunal's jurisdiction but within time for the Local Court under section 48K(3) of the HBA.

Decision

The Supreme Court upheld the Local Court's decision to transfer the matter to the NCAT, affirming that the Local Court acted within its powers under section 48L of the HBA. The

Supreme Court agreed that the NCAT was capable of resolving the core dispute concerning the breach of statutory warranties under the HBA. The Court noted that if the plaintiffs' additional claims exceeded the scope of the statutory warranty issues, they could pursue those claims in the Local Court.

Furthermore, it was acknowledged that since both parties agreed that the six-year statutory warranty period under the HBA applied, it would be challenging to successfully litigate alternative causes of action in the Local Court if the NCAT dismissed the claim under the HBA.

The decision highlights the practicality of the transfer, given the centrality of the HBA claims, and suggests that without the agreement on the six-year warranty, the outcome may have been different, particularly in cases requiring successive actions in both NCAT and the Local Court.

Miller v LMG Building Pty Ltd [2023] NSWSC 995

Coram: Ball J
Court: Supreme Court of New South Wales
Date: 23 August 2023

BUILDING AND CONSTRUCTION — Adjudication — Judicial review — Security of Payment Act (SOPA) — Whether Adjudicator considered relevant material — Where Adjudicator does not consider material filed after payment schedule — Adjudicator committed a jurisdictional error

BUILDING AND CONSTRUCTION — Adjudication — Judicial review — Security of Payment Act (SOPA) — Whether Adjudicator considered merits of the claim at all — Where Adjudicator accepts one party's expert findings based on credibility without reference to inconsistent evidence — Adjudicator committed a jurisdictional error

Facts

The plaintiff, Suzanne Miller, sought to overturn an adjudication determination made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "**SOP Act**"). The dispute arose from a building contract where LMG Building Pty Ltd ("**LMG**") was contracted to carry out renovations and additions to Miller's Mosman residence for a fixed sum of $2.75 million, including GST.

After Miller terminated the contract, LMG lodged a progress claim for $249,516.92 plus adjudication fees. Miller issued a payment schedule indicating no payment was due, citing incomplete work and defects. LMG subsequently applied for adjudication, and the adjudicator ruled in LMG's favour, prompting Miller to challenge the determination in the New South Wales Supreme Court.

Decision

The Court found that the adjudicator had committed jurisdictional errors, necessitating the quashing of the adjudication determination.

Firstly, the adjudicator erred by refusing to consider documentation created after the payment schedule, despite this material merely substantiating the reasons already indicated for non-payment. Secondly, the adjudicator failed to independently assess the merits of the conflicting expert reports on the work's completion, instead relying on credibility assessments of the reports based on prior claims. This failure to properly evaluate the evidence was contrary to the adjudicator's statutory duty.

As a result, the Court set aside the adjudication determination, ordered LMG to repay the garnished amount with interest, and directed the parties to submit orders and costs calculations.

Owners SP 92450 v JKN Para 1 Pty Limited [2023] NSWCA 114

Coram: Gleeson JA; White JA; Brereton JA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 26 May 2023

BUILDING AND CONSTRUCTION — Contract — Implied terms — Statutory warranties — Whether building complied with Building Code of Australia (BCA) — Where performance requirements of BCA specified that external walls must be "non-combustible" — Whether external cladding met performance requirements for fire resistance — Where cladding did not comply with "deemed-to-satisfy" provisions — Where no "alternative solution" prepared prior to issue of construction certificate —Home Building Act 1989 (NSW), s 18(1)(c) — Where breach of s 18(1)(c) conceded

BUILDING AND CONSTRUCTION — Contract — Damages — Claim for reinstatement damages — Evidentiary onus of proving reinstatement would be unreasonable

Facts

The appellant, Owners SP 92450, represents the Owners Corporation of a 28-storey building in Parramatta, NSW, constructed by the respondents, JKN Para 1 Pty Limited and Toplace Pty Ltd. The building was clad with aluminium composite panels ("**ACPs**") manufactured by Fairview Architectural Pty Ltd. These ACPs contained more than 30% polyethylene, rendering them combustible. The Owners Corporation alleged that the cladding did not comply with the Building Code of Australia ("**BCA**") and, therefore, breached the statutory warranties under section 18B of the *Home Building Act 1989* (NSW) (the "**HBA**"). The central dispute at trial concerned whether the ACPs complied with the BCA either through the Deemed-to-Satisfy ("**DtS**") provisions or by an alternative solution.

At first instance, the trial judge determined that the ACPs did not meet the DtS provisions and were also non-compliant under an alternative solution. However, the judge found that the Owners Corporation failed to establish that no alternative solution was available at the time of issuing the

construction certificate, and thus did not substantiate a breach of statutory warranties. Additionally, the judge declined to award reinstatement damages as the Owners Corporation had not demonstrated the unavailability of an alternative solution.

Decision

On appeal, the NSW Court of Appeal reversed the trial court's decision. It was conceded by the respondents that there was a breach of section 18B(1)(c) of the HBA due to non-compliance with the DtS provisions and lack of a valid alternative solution prior to the issuance of the construction certificate.

The Court of Appeal emphasised that, once a breach of the BCA and statutory warranty is established, the onus shifts to the respondents to prove that the costs of rectification, specifically full removal and replacement of the ACPs, would be unreasonable. The Court clarified that the burden of proving the reasonableness of rectification costs falls on the builder or developer, not the claimant.

The respondents did not meet this evidentiary burden, and consequently, the Court awarded the Owners Corporation the agreed sum of $5 million for the cost of rectifying the non-compliant cladding. This decision provides significant clarity on the evidentiary requirements in cladding litigation and the responsibilities of defendants in such claims.

Oxford (NSW) Pty Ltd v KR Properties Global Pty Ltd trading as AK Properties Group ABN 62 971 068 965 [2023] NSWSC 343

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 6 April 2023

BUILDING AND CONSTRUCTION – contract – damages – defects – whether builder entitled to payment of invoices sued upon – whether building work incomplete – whether building work defective – whether cost of rectifying defects proved – whether owners entitled to claim for Hungerfords interest – whether director in breach of the duty prescribed by the Design and Building Practitioners Act 2020 (NSW)

Facts

The Supreme Court of New South Wales adjudicated a dispute arising from a construction contract between Oxford (NSW) Pty Ltd (the "**Builder**") and KR Properties Global Pty Ltd and AS Coaching Pty Ltd atf Calm Properties Unit Trust (the "**Owners**"). The contract, executed on 8 October 2015, involved the construction of a six-unit apartment building. The Guarantors, Elankeeren Eswaran and Ashay Sharma, had guaranteed the Owners' obligations under the contract through a Deed of Guarantee and Indemnity. The Builder sought to recover amounts from the Owners for nine unpaid invoices, while the Owners counterclaimed for damages related to incomplete and defective works, including claims under section 37 of the *Design and Building Practitioners Act 2020* (NSW) (the "**DBP Act**") against Pierre Kazzi, the Builder's sole director.

Decision

Justice Stevenson held that the Owners were justified in withholding payment for the invoices as the Builder had not completed or properly executed significant portions of the work. The Court determined that the contract required the completion of prior stages before payment for subsequent stages, and the Builder's wrongful suspension of work permitted the Owners to terminate the contract.

Regarding the Owners' claims for damages, the court found that while the Owners were entitled to damages for both incomplete and defective works, their claim under section 37 of the DBP Act against Mr Kazzi failed. This was because the Owners did not sufficiently prove the specific costs incurred for rectifying defective work as distinct from completing incomplete work. The Court highlighted that the evidence provided, particularly the architect's allocations, lacked the necessary clarity and methodology.

Additionally, the Owners' claim for Hungerfords interest, amounting to $500,000, was upheld. The Court rejected the Builder's argument that the contract's liquidated damages clause precluded common law remedies, noting that the contract did not explicitly exclude such remedies.

This decision underscores the necessity for precise and detailed evidence in construction disputes, particularly concerning cost allocations and claims under statutory duties of care.

Parkview Constructions Pty Ltd v Futuroscop Enterprises Pty Ltd [2023] NSWSC 178

Coram: Rees J

Court: Supreme Court of New South Wales

Date: 2 March 2023

BUILDING AND CONSTRUCTION — design and construct contract AS4902-2000 — contractor to construct two buildings — airport hotel and long stay carpark — to be completed in September 2017 —principal wishes to use hotel rooftop for tenants — development consent does not approve this use — hotel and carpark tenants commence operations in September 2017 – occupation certificate limits use of rooftop terrace to maintenance only – principal maintains practical completion yet to be achieved.

PRACTICAL COMPLETION — superintendent to issue certificate of practical completion — 'conditional' certificates issued for each building — retrospective date of practical completion on satisfaction of conditions — whether 'conditional' certificates comprise a certificate of practical completion — case law review at [205]-[209] — whether can give a retrospective date at [212]-[213] — 'conditional' certificates have no contractual force.

DETERMINATION BY COURT— whether Court can determine date of practical completion — consideration of Abergeldie Contractors v Fairfield City Council — does not depend on Superintendent having been "manifestly unreasonable" – contractual standard is 'reasonable' — whether Court can determine liquidated damages.

LIQUIDATED DAMAGES — superintendent's certificate did not comply with the contract — whether Court can ascertain liquidated damages — liquidated damages calculated using objective criterion — Court can determine correct sum.

DAMAGES — contractual regime for notifying and remedying defects — whether contract ousts common law damages — caselaw review at [248]-[253] — contract created exhaustive code governing parties' rights regarding defects — common law damages not available — contractual

regime not followed — unnotified defects apparent on reasonable inspection — not entitled to costs of rectification for such defects.

BUILDING AND CONSTRUCTION — security — contractor substitutes cash retention for bank guarantee — whether principal entitled to retain GST on cash retention until bank guarantee returned —GST payable on release of retention.

Facts

This dispute centred on the interpretation and validity of 'conditional' notices of practical completion under an Australian Standard AS4902-2000 contract. The principal, Futuroscop Enterprises Pty Ltd, engaged Parkview Constructions Pty Ltd to design and construct a hotel and carpark. The project commenced on 1 March 2016. By September 2017, the superintendent issued two conditional notices of practical completion—one for Building A (the "**hotel**") and one for Building B (the "**carpark**"). These notices indicated that although there were outstanding items to complete, the buildings could be occupied, subject to further rectifications. Parkview requested the partial return of security based on these notices, but Futuroscop refused, citing defects and delays.

Decision

The New South Wales Supreme Court, presided over by Rees J, determined that the conditional notices did not constitute valid certificates of practical completion. The judge found that the AS4902-2000 contract did not provide for 'conditional' certificates and that the superintendent lacked authority to issue such certificates for individual portions of the works. The Court held that practical completion was not achieved until 25 September 2017. Consequently, this date was used to assess liquidated damages and rectify the security claim.

The Court's decision underscores the necessity for clear, unconditional certification of practical completion and highlights the limitations of conditional notices under standard construction contracts.

Parkview Constructions Pty Ltd v The Owners – Strata Plan No 90018 [2023] NSWCA 66

Coram: Ward P; Leeming JA; Simpson AJA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 17 April 2023

BUILDING AND CONSTRUCTION – residential building work – statutory warranties under Home Building Act 1989 (NSW) – claims by owners corporation against builder and developer – whether claims statutory or contractual – whether single cause of action for breach of contract – whether amendments to introduce new defects more than six years after completion of building work should be permitted – consideration of Onerati v Phillips Constructions Pty Ltd (in liq) (1989) 16 NSWLR 730 holding that builder had res judicata defence when owners sought to raise further defects – consideration of amendments overturning result in Onerati – legislative amendments did not alter nature of claim for breach of contract – appeal from decision permitting owners corporation's amendments dismissed

Facts

This case involved a dispute between Parkview Constructions Pty Ltd, the builder, and The Quay Haymarket Pty Ltd, the developer, regarding a large residential building in Sydney. The building, comprising 286 apartments, was completed with the registration of the building plan on 1 September 2014 and the issuance of a final occupation certificate on 15 December 2014. The Owners Corporation ("**OC**") commenced proceedings on 26 August 2016, alleging defects in the common property due to breaches of the six statutory warranties under section 18B of the *Home Building Act 1989* (NSW) (the "**HBA**"). The OC, as the successor in title to the developer, claimed entitlement to the statutory warranties.

In 2021, the OC sought to amend its statement to include three additional defects, including non-compliance of the building's external façade with the Building Code of Australia. The primary judge allowed the amendments, holding that the OC had a single cause of action to enforce the warranties, not a different cause of action for each defect.

Decision

On appeal, the Court granted leave to appeal but dismissed the appeal, upholding the primary judge's decision. The Court found that the OC's claims are essentially for breach of contract, despite the OC not being a party to the original contract. The statutory warranties under the Home Building Act are incorporated into the contract, allowing the OC to sue for breaches.

The Court ruled that there is a single cause of action for breach of contract when defects are present, regardless of the number of defects. Therefore, the OC's amendments did not introduce a new cause of action but were part of the same contractual breach, allowing the amendments without invoking section 65(2)(c) of the *Civil Procedure Act 2005* (NSW).

The decision underscores that while amendments to pleadings may be permitted, they must be assessed against discretionary considerations related to procedural fairness and the potential impact on the hearing schedule.

Piety Constructions Pty Ltd v Megacrane Holdings Pty Ltd [2023] NSWSC 309

Coram: Richmond J
Court: Supreme Court of New South Wales
Date: 30 March 2023

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) ("the Act") – adjudication determination – whether adjudication determination was affected by jurisdictional error – whether the Act can operate in favour of a claimant which is insolvent or whether abuse of process

Facts

Piety Constructions Pty Ltd ("**Piety**") and Megacrane Holdings Pty Ltd ("**Megacrane**") entered into a subcontract on 30 June 2020 for the provision of tower cranes and associated labour for a project at 93 Forest Road, Hurstville. On 9 March 2022, Megacrane was placed under administration, with Mr Liam Bailey appointed as administrator. Subsequently, on 15 March 2022, Piety issued a notice to Megacrane, taking the remaining works under the contract out of Megacrane's hands due to the appointment of the administrator.

On 11 May 2022, the administrator sent a letter to Piety, claiming that Piety owed Megacrane $258,976.18, including GST, for both pre-appointment works and dry hire fees. This letter, which included invoices and was described as a "payment claim," was followed by an adjudication application by Megacrane on 3 June 2022, challenging Piety's failure to issue a payment schedule. An adjudication determination was issued on 28 June 2022, awarding Megacrane $108,828.05. Megacrane subsequently obtained a judgment debt and registered it in the District Court. Piety, contesting the validity of the adjudication determination, sought a declaration that the determination was void and an injunction to prevent enforcement of the judgment debt.

Decision

The Supreme Court of New South Wales addressed the validity of the adjudication determination under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "**SOP**

Act"). Piety's arguments included the claim that the payment claim issued by Megacrane was invalid, that Piety had not issued a payment schedule, and that Megacrane had not complied with the Act's procedural requirements.

The Court found that the document issued by Megacrane's administrator constituted a valid payment claim under section 13 of the Act, despite being described also as a letter of demand. It satisfied the criteria for a payment claim by identifying the work and amount claimed. The Court held that Piety's email of 20 May 2022, which disputed the claim but did not constitute a valid payment schedule, did not preclude Megacrane from seeking adjudication. The adjudicator's determination was thus not affected by jurisdictional error.

Consequently, Piety's application to quash the adjudication determination was dismissed, and the injunction to restrain enforcement of the judgment debt was refused. The Court emphasised the statutory framework of the SOP Act, affirming the adjudicator's role in determining claims within the prescribed legislative parameters.

Piety Constructions Pty Ltd v Megacrane Holdings Pty Ltd (Administrator Appointed) (No 2) [2023] NSWSC 682

Coram: Richmond J

Court: Supreme Court of New South Wales

Date: 21 June 2023

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) ("the Act") – where application to have adjudication determination quashed or declared void was refused – whether Brodyn/Grosvenor stay should be granted

Facts

This summary assumes familiarity with the facts of *Piety Constructions Pty Ltd v Megacrane Holdings Pty Ltd* [2023] NSWSC 309 at page 64.

The Court had previously dismissed Piety's application to quash the adjudication determination. In this matter, Piety sought a further stay to prevent the release of funds to Megacrane.

Decision

The Court addressed Piety's application for a stay, weighing the balance of convenience against the risk of irreparable prejudice. It found that Piety had an arguable cross-claim under the contract for adjustment of costs following the work being taken out of Megacrane's hands. The Court accepted that without a stay, Piety would suffer irreparable harm due to Megacrane's imminent liquidation.

However, the proposed undertaking by the administrator to hold the judgment funds in trust for Piety mitigated this risk. The Court considered that this trust, alongside the administrator's personal undertaking to cover Piety's costs, provided sufficient protection for Piety. Consequently, the Court declined to grant the stay, ensuring that the funds were held on trust to cover any potential set-off claims or other legal entitlements Piety might have.

The decision affirmed that while Piety could pursue its cross-claim, it would be protected by the administrator's undertaking in the event of a successful appeal or proof of debt adjudication.

Roberts v Goodwin Street Developments Pty Ltd [2023] NSWCA 5

Coram: Ward P; Kirk JA; Griffiths AJA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 10 February 2023

BUILDING AND CONSTRUCTION — Contract — Defects — Duty of care — Whether statutory duty of care under the Design and Building Practitioners Act 2020 (NSW) applies in relation to "boarding houses" — Meaning of "building work" — Meaning of "construction work"

BUILDING AND CONSTRUCTION — Contract — Damages — Whether proper measure of damages to reversionary interest in property is the rectification of the damage or the diminution in value of the reversionary interest

CIVIL PROCEDURE — Commercial List, Technology and Construction List — Procedure — List Statements — Where respondent failed to plead action on the case in trespass in List Statement — Whether denial of procedural fairness to determine the matter on that basis

Facts

Daniel Roberts, a builder operating through his company DSD Builders Pty Ltd (now in liquidation), was engaged by Goodwin Street Developments Pty Ltd under a contract dated 10 July 2017 to construct student accommodation in Jesmond, NSW. The project was progressing when a dispute arose, leading to DSD ceasing work on 2 March 2018. Following this, Roberts entered the property and deliberately caused significant damage by removing fixtures such as doors, windows, and stairs. Goodwin Street Developments discovered the damage on 19 March 2018 and immediately terminated the contract.

In response, Goodwin Street Developments brought two legal claims against Roberts. The first claim alleged that Roberts was liable in tort for the damage caused to the property. Although the trial judge found that a trespass claim could not be established because the respondent did not

have exclusive possession of the property, the judge accepted an alternative claim that was not explicitly pleaded. This alternative claim was characterised as an action on the case for injury to the respondent's reversionary interest, leading to an award for rectification costs. The second claim argued that Roberts owed a statutory duty of care under section 37 of the *Design and Building Practitioners Act 2020* (NSW) ("**DBP Act**") and was liable for defects in the construction work.

Decision

On appeal, Roberts raised three main grounds. First, he argued that the trial judge had denied him procedural fairness by allowing Goodwin Street Developments to recharacterise its claim during the hearing. The Court dismissed this ground, noting that the recharacterisation did not alter the nature of the damages sought and that Roberts had the opportunity to request an adjournment but did not do so.

Second, Roberts contended that the trial judge erred in calculating damages based on the cost of rectification rather than the diminution in value to the reversionary interest. The Court upheld the trial judge's approach, emphasising that rectification costs were a valid measure of damages in this context and that the burden of proving the unreasonableness of this measure lay with Roberts, who failed to meet this burden.

Finally, Roberts challenged the application of section 37 of the DBP Act, arguing that it was wrongly applied to boarding houses. The Court, while using different reasoning from the trial judge, affirmed that the DBP Act did indeed apply to the boarding house in question. As a result, the Court dismissed the appeal, upholding the respondent's success on both claims.

Robust Builders Pty Ltd v Barai & Anor (No.6) [2023] NSWDC 376

Coram: Abadee DCJ
Court: District Court of New South Wales
Date: 15 September 2023

CONTRACTS – building and engineering contracts - – builders' claim for unpaid invoices – question of date the contract was entered – whether collateral contract – whether owners liable for unpaid invoices – whether claimed variations proven - owners' cross-claim for defective and incomplete works – significance of issue of occupancy certificate and other compliance reports to proof of defective or incomplete works – significance of rectification order

Facts

The plaintiff, Robust Builders Pty Ltd (the "**Builder**"), entered into a contract with the defendants, Mr Barai and Ms Mahjabeen (the "**Owners**"), for the demolition and reconstruction of a residential property in Seven Hills, New South Wales. The contract, signed on 23 December 2016, stipulated a total price of $510,000, inclusive of GST.

Throughout 2017 and 2018, the Builder carried out the construction, and an occupancy certificate was issued on 3 July 2018. The Builder alleged that it was locked out of the property in late July 2018, which prevented it from completing the works and reclaiming certain tools and equipment. The Builder subsequently sued the Owners for $312,624.25, claiming unpaid invoices for variations, as well as the value of the equipment allegedly left on the property.

The Owners denied the Builder's claims, arguing that the contract had been signed on 24 September 2016, and that the works were incomplete and defective. They further filed a cross-claim seeking damages for rectification and completion of the works, citing breaches of both express and implied terms of the contract.

Decision

The Court found in favour of the Owners, rejecting the Builder's claim for unpaid variations and the alleged value of the tools left on the property. The Court determined that the Builder had failed to prove the existence of an agreement for the claimed variations. It also held that the mere issuance of an occupancy certificate did not shield the Builder from liability for incomplete or defective work.

The Court noted that the statutory warranty rights under the *Home Building Act 1989* (NSW) remained intact despite the Owners having moved into the property. Furthermore, the Court upheld the Owners' cross-claim, finding that the Builder had breached its contractual obligations by delivering substandard work. The Builder was ordered to pay damages to the Owners for the rectification and completion of the works, with interest calculated under the *Civil Procedure Act 2005* (NSW).

Rodrigues v customOz Services Pty Ltd [2023] NSWSC 379

Coram: Rees J
Court: Supreme Court of New South Wales
Date: 17 April 2023

BUILDING AND CONSTRUCTION — dispute resolution clause – works completed – invoices rendered – clients complain – invoices reviewed and replaced by new invoices – mediator appointed –invoices reviewed again and replaced by final invoice – without prejudice correspondence – adjudication.

PAYMENT CLAIM — whether valid payment claim given earlier invoices – s13(6)(b), SOPA – where earlier invoices withdrawn, final invoice complied with s 13.

PAYMENT SCHEDULE — whether without prejudice offer is a payment schedule — without prejudice offer did not indicate why scheduled amount was less — without prejudice correspondence unlikely to be a payment schedule – confidential communication – inadmissible – respondent cannot pay amount in offer absent acceptance of offer by claimant –provision of without prejudice communication to adjudicator may result in manifest error of law.

Facts

The plaintiffs, Frank and Janina Rodrigues, sought a declaration that an adjudication determination made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "**SOP Act**") was void. The determination awarded the first defendant, customOz Services Pty Ltd (the "**builder**"), $60,000 for renovation work on the plaintiffs' Bowral home.

The plaintiffs contended that the payment claim served on 12 October 2022 was invalid as it lacked a reference date, arguing that previous claims exhausted the builder's entitlement to any further payment claims under the contract. Additionally, they asserted that an email sent on 17 October 2022 should have been considered a payment schedule under SOP Act, which would have rendered the subsequent adjudication application out of time.

Decision

The New South Wales Supreme Court upheld the validity of the adjudication determination. Her Honour found that the amendments to SOP Act in 2019, which abolished the concept of "reference dates," allowed the payment claim issued on 12 October 2022 to be valid, even though it included amounts previously claimed.

The Court rejected the plaintiffs' argument that the September 2022 invoices constituted final payment claims. Furthermore, the court determined that the plaintiffs' 17 October 2022 email, labelled "without prejudice," did not satisfy the statutory requirements for a payment schedule under SOP Act. As such, the adjudication process was lawfully initiated, and the plaintiffs' challenge failed.

Schrader v David Broach t/as David Broach Building Services [2023] NSWDC 97

Coram: J Smith SC
Court: District Court of New South Wales
Date: 14 April 2023

BUILDING AND CONSTRUCTION — Australian Consumer Law – unconscionability – misleading and deceptive conduct – defective work – budget report – unpaid invoices – quantum merit

CONTRACT – cost-plus contract – breach of contract – implied terms – good faith – consequence of breach – damages -– whether termination by acceptance of repudiation

Facts

The plaintiffs, Matthew and Jacqueline Schrader, engaged the defendant, David Broach, for renovations and additions to their home under a cost-plus building contract. The contract, signed in December 2019, included a non-binding estimate of $300,000 for the works. The renovation project involved significant structural work, including excavation, construction of a rumpus room, wine cellar, storeroom, and internal stairs, as well as the removal and rebuilding of an upstairs balcony.

By August 2020, the defendant issued a revised estimate, requiring an additional $352,000 to complete the works. At this time, the plaintiffs had failed to pay several invoices, prompting the defendant to suspend the works in September 2020.

The plaintiffs initiated proceedings in May 2021, claiming that the defendant engaged in misleading and deceptive conduct, unconscionable conduct, and breached an implied duty to act in good faith. They also alleged that some of the work was defective and sought damages for the cost of rectification and completion.

Decision

The District Court of New South Wales dismissed the plaintiffs' claims, finding that the clear provisions of the cost-plus contract, which explicitly stated that the estimated cost was non-binding, precluded any prior representations regarding the cost from being considered misleading or deceptive. The Court found that the plaintiffs had not relied on any such representations, as they had read and signed the contract, which contained explicit warnings about the cost estimate's non-binding nature. The Court also dismissed the claims of unconscionable conduct, ruling that while the defendant may have been negligent or disorganised, his conduct did not reach the threshold of unconscionability.

Furthermore, the Court held that the defendant did not breach his duty of good faith, as the costs charged were in accordance with the contract, and the plaintiffs failed to establish that they suffered any loss due to the defendant's actions. The defendant's cross-claim for unpaid invoices was also dismissed due to non-compliance with the contract's requirements.

Shinetec (Australia) Pty Ltd v The Gosford Pty Ltd; The Gosford Pty Ltd v Bank of China Ltd (No 2) [2023] NSWSC 1405

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 20 November 2023

BUILDING AND CONSTRUCTION – contract –construction of residential unit development in Gosford – where builder agreed to fund first $37 million of development – where builder procured that its Chinese parent company caused its bank to issue standby letter of credit to secure that obligation – where builder contended it had provided the $37 million finance by entering into loan agreement – whether builder had performed its obligation to finance – where receivers appointed to developer – where developer by the receivers made demand under the letter of credit – whether demand invalid and of no effect

CIVIL PROCEDURE – pleadings – Commercial List Statement – where case propounded was that developer not entitled to make demand under letter of credit because letter of credit security for provision of $37 million finance and that such finance had been provided by entry into loan agreement – whether builder had established that case

BANKING AND FINANCE – instruments – standby letter of credit – proper law of letter of credit – letter of credit subject to Rules on International Standby Practices ISP98 – how ISP98 should be construed – whether Official Commentary available in aid of construction of ISP98 – where receivers appointed to beneficiary – where demand made under letter of credit by receivers – whether rules in ISP98 concerning transfer by operation of law engaged – whether bank entitled to suspend payment pending provision of documents by beneficiary

PRIVATE INTERNATIONAL LAW – orders with extraterritorial effect – where Chinese Court made a Civil Ruling that bank suspend payment under standby letter of credit issued by bank in Shanxi in the People's Republic of China – whether this Court should order bank to make payment – whether judgment should be entered against bank – whether judgment should be

suspended pending approach to Chinese Court or recognition of judgment in the People's Republic of China

Facts

Shinetec (Australia) Pty Ltd ("**Shinetec**") and The Gosford Pty Ltd ("**Gosford**") were parties to a construction contract under which Shinetec arranged for the issuance of a $37 million standby letter of credit ("**SBLC**") from the Bank of China ("**BoC**") in favour of Gosford. The SBLC was governed by the International Standby Practices ("**ISP98**"). Following delays in the development project, Gosford presented a demand on the SBLC to BoC's Shanxi branch. At the time, receivers and managers had been appointed to Gosford, and the demand was issued on behalf of Gosford Pty Ltd (Receivers & Managers Appointed).

BoC refused to honour the demand, citing two primary reasons: (1) a request for legal advice and documents concerning the legal status of Gosford under ISP98, and (2) an injunction issued by the Taiyuan Intermediate People's Court of Shanxi Province, which ordered the suspension of payment under the SBLC.

Shinetec subsequently initiated proceedings in the Supreme Court of New South Wales, arguing that Gosford's demand was invalid. In response, Gosford filed a cross-claim against BoC, seeking payment under the SBLC.

Decision

Justice Stevenson dismissed Shinetec's claim, holding that the demand presented by Gosford was valid under the terms of the SBLC. In assessing Gosford's cross-claim against BoC, the Court determined that the relevant provisions of ISP98 did not apply, as the receivers and managers were officers of Gosford and not "successors" of the beneficiary. Thus, BoC was not entitled to request additional documents or legal advice.

Furthermore, the Court found that the judgment in favour of Gosford would not result in BoC contravening the Chinese court order, as compliance with Australian law would not violate the ruling. Consequently, the Court awarded judgment in favour of Gosford against both Shinetec

and BoC, although enforcement of the judgment was stayed pending the resolution of proceedings in the Chinese courts.

Strata Plan 99576 v Central Construct Pty Ltd [2023] NSWSC 212

Coram: Darke J
Court: Supreme Court of New South Wales
Date: 10 March 2023

CIVIL PROCEDURE – application for stay of proceedings – where defective building works the subject of the proceedings are also the subject of an investigation process under the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW) ("the Act") – where the investigation process may ultimately result in the making of orders against the defendants to carry out building rectification work – whether it is appropriate for the Court to order a stay of the proceedings to effectively allow the investigation process under the Act to proceed to a conclusion – stay refused

Facts

The plaintiff, an Owners Corporation, initiated proceedings in the Technology and Construction List against the defendants, who were alleged to be the builder and developer of a strata development. The plaintiff contended that the building work was significantly defective and failed to comply with the Building Code of Australia. Subsequently, the defendants sought a 12-month stay of the proceedings, arguing that an ongoing investigation under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) (the "**Act**") by the Department of Fair Trading, specifically through Project Intervene, could potentially resolve the issues through rectification orders, thereby rendering the court proceedings unnecessary.

Decision

The Court dismissed the defendants' motion for a stay. The judge held that the concurrent investigation under the Act did not warrant halting the legal proceedings. The court was unpersuaded by the defendants' arguments that the stay would prevent inconsistent findings across different forums and reduce litigation costs. Justice Darke noted the uncertainty surrounding the outcomes and timeline of the investigation under Project Intervene and emphasised that the plaintiff had a prima facie right to prosecute its case.

Furthermore, the court found no legislative intention requiring court proceedings to be stayed pending the conclusion of processes under the Act. The defendants' concerns about potential prejudice due to parallel proceedings were acknowledged but deemed insufficient to justify the stay. Consequently, the defendants' motion was dismissed, and they were ordered to pay the plaintiff's costs.

Sunshine East Pty Ltd v CBEM Holdings Pty Ltd [2023] NSWSC 744

Coram: Fagan J
Court: Supreme Court of New South Wales
Date: 29 June 2023

APPEALS – procedure – leave to appeal against summary judgment of District Court Registrar - plaintiff/judgment debtor ordered to pay unanswered progress claim for building works undertaken by defendant/judgment creditor pursuant to s 15 of the Building and Construction Industry Security of Payment Act 1999 (NSW) – where summary judgment entered against plaintiff/judgment debtor due to absence of triable defence

CONTRACTS – parties – agency – whether second plaintiff entered into contract with defendant for building works – where corporate agent empowered to enter into trade contracts on behalf of second plaintiff with prior approval – where no evidence that second plaintiff did not give prior approval in circumstances from which approval could be inferred – corporate agent acted with express actual authority to bind second plaintiff – no triable issue that second plaintiff was not a party to the contract

BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – where defendant/judgment creditor was uninsured – statutory prevention to recover costs of work for failing to insure under s 94(1) not applicable to parts of the work that are not "residential building work" under the Act – where defendant/judgment creditor was unlicensed – where statutory consequences of being unlicensed do not include loss of entitlement to progress payments under s 15 of the Security of Payment Act – no triable issues arise due to the defendant/judgment creditor being uninsured or unlicensed

Facts

This case concerned a dispute over payment under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "**SOP Act**"). The contractor, CBEM Holdings Pty Ltd ("**CBEM**"), had been engaged by Sunshine East Pty Ltd and Chunlin Fan (the "**Principal**") to

carry out civil and stormwater works under a Trade Contract. The contract was part of a broader project managed by ASY Construction Pty Ltd under a Construction Management Contract, which specified that the work was to be performed on residential property in Dural, NSW.

Notably, the work undertaken by CBEM was not covered by the requisite Home Building Compensation Fund insurance ("**HBCF insurance**") nor was CBEM licensed, as required by the *Home Building Act 1989* (NSW) ("**HBA**"). CBEM served a payment claim for $420,952.39 under SOP Act, which was not responded to by the Principal, leading to a summary judgment in CBEM's favour in the District Court. Sunshine East and Fan appealed, arguing that the lack of insurance and proper licensing should preclude CBEM from receiving payment.

Decision

The Supreme Court of New South Wales, presided over by Fagan J, dismissed the appeal, affirming that CBEM was entitled to payment under SOP Act despite the lack of insurance and licensing. The Court held that Chunlin Fan was indeed a party to the Trade Contract, rejecting the argument that Fan had not authorised the agreement. The court further reasoned that while the HBA prohibits the performance of residential building work without the required insurance and licensing, these requirements do not extend to claims under SOP Act.

The statutory right to payment under SOP Act operates independently of the contractual enforcement mechanisms outlined in the HBA, as previously established in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421. Therefore, CBEM's entitlement to payment under SOP Act was upheld, regardless of its non-compliance with the HBA's provisions. This judgment underscores the protective scope of SOP Act for contractors, even in cases where statutory obligations under the HBA are not met.

Superb Build Pty Ltd v Petrosyan [2023] NSWDC 2

Coram: Andronos SC DCJ
Court: District Court of New South Wales
Date: 16 February 2023

CIVIL PROCEDURE— Stay of enforcement pending determination of related proceedings

BUILDING AND CONSTRUCTION – stay of judgment giving effect to adjudication under Building and Construction Industry Security of Payment Act 1999 (NSW)

Facts

This case concerns an application to extend a stay on a judgment entered in favour of the plaintiff, Superb Build Pty Ltd ("**Superb**"), under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "**SOP Act**"). The judgment was based on an adjudication determination awarding Superb $179,262.27 for work performed at the residence of the defendants/applicants, the Petrosyan family. Following the judgment, Superb obtained a garnishee order and a writ of levy on the Petrosyans' property.

The Petrosyans, who had previously overpaid and claimed defective work, initiated separate proceedings against Superb (the "**Related Proceedings**") arguing that the adjudication did not accurately reflect the value of the work performed. They contended that the total amount ultimately owed to them would exceed the adjudicated sum. An interim stay on the judgment was granted, conditioned on the payment of $179,262.27 into Court following the sale of the property.

The primary issue before the Court was whether these funds should be released to Superb pending the outcome of the Related Proceedings.

Decision

The Court considered the balance of convenience and the risk of irreparable prejudice in deciding whether to extend the stay. It was noted that stays on judgments arising from SOP Act adjudications are generally less readily available, given the Act's policy to ensure prompt payment to contractors. However, the applicants were found to have a strong case under the *Home Building Act 1989* (NSW) ("**HBA**"), particularly concerning the lack of a written contract and required insurance, which rendered the agreement unenforceable by Superb.

The Court also examined Superb's financial position, which was weak. The financial statements showed that Superb had no significant assets and was largely dependent on loans to directors, raising concerns about its ability to repay the adjudicated amount if required. Given these factors, the Court determined that the applicants had demonstrated a sufficient risk of irreparable prejudice if the stay were not extended. As a result, the stay was extended, and the funds were not released to Superb pending the final determination of the Related Proceedings.

The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWSC 116

Coram: Rees J
Court: Supreme Court of New South Wales
Date: 23 February 2023

CIVIL LIABILITY ACT — owners corporation sues builder and developer for building defects — breach of statutory duty imposed by s 37 Design and Building Practitioners Act — non-delegable duty by reason of s 39 Design and Building Practitioners Act — proportionate liability — apportionable claims — whether ss 5Q, 39(a) Civil Liability Act operate such that claim is not apportionable.

Facts

The Owners Corporation of a strata development in North Sydney brought a claim against the builder, Pafburn Pty Ltd, and the developer, Madarina Pty Ltd, for breach of the statutory duty of care imposed by section 37 of the *Design and Building Practitioners Act 2020* (NSW) (the "**DBP Act**"). The claim centred around alleged building defects that caused economic loss to the Owners Corporation. The defendants admitted that Pafburn owed a statutory duty under the DBP Act but contested that Madarina owed the same duty. Additionally, the defendants raised a proportionate liability defence under Part 4 of the *Civil Liability Act 2002* (NSW) (the "**CLA**"), asserting that the responsibility for the defects should be shared with nine other concurrent wrongdoers, including various subcontractors, manufacturers, and certifiers involved in the construction process.

Decision

The Court was asked to summarily dismiss the proportionate liability defence on the grounds that it disclosed no reasonable defence and was insufficiently particularised. Her Honour dismissed the application, holding that the DBP Act and the CLA intersect such that the proportionate liability provisions apply to claims brought under section 37 of the DBP Act. The Court found that the statutory duty of care under the DBP Act, while non-delegable, does not preclude the application of the CLA's proportionate liability regime. This means that the defendants could

legitimately argue that the liability for the alleged defects should be shared among the identified concurrent wrongdoers.

The Court's decision underscores the importance of the proportionate liability provisions in addressing the potentially broad application of the statutory duty of care under the DBP Act.

The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301

Coram: Ward P; Adamson JA; Basten AJA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 13 December 2023

APPEAL – leave to appeal – interlocutory order refusing to strike out defence – defence pleaded plaintiff's claim apportionable – issue of general public importance – significant impact on course of trial

TORT – duty of care – statutory duty for construction work – extension of duty to subsequent owners of land – duty non-delegable – whether claim is apportionable under Pt 4 of Civil Liability Act 2002 (NSW) – claim by owners corporation for defective works – Design and Building Practitioners Act 2020 (NSW), s 37(1)

WORDS AND PHRASES – "non-delegable duty – "tort" – "vicarious liability"

Facts

This summary assumes familiarity with the facts of *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2023] NSWSC 116 at page 84.

The appellant, The Owners – Strata Plan No 84674 (the "**Owners Corporation**"), initiated legal proceedings against Pafburn Pty Ltd and Madarina Pty Ltd, the builder and developer of a residential strata building at 197 Walker Street, North Sydney. The primary judge, Rees J, dismissed the motion, holding that section 5Q(1) of the *Civil Liability Act 2002* (NSW) (the "**CLA**") did not extend to the statutory duty under the DBP Act, leading the Owners Corporation to seek leave to appeal.

Decision

The key issues on appeal were: (i) whether the non-delegable duty under section 37(1) of the Design and Building Act constitutes a "tort" under section 5Q of the CLA; and (ii) whether the proportionate liability provisions in Part 4 of the CLA are applicable.

On the first issue, the Court (Adamson JA and Basten AJA, with Ward P agreeing) held that the terms "liability in tort" and "breach of a non-delegable duty" in section 5Q(1) of the CLA are not restricted to common law torts or duties. Instead, the legislation extends the scope of common law duties and establishes a statutory cause of action, as evidenced by section 37(3) of the *Design and Building Practitioners Act 2020* (NSW) ("**DBPA**"). The Court clarified that a breach of a non-delegable duty is treated as a tortious liability, consistent with statutory and common law principles.

Regarding the second issue, the Court determined that the non-delegable duty imposed by section 37 of the DBPA is sufficient to exclude the proportionate liability provisions of Part 4 of the CLA. The respondents, as builders, are vicariously liable for breaches by concurrent wrongdoers under section 5Q of the CLA. While the respondents may seek a cross-claim against these wrongdoers, this does not reduce their liability to the Owners Corporation for the entire loss incurred. The Court emphasised that the Acts should be interpreted harmoniously, and the liability owed by the respondents is akin to vicarious liability, which is not subject to apportionment under Part 4 of the CLA. Consequently, the appeal was allowed, and leave was granted.

The Owners - Strata Plan No 97315 v Icon Co (NSW) Pty Ltd [2023] NSWSC 363

Coram: Darke J
Court: Supreme Court of New South Wales
Date: 13 April 2023

BUILDING AND CONSTRUCTION – defective sunshades on façade of residential tower – referral of issues to referee – referee to determine whether builder liable and, if so, what is the proper rectification method – referee finds builder liable in respect of structurally inadequate sunshades – referee faced with competing rectification methods – referee concludes that C Bracket Solution is proper rectification method – whether referee misconstrued contract in finding that C Bracket Solution would achieve conformity with the contract – whether referee's findings concerning visibility of brackets perverse or based upon a failure to understand evidence – held that referee made no error of principle, and his findings of fact were clearly open to him – not appropriate to exercise discretion to reject or vary the referee's report – motion dismissed

Facts

The plaintiff, the Owners Corporation, initiated proceedings against Icon Co (NSW) Pty Ltd, the builder of the Opal Tower at Sydney Olympic Park, alleging both structural and non-structural defects. Among the issues raised was the method by which sunshades were affixed to the building's façade. Following a court order under *Uniform Civil Procedure Rules 2005* (NSW) ("**UCPR**") rule 20.14, the matter of the sunshade defects was referred to an expert referee to determine Icon's liability and the appropriate rectification methodology. The referee conducted a hearing where Icon proposed the "C-Bracket Solution" as the appropriate remedy, while the Owners Corporation advocated for the "Hidden Bracket Solution." The referee concluded that the C-Bracket Solution was the proper rectification method, finding that the sketches attached to the construction contract did not necessitate invisible affixation of the sunshades.

Dissatisfied with the referee's findings, the Owners Corporation filed a notice of motion seeking orders under UCPR rule 20.24 to reject or vary the referee's report, arguing that the C-Bracket

Solution failed to bring the work into conformity with the contractual obligations, as required under the principles established in *Bellgrove v Eldridge* (1954) 90 CLR 613.

Decision

Justice Darke dismissed the Owners Corporation's application, holding that the referee made no error of principle and that his findings of fact were clearly open to him. His Honour found that the drawings and sketches annexed to the contract were indicative rather than prescriptive, with no specific requirement for how the sunshades were to be affixed. The referee's determination that the C-Bracket Solution achieved contractual conformity was upheld, and it was deemed the appropriate rectification methodology.

Consequently, the Court refused to exercise its discretion to reject or vary the referee's report, and the application was dismissed with costs awarded against the Owners Corporation.

The Owners of Strata Plan No 97315 v Icon Co (NSW) Pty Ltd [2023] NSWCA 303

Coram: Bell CJ; Meagher JA; Adamson JA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 27 November 2023

APPEALS – leave to appeal – principles governing – where Applicant sought leave to appeal from a discretionary decision of the primary judge to adopt aspects of a referee's report – whether matter raises an issue of principle, a question of public importance, or a reasonably clear injustice going beyond something that is merely arguable

Facts

This summary assumes familiarity with the facts of *The Owners - Strata Plan No 97315 v Icon Co (NSW) Pty Ltd* [2023] NSWSC 363 at page 88.

The primary judge, Darke J, accepted the findings of a referee who had concluded that the C-Bracket solution was both structurally adequate and in conformity with the building contract, dismissing the Owners' Corporation's preferred Hidden Bracket solution as unreasonable and disproportionately expensive. This matter concerned an application for leave to appeal from Darke J's decision.

Decision

The Court of Appeal, led by Bell CJ, refused the Owners' Corporation's application for leave to appeal the primary judge's decision. The Court upheld the referee's findings that the C-Bracket solution was consistent with the building contract and reasonable given the circumstances. The Court noted that even if the primary judge's adoption of the referee's report was overturned, the same issues concerning the proportionality and reasonableness of rectification methods would likely yield the same outcome.

The Court found no significant error in the primary judge's decision, determining that the case did not raise issues of principle, public importance, or clear injustice warranting appellate review. Consequently, the application for leave to appeal was dismissed with costs.

The Owners Strata Plan 64757 v Sydney Remedial Builders Pty Ltd [2023] NSWSC 1127

Coram: Rees J
Court: Supreme Court of New South Wales
Date: 18 September 2023

BUILDING AND CONSTRUCTION — builder retained to repair defects caused by original builder — whether proceedings for breach of statutory warranty commenced within 7 years after completion of work — s18E, Home Building Act 1989 (NSW) — date of completion of work — s3B, Home Building Act — legislative history – distinction between completion and practical completion – meaning of "completion" — interaction between s3B(2) and (3).

REFEREE — separate question — whether to adopt report — error of law in application of section 3B — failed to consider when contractor last attended site to carry out work under section 3B(3)(b) — final date on which contractor attended site was earlier than date of practical completion under section 3B(2) — the earliest date applies — proceedings out of time.

Facts

In this case the New South Wales Supreme Court was asked to interpret the meaning of "completion" for the purposes of the *Home Building Act 1989* (NSW) (the "**HBA**"). The plaintiffs, The Owners Strata Plan 64757, initiated proceedings on 15 March 2019, seeking redress for defective building work under section 48MA of the HBA. The defendant, Sydney Remedial Builders Pty Ltd, had been engaged to rectify defects caused by the original builder.

A central issue in the case was whether the proceedings had been commenced within the seven-year statutory warranty period prescribed by section 18E of the HBA. This question hinged on the determination of the date of "completion" of the remedial works, which was assessed by an architect, Dr Phillip Briggs. Dr Briggs concluded that "practical completion" of the works occurred on 16 March 2012, suggesting that the proceedings were timely. The plaintiff supported

Dr Briggs' findings, while the defendant argued that the architect had misapplied the definitions of "completion" and "practical completion."

Decision

The Court, presided over by Justice Rees, scrutinised section 3B of the HBA, which delineates the concept of "completion" in two scenarios: (1) where the work is deemed complete according to the contract under which it was carried out, and (2) where no contractual definition exists, the work is considered complete upon "practical completion." Justice Rees highlighted the statutory distinction between "completion" and "practical completion," noting that "completion" generally occurs later in the construction process, although not necessarily at final completion.

The Court determined that Dr Briggs had conflated the contractual notion of "practical completion" with the statutory definition of "completion" under section 3B(2), resulting in an incorrect application of the law. Upon applying the correct statutory test, Justice Rees concluded that "practical completion" occurred at least a week earlier than Dr Briggs' assessment, thereby rendering the plaintiffs' proceedings out of time.

The Owners - Strata Plan 89412 v Brookfield Residential Developments Australia Pty Ltd [2023] NSWSC 1420

Coram: Stevenson J
Court: Supreme Court of New South Wales
Date: 21 November 2023

BUILDING AND CONSTRUCTION – Design and Building Practitioners Act 2020 (NSW) – statutory duty under s 37 – application to amend Technology and Construction List Statement

Facts

The Owners Corporation, representing a five-storey block of 55 apartments in Little Bay, initiated proceedings against Brookfield Residential Developments Australia Pty Ltd and several other defendants for alleged construction defects. The development was designed and constructed by Pimas Gale Constructions Pty Ltd (the "**Builder**") under a Design and Construct Agreement ("**Contract**") with Little Bay South 4 Pty Ltd (the "**Developer**"). Brookfield, named as the Superintendent in the Contract, was not a party to the Contract but was responsible for overseeing the construction process, including certifying payment claims and issuing certificates of practical completion.

The Owners Corporation sought to amend its Technology and Construction List Statement to allege that Brookfield, by virtue of its role as Superintendent, had a duty of care under section 37 of the *Design and Building Practitioners Act 2020* (NSW) (the "**DBP Act**"). The Corporation argued that Brookfield's supervisory role amounted to "construction work" as defined in the DBP Act, thus making it liable for the construction defects.

Decision

Justice Stevenson of the New South Wales Supreme Court refused the Owners Corporation's application to amend its List Statement. The Court found that the allegations against Brookfield were inadequately particularised and did not sufficiently demonstrate how Brookfield's role as Superintendent could be construed as "construction work" under the DBP Act. The Court noted

that while Brookfield had supervisory duties under the Contract, the Owners Corporation failed to provide specific evidence or detailed allegations showing that Brookfield directly engaged in construction activities or had substantive control over the work.

The Court also criticised the reliance on broad assertions in the Spratling Report, which did not clearly link Brookfield's actions to the alleged defects. Consequently, the Court denied leave to amend the List Statement, finding that the proposed amendments lacked the necessary factual basis to support a claim under the DBP Act.

The Owners-Strata Plan 86807 v Crown Group Constructions Pty Ltd [2023] NSWSC 44

Coram: Ball J

Court: Supreme Court of New South Wales

Date: 7 February 2023

CIVIL PROCEDURE — Originating process — Amendment — Disallowance of amendment — claim under the Home Building Act 1989 (NSW) s18B

CIVIL PROCEDURE — Originating process — Amendment — Disallowance of amendment — claim under Design and Building Practitioners Act 2020 (NSW) — opportunity to replead

Facts

This case involved a residential strata development in Waterloo, where the plaintiff, the Owners Corporation, sought to amend its claim against Crown Group Constructions Pty Ltd (the "**Builder**") and Crown W Pty Ltd (the "**Developer**"). The Owners Corporation's original claim, initiated in December 2016, related to alleged defects in the building work, invoking warranties implied under section 18B of the *Home Building Act 1989* (NSW) ("**HBA**").

In December 2022, the Owners Corporation filed a motion to amend its claim to include allegations concerning the non-compliant cladding on the façade, asserting that the cladding posed a fire risk and breached the warranties under the HBA. The Owners Corporation also sought to add a claim against the Builder under section 37 of the *Design and Building Practitioners Act 2020* (NSW) (the "**DBP Act**") for breach of a duty of care in relation to the cladding.

The defendants opposed the amendments on several grounds, including the expiration of the limitation period and the lack of evidence that the cladding was non-compliant at the time of construction.

Decision

The Supreme Court of New South Wales dismissed the Owners Corporation's motion to amend its claim. The Court identified three primary reasons for refusing leave to amend the claim under the HBA: the absence of evidence demonstrating that the cladding did not comply with the Building Code of Australia ("**BCA**") at the time of construction, the owners corporation's failure to investigate the cladding issue earlier despite being aware of potential concerns since 2018, and the potential prejudice to the defendants due to the delayed claim.

Additionally, the Court found that the proposed claim under the DBP Act was inadequately pleaded, lacking proper particulars regarding the alleged negligence of the Builder. The Court held that it was not in the interests of justice to allow the owners corporation to bring new claims at this stage, particularly given the significant delay and the potential impact on the defendants' ability to pursue related claims against third parties.

Total Construction Pty Ltd v Catholic Healthcare Limited [2023] NSWSC 585

Coram: Ball J
Court: Supreme Court of New South Wales
Date: 1 June 2023

BUILDING AND CONSTRUCTION — Contract — Recourse to unconditional bank guarantees — Application by contractor for interlocutory injunction to restrain recourse to security — Construction of security clause — Principal able to call on guarantee in the circumstances — Contractor unable to demonstrate unconscionable conduct

Facts

The plaintiff, Total Construction Pty Ltd, entered into a contract with the defendant, Catholic Healthcare Limited, for the design and construction of works at a residential aged care facility in Kincumber, New South Wales. The contract, valued at $28,716,510 (excluding GST), required the plaintiff to provide two unconditional bank guarantees, each worth 2.75% of the contract sum, as security. Under Clause 5.2 of the General Conditions, the defendant had the right to recourse to this security if it had a bona fide claim that the plaintiff was in default under the contract. Clause 5.2A further stipulated that the plaintiff agreed not to seek an injunction to prevent the defendant from calling on the bank guarantees.

After the plaintiff incurred significant delays and faced a material deterioration in its financial position, the defendant issued a show cause notice. The plaintiff's response was inadequate, and the defendant subsequently terminated the contract and called on the bank guarantees, seeking indemnification for the additional costs of completing the work. The plaintiff sought an ex parte interlocutory injunction to restrain the defendant from calling on the guarantees, arguing that the defendant lacked a bona fide claim of default and that its conduct was unconscionable under the Australian Consumer Law.

Decision

The Supreme Court of New South Wales, presided over by Stevenson J, refused to extend the interlocutory injunction and ordered the plaintiff to pay the defendant's costs on an indemnity basis. The Court found that the defendant had a bona fide claim that the plaintiff was in default under the contract, as required by Clause 5.2. The plaintiff failed to demonstrate that the defendant's belief was dishonest, specious, or untenable.

Moreover, the Court held that the defendant was not required to quantify its loss before calling on the bank guarantees. The purpose of the guarantees was to allocate the risk of being out of pocket to the plaintiff, pending the resolution of disputes. The Court also dismissed the plaintiff's argument of unconscionable conduct, noting that no substantive evidence was provided to support such a claim. As the plaintiff had no reasonable basis for its allegations and failed to disclose pertinent case law on the rarity of injunctions in such circumstances, the Court awarded indemnity costs to the defendant.

Total Construction Pty Ltd v Kennedy Civil Contracting Pty Ltd (subject to a Deed of Company Arrangement) [2023] NSWCA 306

Coram: Meagher JA; Mitchelmore JA; Adamson JA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 14 December 2023

BUILDING AND CONSTRUCTION — Payment claim requirements — Where alleged payment claim consisted of letter from solicitors and attached invoices — Where correspondence between attached invoices and earlier submitted payment claims — Where indebtedness asserted in letter — Whether payment claim within meaning of s 13(1) of Building and Construction Industry Security of Payment Act 1999 (NSW)

Facts

In this matter, the New South Wales Court of Appeal considered whether a letter of demand could constitute a valid payment claim under section 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "**SOP Act**").

The dispute arose from a construction contract between Kennedy Civil Contracting Pty Ltd ("**Kennedy Civil**") and Total Construction Pty Ltd ("**Total Construction**"). Following Kennedy Civil's entry into administration, its administrator's solicitors issued a letter of demand to Total Construction, seeking payment of an outstanding amount and enclosing several invoices. The letter did not explicitly state that it was a payment claim under the Act, and it required payment within five business days, with instructions for the payment to be made into the solicitor's trust account rather than directly to Kennedy Civil. Total Construction did not issue a payment schedule in response, leading Kennedy Civil to argue that the letter constituted a payment claim under the Act, thereby entitling it to the claimed amount.

Decision

The Court of Appeal held that the letter of demand did not constitute a valid payment claim under section 13 of the SOP Act. The Court emphasised that for a document to be recognised as a payment claim, it must, when read objectively, satisfy the statutory requirements outlined in section 13(2) of the SOP Act, including clearly identifying the construction work to which the claim relates and stating that it is made under the SOP Act.

The Court found that the letter's language and context—such as the use of solicitor's letterhead, the demand for payment within a shorter period than allowed under the SOP Act, and the instruction to pay into a trust account—were indicative of a demand for payment rather than a payment claim. Furthermore, the historical nature of the enclosed invoices and the fact that they recorded partially paid amounts rather than claiming new entitlements led the Court to conclude that the letter was not a valid payment claim under the SOP Act.

This decision serves as a reminder of the importance of strict compliance with the SOP Act's requirements when issuing payment claims.

Turnkey Innovative Engineering Pty Ltd v Witron Australia Pty Ltd [2023] NSWSC 981

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 18 August 2023

BUILDING AND CONSTRUCTION – contract – whether email constitutes a valid payment schedule for purpose of s 14 of the Building and Construction Industry Security of Payment Act 1999 (NSW) – whether email indicated the amount the respondent to the payment claim proposed to pay – whether email indicated the reasons the respondent to the payment claim withheld payment

Facts

This matter primarily concerned whether an email sent by Witron Australia Pty Ltd (the "**Principal**") to Turnkey Innovative Engineering Pty Ltd (the "**Contractor**") constituted a valid payment schedule under section 14 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "**SOP Act**"). The parties had entered into a contract in September 2022 for electrical installation works at a distribution centre. The contract price was initially set at $11.4 million, subject to variations. Disputes arose when the Contractor sought to increase the contract price to $14,141,951.32 due to additional works.

On 1 May 2023, the Contractor served a payment claim for $884,570.10, comprising contract works and variations. In response, the Principal sent an email on 3 May 2023, stating that it would review the variations and new pricing after seeing progress on specific works and instructed the Contractor to adjust and resubmit the claim based on the original contract price.

Decision

The Supreme Court of New South Wales found that the email did not constitute a valid payment schedule under section 14 of the SOP Act. The Court held that while the email sufficiently identified the payment claim, it failed to adequately indicate the amount the Principal proposed to pay and the reasons for withholding payment.

Although the email implied that the Principal did not intend to make any payment, it did not explicitly address the entirety of the payment claim, particularly the variations component, which represented a significant portion of the claim. As the email did not satisfy the statutory requirements, the Court ruled that it was not a valid payment schedule, entitling the Contractor to judgment for the claimed amount.

Witron Australia Pty Ltd v Turnkey Innovative Engineering Pty Ltd [2023] NSWCA 305

Coram: Leeming JA; Payne JA; Kirk JA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 13 December 2023

BUILDING AND CONSTRUCTION — Payment schedule requirements — Where payment claim had two distinct and substantial components — Where statement for withholding payment failed to provide any reason directed to a distinct and substantial component of a payment claim — Whether statement was sufficient to constitute "reasons" under s 14(3) of the Building and Construction Industry Security of Payment Act 1999 (NSW) — Sufficiency of reasons is to be assessed in a purposive manner

Facts

This summary assumes familiarity with the facts of *Turnkey Innovative Engineering Pty Ltd v Witron Australia Pty Ltd* [2023] NSWSC 981 at page 104.

The appellant, Witron Australia Pty Ltd ("**Witron**"), engaged Turnkey Innovative Engineering Pty Ltd ("**Turnkey**") to perform electrical installation works under a contract that specified a fixed price of $11.4 million. Due to project delays, Witron sought to adjust this price to $14.1 million. Turnkey subsequently submitted a payment claim for $804,154.63, divided into two components: $499,924.63 for base contract works and $304,230 for variations. Witron responded to this claim via email, stating it would review the variations and new pricing after substantial progress on the project had been made. Witron contended that this email constituted a valid payment schedule under s 14 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "**SOP Act**"). The primary judge disagreed, leading Witron to appeal the decision.

Decision

The New South Wales Court of Appeal unanimously dismissed the appeal, affirming the lower court's decision. The Court held that for a document to qualify as a payment schedule under s 14 of the SOP Act, it must (1) identify the payment claim it relates to, (2) indicate the amount proposed to be paid (if any), and (3) provide reasons for any difference between the amount claimed and the amount proposed to be paid for each distinct component.

The Court found that Witron's email failed to meet these criteria, particularly in relation to the variation component of the payment claim. The email neither addressed the variations substantively nor provided reasons for non-payment, merely deferring consideration until further progress was made. This lack of specificity and failure to address distinct components rendered the email insufficient to meet the statutory requirements of a payment schedule.