BUILDING AND CONSTRUCTION CASES 2017

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

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TABLE OF CASES

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

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

High Court of Australia

Date: 7 December 2016

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

CONTRACT — Rectification — Actual or true common intention of parties — Where references to non-existent entity in Undertakings and applications result of common mistake — Whether rectification available to correct references to non — Existent entity.

Facts: The New South Wales Land and Housing Corporation ("the Corporation") engaged Nebax to demolish buildings and construct units. Nebax and the Corporation entered into a construction contract under which Nebax was required to provide $144,965.06 as security. The security was in the form of unconditional undertaking from ANZ to pay on demand.

The security contained incorrect information including the true identity of the proper beneficiary of the security.

In 2013, the Corporation called on the undertakings and the bank refused to pay as the Corporation was not the correct beneficiary of the bonds. The Corporation contended, and both the judge at first instance and the plurality of the appeal accepted that the determination of the proper beneficiary was a matter of construction.

The Court distilled the issue thusly;

> *"This appeal concerns a claim for payment on performance bonds issued in relation to a construction contract. It raises a general question about the proper approach to their interpretation where the erroneously named beneficiary is a non-existent entity. It also raises a particular question in the circumstances of this case about the availability of rectification to substitute the intended beneficiary. For the reasons given in the joint judgment, I agree that the bonds cannot be construed to overcome the erroneous designation of the beneficiary. However, I also agree, for the reasons given by Kiefel J, that they should be rectified to reflect the common intention of the issuing bank and the contracting party requesting the issue of the bonds that the beneficiary be the principal in the construction contract in relation to which the bonds were issued."*

The Court made an order for rectification so as to properly nominate the beneficiary of the security to be the Corporation.

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

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

High Court of Australia

Date: 21 December 2016

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

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

Facts: Southern Han and Lewence Construction were parties to a contract for the construction of an apartment block in Breakfast Point.

On 10 October 2014, Southern Han gave Lewence a notice to show cause under cl 39.2. On 27 October 2014, Lewence having responded to the notice to show cause, Southern Han gave Lewence a further notice purporting to excise its right under cl 39.4 to take the remaining works to be completed from the hand of Lewence. Lewence treated the giving of that further notice as repudiation of the Contract. On 28 October 2014, Southern Han accepted the repudiation and elected to terminate the contract.

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

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

On Appeal, the Court unanimously held that the existence of a reference date is not a precondition to the making of a valid payment claim.

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

The High Court held that the existence of the reference date is a precondition under a construction contract and no such date existed in the present case.

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

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

Supreme Court of New South Wales — Court of Appeal

Date: 23 December 2016

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

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

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

Facts: (Note: Leave has been granted for an appeal to be heard in the High Court)

Shade Systems was a subcontractor to Probuild who was the principal contractor saddled with the responsibility of undertaking building work. On the 23 December 2015, Shade Systems served a payment claim pursuant to the SOP Act. On 11 January 2016, Probuild served a payment schedule asserting no money was owing. On 15 February 2016, an adjudication determination was made in the appellant's favour for an amount of $277,755.

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

Emmett AJA rejected the claim of procedural unfairness holding that the supervisory jurisdiction was available to review non-jurisdictional errors of law on the face of the record and, having established such an error, quashed the determination and remitted the matter back to the adjudicator.

The issue before the Court is whether the Court has power to intervene in cases where the only errors identified were non-jurisdictional errors of law. The appellant said that binding authority is *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 and *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 both decisions supported that conclusion.

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

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

Basten JA regarding the above stated at [48]:

> "*The exercise of construction required of this Court concerns the interaction of two pieces of State legislation, namely the Security of Payment Act and s 69 of the*

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

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

Judge: Bathurst CJ, Beazley P and Gleeson JA

Supreme Court of New South Wales — Court of Appeal

Date: 1 March 2017

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

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

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

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

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

1. Whether on a proper construction of the terms of the Deed of Assignment and the letter of consent from WGC, there was an assignment by P&O to Tzaneros of any accrued cause(s) of action for breach of the building warranties.

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

2.Whether construction of the relevant documents by reference to the surrounding circumstances was permissible.

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

3.Whether Tzaneros acquired the terminal with knowledge of the defects and therefore suffered no loss as a consequence of those defects.

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

4.Whether Tzaneros was entitled to recover damages for the cost of full replacement of the pavement.

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

5.Whether a reduction in the sum of damages awarded to Tzaneros for betterment should have been made.

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

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

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

Judge: Hammerschlag J

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

Date: 7 March 2017

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judge: Ball J

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

Date: 17 March 2017

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

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

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

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

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

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

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

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

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

Coram: Beazley ACJ, Basten and Leeming JJA

Supreme Court of New South Wales — Court of Appeal

Date: 23 March 2017

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

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

Facts: In December 2010, the applicant, Fitz Jersey engaged the respondent, Atlas Construction, to design and construct a major development at Mascot. On 15 November 2016, Atlas served on Fitz Jersey a final payment claim pursuant to the SOP Act for an amount in excess of $10.5 million plus interest. On 29 November 2016, Fitz Jersey served a payment schedule asserting it owed no money to Atlas. The adjudication determination held that the payment claim was payable in full and as Fitz Jersey did not make payment within five business days pursuant to the Act, Atlas obtained an adjudication certificate and held a judgement debt after it was filed in the Supreme Court. Atlas obtained a garnishee order which was served on the developer's bank for monies owning from the bank account of the Fitz Jersey. This money was paid but no notice of the judgement debt or garnishee being paid was given to Fitz Jersey.

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

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

The Court of Appeal gave a unanimous judgement dismissing the appeal. The Court held the view that the issue of the garnishee order was "essentially an administrative decision" and "not to be equated with an ex parte application to a judge seeking injunctive or equivalent relief." At all stages from the moment that it was served with a copy of the adjudicator's determination, the Fitz Jersey was aware of its legal obligation, within five working days, to pay the amount of the determination, failing which the Atlas would have a right to obtain a judgment merely by obtaining and filing a copy of the adjudication certificate and taking steps to enforce it.

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

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

Judge: Beazley ACJ, Basten and Meagher JJA

Supreme Court of New South Wales — Court of Appeal

Date: 26 May 2017

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

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

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

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

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

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

The Court, on appeal, considered which date was the date for practical completion as this informed the correct reference date. The Court held the structure and language of the contract was consistent with the conclusive event being the issuing of a certificate of practical completion, which depends upon a contemporaneous opinion of the superintendent. The contractor cannot know whether practical completion has been reached until it receives the certificate, which must be dated. This will evidence the date of practical completion. The structure of the contract, which is part of the context which must be considered in construing the contract, supports that conclusion.

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

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

Judge: Ball J

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

Date: 5 June 2017

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

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

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

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

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

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

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

The Court looked at the Deed signed between the parties and the operation of the contract. It held that the mechanism in the deed for payment of liquidated damages did nothing to remove the operation of extension of time or other operative clauses in relation to practical completion. The Court looked at deductions and entitlements of Nahas with respect to delays due to inclement weather and held that they were reasonable however, Home Site was entitled as a result to liquidated damages for 20 days.

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

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

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

Judge: McDougall J

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

Date: 22 June 2017

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

Trilla served a payment claim on the Quasar on 31 January 2017 for $861,000. Quasar responded with a payment schedule asserting a nil amount to be paid due to liquidated damages. An adjudication determination was made in Trilla's favour for $462,000.

The proceedings were brought by Quasar seeking relief in the form of liquidated damages of $2.5 million on the basis of a denial of natural justice. It sought a declaration quashing the determination and in the alternative, an order restraining Trilla from enforcing the determination.

Quasar submitted to the adjudicator that the date of practical completion was delayed by some 192 days from the date for practical completion, in circumstances where the date for practical completion had not been extended. Trilla argued that any delays had been a result of Quasar's actions and they were aware of all material delays. Trilla submitted that it had retained a programmer to assist it, but that by reason of what Trilla said were the lamentable deficiencies in the information available to it from Quasar, that programmer could not carry out his task.

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

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

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

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

Coram: Beazley ACJ, McColl and Macfarlan JJA

Supreme Court of New South Wales — Court of Appeal

Date: 23 June 2017

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

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

Facts: The joint judgement deals with the case of the appellant, Probuild against Meagher JA's decision refusing its application to quash an adjudication determination under the SOP Act that was brought by DDI. Probuild contended that Meagher JA erred in determining that the adjudicator did not deny Probuild procedural fairness (natural justice) in relation to the making of the Determination.

The SOP Act ensures a person is entitled to receive those progress payments by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.

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

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

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

Further, the Court came to the conclusion that the Adjudicator's decision and material before the adjudicator encompassed the underlying rationale and consequently there had been no denial of procedural fairness in the decision.

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

Judge: McDougall J

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

Date: 30 June 2017

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

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

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

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

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

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

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

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

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

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

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

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

Judge: McDougall J

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

Date: 17 August 2017

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

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

The Court considered the decision of the Court of Appeal in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* which established that the determinations of adjudicators may attract the principle of issue estoppel, and that repetitious re-agitation of claims may be construed as an abuse of process. The Adjudicator looked at the issue but came to the conclusion that that it was not open to him to consider the claim as it had been framed and consequently did not decide the case on the merits of the issue of whether McMahon was entitled to be paid for the variation claim and what amount it would be entitled to.

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

Accordingly, McMahon had taken Arconic to much trouble and expense in attempting to agitate the issues before the adjudicator on the merits, but had not reached a necessary threshold for an abuse of process which would fall under the actions of attempting to re-agitate claims already concluded on its merits.

The summons was dismissed with costs against the plaintiff.

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

Judge: Hammerschlag J

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

Date: 24 August 2017

BUILDING AND CONSTRUCTION — Building and Construction Industry (Security of Payment) Act 1999 (NSW) (the Act) — Ss 13, 21(3), 29, 31 — Building and Construction Industry (Security of Payment) Regulation 2008 (NSW) (the Regulation) — Whether the defendant's payment claim dated 16 December 2016 complied with the requirements of ss 13(7) and (9) as being accompanied by a compliant supporting statement — Whether the supporting statement which accompanied the claim complied with the requirements of ss 13(7) and (9) and the Regulation

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

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

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

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

A payment claim, under s 13(1), is a document. Section 13(2) requires that document to identify the construction work to which it relates and to indicate the claimed amount. If at the time a head contractor makes a payment claim to a principal under a construction contract an amount is owed to a subcontractor or supplier then the provisions require the head contractor to confirm that these payments have been made.

The claim was out of time in its ordinary meaning under s31(1). It permits notice in a series of ways which are not exclusive. Further, a notice out of time does nothing to indicate the invalidity of a determination made on that basis. *MPM Constructions*

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

Outcome: The adjudication determination of the second defendant dated 2 March 2017 was declared void.

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

Judge: Stevenson J

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

Date: 29 August 2017

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

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

Facts: The second defendant, Iris Diversified Property Pty Ltd entered into a building contract with the first defendant Nazero Construction Pty Ltd (in liq.) to construct a residential block of six units in Clovelly on 12 July 2011.

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

On 16 October 2015, Owners Corporation obtained judgement for $1,452,419.32. The key issue in the present case was the quantification of damages. The Owners Corporation's claim for the reasonable cost of rectifying the defects in the buildings was $1,173,909 comprising various trade costs totalling $734,221 and various add on-costs totalling $439,688.

The Court went through various items that were still in dispute with key evidence from both parties put forward and suggested a reasonable figure to guide the parties.

Court proposed that final orders and costs to be made after parties confer and agree on the judgement.

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

Judge: McDougall J

Supreme Court of New South Wales

Date: 14 September 2017

Building and construction — Building contracts — Payment claims — Adjudication

Parties entered into contract pursuant to which AB Developments agreed to supply concrete for project being conducted by Falco’s.

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

AB Developments sought payment and matter went to adjudication.

The adjudicator found that AB Developments was entitled to amount claimed, together with interest.

Falco’s relied on s 13(5) of the SOP Act, namely that AB Developments had acted in derogation of the Act by purporting to serve more than one payment claim in respect of each reference date under construction contract.

The Court found that the payment claim that went to adjudication determination was served at a later in point of time.

Finding that there was no right to make adjudication application and adjudicator had no power to consider it.

Ordered that adjudicator's determination be quashed.

Buildum Construction Pty Ltd v Pile & Bucket Pty Ltd [2017] NSWSC 1260

Judge: Parker J

Supreme Court of New South Wales — Equity — Commercial List

Date: 15 September 2017

CONTRACTS — Oral settlement agreement — Enforceability — Ostensible authority to enter agreement — Prior judgment and garnishee proceedings — Deed drafted but not executed — No requirement for execution of deed — No requirement for agreement on mode of payment or on setting aside of judgment.

Facts: Pile and Bucket made a claim under the Act for a progress payment of $75,000 pursuant to a subcontract with Buildum. Pile and Bucket was successful in obtaining an adjudication determination in its favour.

Pile and Bucket lodged the adjudication certificate as a judgement in the local court and issued garnishee notices to various parties to obtain payment. Buildum brings the current proceedings to challenge the determination.

Buildum claimed that at a pre-settlement conference the parties had reached terms which were to be formalised for a payment of $40,000 to be paid to Pile and Bucket (out of $70,000 already paid into the court). Pile and Bucket denies reaching such an agreement.

Parker J held that there was a binding and enforceable agreement between the two parties, as his Honour stated

"As I have noted, the requirement for a deed was one that was mentioned only after the parties had agreed on the figure and the other terms. In my opinion, a binding settlement agreement came into existence at that point."

A declaration was made that there is a binding and enforceable contract between the parties. Buildum was ordered to pay Pile and Bucket $40,000 out of the monies paid into the court. The local court judgement was set aside and each party was ordered to bear their own costs.

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

Judge: Stevenson J

Supreme Court of New South Wales

Date: 29 September 2017

Building and construction — Building contracts — Payment claims — Adjudication determination

In earlier proceedings, an adjudicator made determination in respect of payment claim made by Ghossayn on Castle Constructions

Castle Constructions sought that adjudicator's determination be quashed on basis that adjudicator had no jurisdiction to make determination.

The Court found that a condition contained in the contract to the effect that Ghossayn would only be entitled to final payment when relevant engineers and surveyors had signed off on completion of work did purport to exclude, modify or restrict operation of law.

The Court further found that such a condition was therefore void and that the relevant reference date was the date when Ghossayn made the payment claim.

As Ghossayn was a head contractor it was obliged not to serve payment claim unless accompanied by supporting statement. As this had not occurred, the payment claim had not been validly served, and no statutory rights or entitlements arose by reference to that document.

Accordingly, the adjudicator had no jurisdiction to make determination and the adjudication determination was void and therefore quashed.

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

Judge: Leeming, Payne and White JJA

Supreme Court of New South Wales — Court of Appeal

Date: 10 November 2017

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

Facts: The case raised a single question of law on contested facts. That question was whether a provision in a construction contract which provided that early progress claims were deemed to have been made on the date specified for making a claim meant that a progress claim served prior to the reference date engaged the provisions of the SOP Act.

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

Clause 37.1 dealt with progress claims as follows *"The Subcontractor shall claim payment progressively in accordance with Item 37. An early progress claim shall be deemed to have been made on the date for making that claim.*

Each progress claim shall be given in writing to the Subcontract Superintendent and shall include details of the value of WUS done and they include details of other monies then due to the Subcontractor pursuant to provisions of the Subcontract."

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

The respondent supplied a Payment Schedule dated 26 July 2016 which asserted it had no obligation to pay as there was dispute whether practical completion had been reached. Further, the payment claim dated 12 July 2016 was a second payment claim in respect of the 20 June 2016 claim and was in contravention of s13(5) of the Act. An Adjudicator accepted the applicant's submission for the reference date for the 12 July 2016 claim was 20 July 2016 (as progress payments were due 20th of each month) and was therefore satisfied it was a valid payment claim. The contentious issue being that the legislation prohibits upon the service of more than one payment claim in respect of each reference date.

The Act creates a parallel regime, separate from the contract, for the prompt making of progress payments under a construction contract, without affecting the parties' rights under that contract. (*South Han Breakfast Point Pty Ltd (in Liq) v Lewence Construction Pty Ltd [2016] HCA 52)*

The Court held that *"It is authoritatively determined by Southern Han that the entitlement of a person to a progress payment only arises "on and from each reference date". At the time that the applicant's 12 July 2016 claim was sent to the respondent, it had no entitlement to a progress payment."*

Appeal dismissed with costs.

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

Judge: Ball J

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

Date: 17 November 2017

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

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

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

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

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

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

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

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

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

Outcome: Judgement in favour of plaintiff against the first defendant ($804,703.55), second defendant ($477,013.45) and third defendant ($467,950.00).

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

Judge: Meagher, Payne and White JJA

Supreme Court of New South Wales — Court of Appeal

Date: 17 November 2017

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

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

Facts: The appellant Kawasaki and the respondent Laing O'Rourke were parties to a contract with JKC, the head contractor of a cryogenic tank project near Darwin (the subcontract). The parties agreed to provide services to JKC and also required the parties to provide performance bonds and advance payment bonds to JKC. By a third agreement (the LORAC Subcontract), Laing O'Rourke agreed to perform some of the work allocated to Kawasaki by the Consortium Agreement. The LORAC Subcontract in Article 6 also provided for the procurement of bonds on behalf of Laing O'Rourke to Kawasaki.

To regulate their joint and several obligations, Kawasaki and Laing O'Rourke entered into a consortium agreement outlining the scope of work of each party responsible under the subcontract. Under Cl14, Kawasaki agreed to take responsibility for providing the performance bonds and advanced payment bonds to JKC and in the same clause, Laing O'Rourke agreed to provide surety bonds to Kawasaki. Further the contract agreed to a regime for the determination of all disputes between them by international arbitration in Singapore however, allowed for interlocutory relief to be sought from a Court of competent jurisdiction.

Following a dispute, Kawasaki made a call on the bonds. Laing O'Rourke applied to the Supreme Court of New South Wales restrain Kawasaki from calling on the bonds on the basis that there was a serious question to be tried about whether Kawasaki was entitled to call on the bonds in circumstances where JKC had yet to call on the corresponding bonds provided to JKC under the Subcontract.

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

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

Appeal dismissed

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

Judge: Stevenson J

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

Date: 30 November 2017

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

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

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

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

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

(a)$667,516.17 for the Dubbo contract;

(b)$1,521,741.95 for the Griffith contract; and

(c)$1,962,888.57 for the Parkes contract.

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

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

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

There was a statement given by Southern Cross implying at an earlier meeting there was an agreement to not deduct the liquidated damages rate although no substantive evidence was provided. The adjudicator appeared to have accepted this statement as confirming an agreement that it would not set off despite the lack of evidence. Consequently, the Court determined it was:

satisfied that there is a serious question to be tried that this decision by the adjudicator was legally unreasonable in the sense discussed by the High Court in Minister for Immigration & Citizenship v Li [2013] HCA 18; 249 CLR 332, such as to bespeak jurisdictional error.

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

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

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

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

Judge: Macfarlan, Gleeson and Leeming JJA

Supreme Court of New South Wales — Court of Appeal

Date: 18 December 2017

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

Facts: The applicant, Quickway engaged the respondent, Electrical to undertake cable hauling works at electrical substations in Canterbury and Leichhardt. On 22nd April 2017, Electrical sent invoices of $24,725.25 and $41,250 for work done at the substations. Electrical contends the invoices were for progress payments pursuant to the SOP Act. After Quickpay lodged payment schedules pursuant to s14 of the SOP Act disputing Electricals' claims, the disputes were the subject of adjudications conducted by the second respondent.

The adjudicator rejected Quickway's arguments because it had assigned its entitlements to Scottish Pacific Pty Ltd.

Quickway's argument that invoices were not payment claims for the purposes of the statute was rejected as the invoices were claims by Electrical, expressed to be tax invoices issued by Electrical to Quickway. Section 13 does not contain an express requirement that a payment claim must demand payment to the claimant and the Court did not consider any basis for implying such a requirement. If a claimant wishes to have its debt paid to a third party, there is no reason why it should not and could not state this in its payment claim.

Further, Quickway argued that the payment claims did not fall under s13 because Electrical's entitlements were assigned to a third party. However, the Court held that under s8(1) of the Act, Electrical was the party who claimed to be *entitled* to a progress payment. Upon a legal assignment of a debt by a creditor, the debt ceases to exist as between the original creditor and the debtor, although the debtor becomes liable to the assignee for the amount of the debt.

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