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BUILDING AND CONSTRUCTION CASES 2018

A REVIEW OF BUILDING AND CONSTRUCTION CASES AT FIRST INSTANCE AND ON APPEAL DECIDED IN NEW SOUTH WALES FROM JANUARY TO DECEMBER 2018

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Coram: Hammershlag J

Supreme Court of New South Wales

Date: 10 May 2018

LANDLORD AND TENANT – BUILDING AND CONSTRUCTION LAW – agreement for lease – where landlord agreed to carry out certain building work on the premises but did not do so – where binding determination by an expert found that the landlord was in breach – whether appropriate to grant a decree for specific performance requiring the landlord to do the work – claim for damages for breach of the agreement for lease representing the loss of profits from not being able to conduct child care centre business at the premises; HELD: the question of whether specific performance should be granted should be decided before all other questions in the proceedings – decree for specific performance made.

Facts

On 11 April 2014, Anthony Tadros and Sharon Tadros (collectively, the Tenants), entered into an agreement for lease (AFL) with the third-cross defendant, 711 Hogben Pty Ltd (the Landlord), for premises at levels 1 and 2, 7-11 Hogben Street, Kogarah, which the Tenants proposed to use as a child care centre. George Tadros guaranteed the Tenants' obligations under the AFL. George is the father of Sharon and Anthony Tadros.

The AFL provides for a lease of ten years, with two options to renew of ten years each.

The Landlord agreed to carry out, for the Tenants' benefit, building work designated on a plan numbered CD 1231 (the Plan). The proposed child care centre was on levels 1 and 2 of a multi-storey building.

There are planning rules for child care centres, those rules required provision of indoor areas and outdoor areas. The Landlord did not construct according to the Plan. Various aspects of the build did not comply with safety requirements. The Landlord denied the Tenants' assertion that it was bound to construct in accordance with the Plan.

Under the provisions of the AFL, the Commencing Date of the Lease was to be the date upon which the Landlord obtained an Occupation Certificate under s 109C of the *Environmental Planning and Assessment Act 1979* (NSW) (*EP&A Act*) with respect to the premises. The parties fell into dispute as to the date the Occupation Certificate was obtained.

The AFL contains a provision for the binding resolution of disputes by an expert.

The disputed questions were answered on 28 July 2015 by an experienced solicitor, Mr Dennis Bluth, who determined that the Occupation Certificate was issued on 18 May 2015 and that the Landlord was obliged to construct in accordance with the Plan, and that it was in breach of the AFL by not doing so.

The Landlord challenged each determination and failed. It is not in dispute that the Landlord is, and remains, in breach of the AFL. The Tenants seek an order for specific performance that the Landlord carry out the work necessary to bring the premises into conformity with the Plan, and claim damages of $1,401,000, said to have been suffered by the breach, being the profits that would have earned from operating the child centre business.

These figures are calculated on the basis that the Tenants paid rental under the lease for the periods concerned.

To operate a child care centre, the Tenants require certification, known as a Service Approval, from the Department of Education and Communities (DEC). There are regulations which lay down certain criteria which must be satisfied.

The Tenants would need an Occupation Certification under the *EP&A Act*. There would also need to be an Amended Development Approval. The alterations would need to comply with applicable provisions in the Building Code of Australia or the appropriate authority would need to waive non-compliance.

It is not in dispute that the premises in their current state are not eligible for Service Approval.

The central controversy in the damages claim is if the premises are altered so as to conform with the Plan, would certification be achieved? If not, the Tenants would not have suffered any loss of profits by reason of the breach.

The Tenants say they would obtain certification. The Landlord says they would not. His Honour noted that, given the question before the court was whether a decree of specific performance should be made, that the question of damages ought to be deferred.

His Honour held that there was no reason why an order for specific performance requiring the Landlord to construct in accordance with the Plan should not be made.

The Court made a decree specific performance.

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

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

NSW Civil and Administrative Tribunal Appeal Panel

Date: 28 May 2018

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

Facts

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

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

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

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

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

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

Decision

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

In relation to the issue of whether the Owners non-contracting parties for the purposes of section 18D(1A), the Appeal Panel decided that the Owners fell within the definition non-contracting owners. Accordingly, the Owners could enforce the section 18B warranties against AJG. The Appeal Panel based this conclusion on the fact that the only contract to perform the Polishing Works was between Simonds and AJG, to which the Owners were not a party.

Australia Avenue Developments Pty Ltd v Icon Co (NSW) Pty Ltd [2018] NSWSC 1578

Coram: Parker J

Supreme Court of New South Wales

Date: 19 October 2018

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) ("SOP Act") – payment claims – validity of payment claim – supporting statement under SOP Act, s 13(7) and (9) – whether validity of payment claim requires that the supporting statement be "made" on the same day as the payment claim – whether validity of payment claim requires that the supporting statement declare that all subcontractors have been paid up to the date on which the payment claim is "served"

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) ("SOP Act") – adjudication of payment claims – scope and parameter of payment claim – allowances made by adjudicator that were not raised in the payment claim – whether the adjudicator erred in making allowances not raised in payment claim – whether the adjudicator exceeded their jurisdiction in making allowances

Facts

In these proceedings, Australia Avenue Developments Pty Ltd (**"the Principal"**) challenges an adjudication determination in favour of Icon Co (NSW) Pty Ltd (**"the Contractor"**) under the Building and Construction Industry Security of Payment Act 1999 (NSW).

The contract between the parties covers the design and construction of a tower building at Sydney Olympic Park. The original contract sum was approximately $155 million (excluding GST). The contract is dated October 2015 and uses Australian Standard Form 4902-2000 (incorporating amendment number 1). Sterling Project Solutions is the Superintendent.

The present dispute concerns the Contractor's progress claim 33 for July 2018. The claim was sent by the Contractor to the Superintendent, acting on behalf of the Principal, on 30 July. The amount claimed was $3.66 million. On 13 August, the Superintendent issued a combined progress certificate and payment schedule in the sum of $1.16 million. On 27 August the Contractor lodged an adjudication application. The application was referred to Rosemarie Risgalla as Adjudicator who issued her determination on 14 September (2018-TASC-070). The Adjudicator determined the amount to be paid as $2.64 million.

The Principal paid the scheduled amount to the Contractor and paid the additional disputed amount the subject of the adjudication into Court, pending the Court's determination in the proceedings.

The Principal challenged the Adjudicator's determination on two grounds:

- First, the Principal contended that progress claim 33 did not comply with the requirements of the Act for a valid "payment claim" because the supporting statement did not include a declaration concerning payment of subcontractors in appropriate form.
- Secondly, certain previous deductions made by the Superintendent from the contract works price were allowanced in favour of the Contractor in the

adjudication determination. The Principal argued that such allowances fell outside the scope of the payment claim and that the Adjudicator thereby exceeded her jurisdiction.

Validity of the payment claim where signature of the claim and supporting statement predated service

The principal argued that the payment claim did not comply with the requirements of the *Building and Construction Industry Security of Payment Act 1999* (NSW) because the supporting statement did not include a declaration concerning payment of subcontractors in the appropriate form. Specifically, the Principal argued that a payment claim is not 'made' until it is actually served, and hence the supporting statement was invalid as it predated service by 5 days. The argument was grounded in the decision of Hammershlag J in *Mt Lewis Estate Pty Ltd v Metricon Homes Pty Ltd* [2017] NSWSC 1121.

His Honour held that sections 13(7) and (9) of the SOP Act should not be construed so as to impose an obligation to ensure that the supporting statement is up to date at the point of service. Instead, the proper construction of section 13(9) of the SOP Act merely requires that the declaration must refer to the work the subject of the payment claim and state that all of the subcontractors have, at the date of the declaration, been paid.

His Honour distinguished the instant case from that of *Mt Lewis Estate Pty Ltd v Metricon Homes Pty Ltd*.

Parker J noted that, if the construction contended for by the Principal were accepted, the corollary would be that a one-day delay in service after signing a supporting statement would result in non-compliance with the SOP Act.

His Honour highlighted a lacuna in the legislation, noting that the possibility of it arising was uncertain: however, where a subcontractor has undertaken work but is not contractually entitled to payment until a date after the contractor is entitled to payment for that work, it is permissible for the contractor to make a claim and enforce payment despite not having paid the subcontractor's amount. This issue militates against the mischief that section 13(7) seeks to address.

Adjudication of Back charges

The Adjudicator considered the merits of the back charge items claimed by the Contractor.

The Principal argued that

- The adjudicator erred in entertaining such a challenge to five back charge items, in that those items had not been part of the payment claim and were not properly part of the adjudication process.
- The error was a jurisdictional one which invalidated the determination

Parker J held that the Adjudicator had erred in that the Adjudicator was not entitled to consider the back charge items. They should not have been raised in the payment schedule. Where a payment claim is made up of a number of individual items for which an amount is claimed, the adjudication must be limited to those items and those amounts. An application for an adjudication is an application for adjudication “of a payment claim”. This can only include amounts actually claimed in the payment claim In so holding, his Honour drew support from the judgment of Mossop AsJ in *Creative Building Services Pty Ltd v TIO Air-Conditioning Pty Ltd* [2016] ACTSC 367, where his Honour held that an adjudicator cannot award a sum larger than the amount claimed in the payment claim.

His Honour embraced the reasoning of Mossop AsJ in also determining that the error was a jurisdictional error that warranted the Court’s intervention. His Honour followed the reasoning expressed by Mossop AsJ who found that the error did constitute the error was a jurisdictional error for the following reasons:

1. The adjudicator is given no express authority to determine what is claimed in the payment claim. This is comparable with the question whether the time limits in s 17(2) have been complied with, where the Act likewise confers no express power of decision on the adjudicator. This is in contrast with the determination of the dispute arising from the payment claim
2. What the contractor claims in the payment claim can be determined from the payment claim itself, before any adjudication occurs. As with the question of compliance with s 17, it arises at an anterior point to determination of the dispute. Furthermore, the determination of the amount claimed may have consequences outside any adjudication which may be made, or even if there is no adjudication at all. In particular, if there is no payment schedule, the contractor can proceed to enforce the "claimed amount" as a debt.
3. The determination of what is claimed in the payment claim, as distinct from interpreting the claim and dealing with it, is not a matter which itself requires "particular expertise of adjudicators" or "difficult questions of construction."

The touchstone, his Honour held, was understanding the difference between the adjudicator determining the "parameters" of the payment claim which was a reference to the adjudicator determining the grounds, factual or legal, upon which the contractor advanced the claim as distinct from the more fundamental question of whether a claim was made at all.

The adjudication determination was quashed.

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

Coram: McDougall J

Supreme Court of NSW

Date: 27 April 2018

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

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

Facts

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

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

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

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

Decision

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

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

Broken Hill City Council v Unique Urban Built Pty Ltd [2018] NSWSC 825

Coram: Hammerschlag J

Court: Supreme Court of New South Wales

Date: 5 June 2018

COMMERCIAL ARBITRATION – *Commercial Arbitration Act 2010* (NSW) – application for an order that the plaintiff and first defendant be referred to arbitration – arbitration agreement – whether there is an operative agreement between the parties to submit to arbitration – the meaning of inoperative – where the person prescribed in the contract to nominate an arbitrator does not exist – whether non-existence of person prescribed to nominate an arbitrator renders the agreement inoperative; HELD – the parties' arbitration agreement is operative – plaintiff and first defendant referred to arbitration

Facts

On 26 April 2016, Broken Hill City Council (**Council**) entered into a contract with Unique Urban Built Pty Ltd (**Urban**) to upgrade the Broken Hill Civic Centre under a written contract in the form AS4000-1997 published by Standards Australia (**the contract**).

A dispute arose between the parties. Council alleged that Urban breached the Contract by:

- failing to proceed and complete the works with due diligence and within the time stipulated by the Contract,
- failing to carry out the works to the required standard, and
- failing to rectify defects and deficiencies in, and omissions from, the works.

It asserted against the Architects that their design was defective which, under the contract, was a matter the subject of an arbitration agreement.

The Council commenced proceedings in the Supreme Court of New South Wales. Urban sought an order for the parties to be referred to arbitration. Under section 8(1) of the *Commercial Arbitration Act 2010* (NSW) (**Act**), a court must, upon a party's request, refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

Clause 42.2 of the contract provided that within 14 days after receiving a notice of dispute, the parties shall confer at least once to resolve the dispute or to agree on methods of doing so. At every such conference each party shall be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference shall be privileged. If the dispute has not been resolved within 28 days of service of the notice of dispute, that dispute shall be and is hereby referred to arbitration.

Clause 42.3 of the contract provided that, *'If within a further 14 days [after a dispute is referred to arbitration] the parties have not agreed upon an arbitrator, the arbitrator shall be nominated by the person in Item 32(a). The arbitration shall be conducted in accordance with the rules in Item 32(b).'*

Item 32(a) provided that, if no-one is stated, the person to nominate an arbitrator is the President of the ADC. No President of the ADC existed; the ADC was defunct at the time of the contract.

Item 32(b) provided that, if no rules for arbitration were stated, rules 5-18 of the Rules of The Institute of Arbitrators, Australia for the Conduct of Commercial Arbitrations (**Rules**) would form the rules for arbitration.

Article 8 of the Rules relevantly provided:

1. If one arbitrator is to be appointed, either party may propose, the names of one or more persons, one of whom would serve as the sole arbitrators.
2. If within 14 days after receipt by a party of a proposal made in accordance with Article 8, paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the arbitrator shall be nominated by IAMA.'

Under s 8(1), if the action has been brought in a matter which is the subject of an arbitration agreement, the court must, if a party requests, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. There is no discretion to do otherwise: *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451.

It was not in issue that:

- there was a dispute between the Council and Urban within the meaning of that term in cl 42
- the Council and Urban were parties to an arbitration agreement
- the action had been brought in a matter which was the subject of the arbitration agreement
- Urban had requested that it and the Council be referred to arbitration.

The issue for determination was whether the arbitration agreement was inoperative. Hammershlag J determined that his required consideration of:

1. what was meant by the term inoperative; and
2. whether the defect (if that is what it is) in cl 42.3 rendered the arbitration agreement inoperative.

Argument

Urban Argued that Article 8, which is incorporated into the Contract by cl 42.3 and *Item* 32 b), is the mechanism for the appointment of an arbitrator. It further argued, in the alternative, that cl 42.2 was an arbitration agreement within the meaning of s 7(1) in its own right and is capable of standing alone. Accordingly, if cl 42.3 was ineffective as a mechanism for the appointment of an arbitrator by dint of the non-existence of the named appointor in *Item* 32 a), it and the Council had failed to agree on a procedure of appointing an arbitrator, in which event, s 11(3)(b) empowered the court to appoint one.

Council argued that because the appointor described in *Item* 32 a) does not exist, the arbitration agreement is inoperative. It argued that the parties contemplated a single mechanism for appointment and that the agreement to arbitrate is dependent upon that mechanism not misfiring. Where it did misfire, as it had in this instance, there was no agreement to arbitrate.

Council maintained that the Rules operate so as to govern arbitration procedure and have no role to play with respect to the initial appointment of the arbitrator.

Decision

The court upheld the arbitration agreement and referred the parties to arbitration.

Hammerschlag J noted that clause 42.3 of the contract did not ultimately allow for the operation of Article 8 of the Rules. His Honour found that once cl 42.3 is read together with *Item* 32 b), Article 8 could not apply to the appointment. This was so because clause 42.3 commenced with the words ‘if one arbitrator is to be appointed’, which would not be the case if the first part of cl 42.3 had already operated. In this way, the provisions of the Contract operate congruently: *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at 529; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 117.

Nonetheless, the arbitration agreement itself was not inoperative. In *Lucky-Goldstar International (HK) Ltd v NG Moo Kee Engineering Ltd* [1993] HKCFI 14 (*Lucky-Goldstar*), the parties had agreed that arbitration would be in accordance with the rules of procedure of an association which did not exist. In the instant case, the arbitration agreement is effective even where clause 42.3 did not operate.

Clause 42.2 of the contract contained the agreement to arbitrate, whereas clause 42.3 was merely an agreement on a procedure and could be severed. Whether an arbitration agreement is inoperative is assessed within the context of provisions of the Act.

In this case, section 11(3) of the Act empowered the court to appoint an arbitrator because the parties had identified a non-existent appointor.

The present case can, it seems to me, be viewed in one of the following three ways, and the Act caters for each of them:

- the parties have, by virtue of having identified a non-existent appointor, not agreed on an appointment procedure at all – s 11(3) will help
- the parties agreed a procedure which requires them to agree, but one has failed to act, or both have failed to act as required – s 11(4)(a) will help
- the parties have agreed on a procedure, being the agreement contemplated in cl 42.3, but they have been unable to reach the agreement expected of them – s 11(4)(b) will help.

Ultimately, his Honour found that reasonable persons in the parties' positions would not have intended that the arbitration agreement fail because of the non-existence of the President of the ADC. This was different to a case where a particular arbitrator had been agreed upon.

Accordingly, His Honour referred the matter to arbitration pursuant to s8(1) of the Commercial Arbitration Act 2010 (NSW).

Carr v Miller [2018] NSWSC 1424

Coram: McDougall J

Supreme Court of New South Wales

Date: 20 September 2018

BUILDING AND CONSTRUCTION – residential property contained substantial defects – where purchaser induced to complete purchase through the provision of fraudulently obtained home warranty insurance certificates – whether third defendant (vendor) vicariously liable for the deceit of the second defendant (son-in-law).

BUILDING AND CONSTRUCTION – damages for defects – where first defendant (builder) named on the insurance certificates did not carry out the building works – whether first defendant estopped from denying the applicability of statutory warranties – assessment of rectification damages.

CONTRACT – interpretation of Deed which purports to deal with any claims relating the building words – whether Deed requires the second defendant to indemnify the third defendant for his deceitful conduct.

COSTS – usual order for hearing not complied with – produced court book was productive of excessive inefficiencies – solicitors not to charge clients for costs in creating and remedying the court book.

Facts

The Mr Pascali was the proprietor of a waterfront residence at Seaforth. He arranged with his son in law, Mr Nowytarger, to undertake a very extensive redevelopment, purportedly in accordance with plans and specifications approved by Manly Council.

When those works were substantially complete, Mr Pascali agreed to sell the property to the Mrs Carr. The contract was dated 7 June 2012, and called for completion within 120 days from that date.

Completion of the sale contract between Mr Pascali and Mrs Carr was subject to and conditional on Mr Pascali providing evidence that all building work undertaken on the property was covered by a Home Warranty Insurance policy.

The Purchaser's claims

Mrs Carr claimed she was deceived into completing the sale contract by the provision of what she claims to have been false certificates as to compliance with the conditions of the development consent, and as to applicable Home Warranty Insurance required by section 92 of the Home Building Act.

Mrs Carr further submitted that but for the provision of the false certificates, she would not have completed the purchase. Mrs Carr quantified her loss as the difference between the purchase price paid ($8.55 Million) and the true value of the property ($5.325 Million), due to defective building work.

Mr Miller was a builder. He signed three contracts under which he undertook to perform residential building work on the property for Mr Nowytarger as the owner. Mr Miller obtained HWI in the sum of $170,000 before the first contracts were signed.

In September 2012, when the time for settlement of the contract for sale was approaching and Mrs Carr was pressing for evidence of, among other things, appropriate HWI, Mr Miller colluded with Mr Nowytarger to obtain further HWI cover. Two further HWI certificates, evidencing cover in the amount of $170,000 and $450,000 respectively, were issued on 14 September 2012.

Mr Nowytarger maintained that Mr Miller completed the building work on the property because he had supervised (although neither as an employee or a sub-contractor to him) a person who had done some of the work (Mr Taylor), for Mr Nowytarger.

Claim for breach of contract

The Court held that the contractual obligation contained in special condition 16 was confined not to achieve satisfaction of that conduction, rather, to do all that is reasonable (or in this case, can be done by the use of best endeavours) to that end. Special condition 16 is not concerned with the objective truth, or objective accuracy, of the evidence produced. The function of the evidence is limited to that stated in the clause: to persuade Mrs Carr, acting reasonably, that Mr Pascali's obligations to finish the work in accordance with the requirements of the Council and to procure current HWI, have been satisfied.

In the circumstances there was therefore no breach of contract.

Claim of deceit against the Mr Miller and Mr Nowytarger

The Court found that the Mr Miller did not carry out the works. In substance the works were carried out by Mr Nowytarger. The works completed by Mr Taylor were not supervised by Mr Miller either.

The Court found that Mr Miller and Mr Nowytarger prepared and backdated three sham contracts for residential building work on the property. The contracts were created for the sole purpose of persuading the HWI underwriter to issue certificates of insurance, which covered work to be carried out by Mr Miller as builder and Mr Nowytarger as owner. They were concocted to conceal the fact that in substance the work had been done by Mr Nowytarger, who was neither a licensed builder nor an owner-builder. Mr Miller and Mr Nowytarger knowingly made false representations to the insurer to procure HWI.

The Court held that by providing the HWI certificates to Mrs Carr's solicitor, Mr Thomas, Mr Nowytarger made an implied false representation that the building work was covered by a HWI policy in accordance with the sale contract. Mr Nowytarger knowingly made the false representations to Mrs Carr to induce her to complete the sale contract, which Mrs Carr relied upon. Additionally, a letter was sent with the HWI certificates. That letter represented that the HWI certificate was capable of satisfying Mrs Carr, acting reasonably, that all building works undertaken on the property in the 6 years preceding exchange of contract were covered by a current HWI policy in respect of the whole of those works.

The Court held that the implied and express representations were false. Further, in the Court's view, Mr Nowytarger knew that they were false.

The Court accepted that Mrs Carr did rely upon the HWI certificates, together with the express or implied representations in deciding not to rescind, but rather to complete, the contract.

The Court acknowledged that Mr Pascali was not personally involved in and had no knowledge of the building works, nor with the false representations made to the insurance broker; nor with the false representations in connection with the provision of the HWI certificates to Mrs Carr.

However, Mr Pascali left everything connected with the building works and the sale to his son in law Mr Nowytarger. However, the inevitable conclusion is that Mr Pascali in effect appointed Mr Nowytarger as his agent to do all things necessary to undertake the works and achieve and settle the sale. It therefore followed that Mr Pascali was liable, either vicariously or by delegation, for Mr Nowytarger's acts and omissions within the scope of his ostensible authority.

For similar reasons, the Court found Mr Pascali liable for the consequences of Mr Nowytarger's deceit in relation to the provision of the final occupation certificate.

The Court found for Mrs Carr against Mr Nowytarger's in deceit.

Breach of statutory warranties claim against Mr Miller

The final issue to be determined by the Court was whether Mr Miller was liable for work done in breach of the warranties under section 18B of the HBA.

The Court held that Mr Miller was estopped from denying liability because he knew that the contracts were to be used for the purpose of obtaining HWI certificates, and knew that the certificates were to be given to Mrs Carr to induce her to complete, rather than rescind, the contract for sale.

Mr Miller collaborated with Mr Nowytarger for the purpose that I have described. That purpose succeeded. It was too late for Mr Miller to resile from the represented state of affairs.

The estoppel was held not to go any further than the contracts themselves. That is to say, to the extent that Mr Miller is liable under the contracts (or is estopped from denying that liability), his liability could only extend to the work described in those contracts.

Mr Pascali was held not to be liable under the statutory warranties contained in the Home Building Act on the basis that he did not undertake the work and was not an owner builder.

Family Deed

The Court found, according to the terms of the Deed, that Mr Pascali was entitled to be indemnified by Mr Nowytarger and Ms Pascali-Nowytarger in respect of the claims brought by Mrs Carr against Mr Pascali in the proceedings.

The Court ultimately found that Mrs Carr succeeded in:

1. The breach of statutory warranties claim against Mr Miller, to the extent that he is estopped from denying that he is liable for breach of statutory warranties by reason of having signed the contracts;
2. The deceit claim against Messrs Nowytarger and Pascali; and
3. The claim against Mr Nowytarger in respect of the June and September lists.

Cenric Group v TWT Property Group [2018] NSWSC 1570

Coram: McDougall J

Supreme Court of New South Wales

Date: 10 May 2018

CONTRACT – where parties entered into various contractual arrangements to harvest sandstone – which party is entitled to share in royalties from that harvesting – on what terms must the royalties be paid – when must payment of royalties be made.

CONTRACT – whether an oral agreement or variation was made – enforceability and effect of that variation – whether contracts validly terminated – construction of the terms of contracts and subcontracts – importance of not using a hindsight view of commerciality to disregard the terms of the contract.

BUILDING AND CONSTRUCTION – where milestone dates were missed – liquidated damages – application of prevention principle prevents award of such damages.

Facts

The plaintiff (Cenric) is a construction company. Its activities include the management of large-scale demolition and excavation works.

The first defendant (TWT) is the developer of a site at Harris Street, Pyrmont. TWT was not the owner of the site but represented the owners. The proceedings were conducted on the basis that TWT was the owner.

The second defendant (Bundanoon) was experienced in the harvesting and sale of sandstone.

TWT obtained approval to carry out a development on the site, involving the construction of a multi-dwelling building. It was a condition of the consent that TWT should investigate and assess the sandstone within the site boundaries to see whether there was any that could be salvaged and reused.

Cenric had tendered for the early works (demolition, removal of contaminated material, shoring and excavation).

In April 2017, TWT invited Cenric to resubmit that tender. Cenric did so. At that time, TWT did not think that the sandstone on the site was of any value.

Cenric and TWT signed the head contract on 20 June 2017.

On 26 June 2017, Bundanoon provided a proposal that included the removal of overburden at specified rates per cubic metre, and harvesting and facilitating the sale of the underlying sandstone at its own cost. It offered to pay a royalty per cubic metre to Cenric. The amount of the royalty would depend on the classification of the sandstone.

Cenric provided Bundanoon’s proposal to TWT. TWT agreed that Cenric could engage Bundanoon as a subcontractor. On 30 June 2017, Cenric and TWT agreed on a harvesting proposal and for a split of the royalties that would be payable. That was done by letter. It was common ground between the parties that the letter had the effect of amending the head contract.

Bundanoon started work on site in early July 2017.

Disputes

A number of disputes broke out. TWT expressed dissatisfaction with Cenric's rate of progress. Cenric, in turn, said that TWT had been responsible for various delays, and that otherwise responsibility for the delays lay with Bundanoon.

TWT and Cenric became concerned at Bundanoon's failure to pay any royalties for sandstone that had been harvested. Bundanoon became unhappy because TWT had sought to ascertain the price at which Bundanoon was selling sandstone to the Department of Public Works and Services (DPWS).

While all this was going on, the parties were considering whether, and if so how, to harvest the s 96 sandstone (being the sandstone that required an amendment to the development consent to harvest).

The Meeting

On 19 February 2018, a meeting was held and attended by representatives of TWT, Cenric and Bundanoon. There was an agreement of some form reached at that meeting. There is a dispute as to what was agreed.

At the meeting, TWT gave Cenric a show cause notice, based on Cenric's failure to reach practical completion by the required date. The notice required Cenric to show cause why TWT should not take the balance of the head contract works out of its hands. Cenric sought to show cause. TWT was not persuaded. It took the balance of the works out of Cenric's hands, and contracted with Bundanoon direct to perform them. It also contracted with Bundanoon direct for the harvesting of the s 96 sandstone.

The Court found that, at the meeting, Cenric, TWT and Bundanoon agreed that:

1. the head contract between Cenric and TWT would be varied to include the bench 4 works;
2. by necessary implication, the subcontract between Cenric and Bundanoon would be varied likewise;
3. the subcontract would be varied further to provide for royalties to be paid on bench 4 sandstone at a rate of $1,200 per m^3 (presumably for first class yellow block), with a minimum quantity of 1,000 m^3;
4. TWT would not seek to recover liquidated damages from Cenric for delays up until 19 February 2018; and
5. TWT would grant the extension of time that Cenric had sought.

Was the Agreement Enforceable?

TWT raised two reasons why that agreement reached at the agreement (if, contrary to its principal case, such an agreement was struck) was not enforceable.

- The first was that there were no oral modification (NOM) clauses.

The Court held that there is clear authority in this country that a NOM clause cannot prevent the parties to a contract containing it from agreeing orally to vary it. That principle, which is no more than an affirmation of the basic principle of contractual autonomy, may be traced back at least to the judgment of Cardozo J in *Beatty v Guggenheim Exploration Company* (1919) 225 NY 380. There is intermediate appellate court authority in this country affirming the principle: see for example *Hawcroft General Trading Co Pty Ltd v Hawcroft* [2017] NSWCA

91and *GEC Marconi Systems Pty Limited v BHP Information Technology Pty Ltd* (2003) 128 FCR 1.

- The second ground of defence is that the agreement, if made, is an agreement for the disposition of an interest in land and is thus unenforceable for want of writing by reason of ss 23C and 54A of the *Conveyancing Act 1919 (*NSW).

The Court held that the head contract and the subcontract are contracts for the excavation of the site. It cannot be correct that every contract for excavation works is required to be evidenced in writing. The "right", or entitlement, of Bundanoon to sell the sandstone is given by the letter of title, which was in writing and signed on behalf of TWT. The confined rights accruing to Bundanoon, coupled with the requirement of it to hold the proceeds of sale in trust, rendered the argument that Bundanoon acquires any proprietary right, of the nature of a profit à prendre, in the sandstone that it harvests untenable.

Was the show cause notice valid?

The show cause notice was dated 9 March 2018. It was based on an alleged substantial breach of the head contract, comprising two elements:

- substantial departure from the construction program
- failure to proceed with due expedition and without delay.

The letter required Cenric to show cause in writing why TWT should not exercise its right to take the head contract works out of Cenric's hands. Cenric argued that there were three reasons why the show cause notice was not valid:

1. The first was that the agreement of 19 February 2018 included, as a term, that TWT would grant Cenric a seven-week extension of time. The proposition that Cenric had failed to achieve completion by the date for practical completion could not be sustained, because the effect of the agreement to grant an extension of time was to extend accordingly the date for practical completion.
2. The second ground of invalidity for which Cenric contended was that the show cause notice was not issued in good faith, because TWT, at the time the notice was issued, to take the work out of Cenric's hands regardless of the substance of any cause that Cenric might show. The court held that this evinced bad faith that would have rendered the show cause notice invalid.
3. The third reason given by Cenric for impugning the validity of the show cause notice is that it was issued for an ulterior purpose. That purpose was identified as being the wish to contract directly with Bundanoon for the works, and to receive the whole of the royalty payable by Bundanoon for itself.

The Court held that TWT was not entitled to issue the show cause notice. Cenric was found to have an entitlement to damages arising from this breach but found that it did not prove that it had suffered loss.

His Honour did not deal with Cenric's argument, as against TWT, that if for any reason it did not recover royalties from Bundanoon for sandstone (including level 4 sandstone), because of Bundanoon's termination of the subcontract, then it was entitled to recover from TWT damages equivalent to the amounts of those lost royalties.

Termination of the subcontract between Cenric and Bundanoon

As for whether the termination of the contract was valid Cenric submitted, that if TWT was not justified in taking the head contract works out of its hands, the termination of the subcontract was invalid.

His Honour held that Bundanoon did not validly terminate the subcontract.

His Honour posited a separate question; specifically, if TWT's decision to take the head contract works out of Cenric's hands was not justified, nonetheless does the fact that it did so mean that Bundanoon was entitled to terminate the subcontract? In other words, was the de facto loss of possession of the site sufficient to justify termination of the subcontract? His Honour did not answer this question as it was not taken up by Bundanoon.

Royalties Payable

The Court determined that whether the termination of the subcontract was valid was of no moment in respect of the payment of royalties in respect of the harvesting of sandstone. This was so because, on the evidence, all blocks down to and including bench 3 were harvested before the purported termination of the subcontract. Under the subcontract, the royalties became payable upon completion of harvesting. Accordingly, Cenric's accrued right to payment would have survived the termination, even if said termination were valid: *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457.

The Court therefore found in favour of Cenric.

Central Projects Pty Ltd v Davidson [2018] NSWSC 523

Coram: Ball J

Supreme Court of NSW

Date: 30 April 2018

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

Facts

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

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

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

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

Decision

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

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

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

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

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

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

Clements v Murphy [2018] NSWCATAP 152

Coram: Principal Member K Rosser and Senior Member DAC Robertson

NSW Civil and Administrative Tribunal

Date: 20 June 2018

BUILDING AND CONSTRUCTION – Home Building – whether the preference for rectification of defective work by the responsible contractor arising from s48MA of the Home Building Act applies in relation to incomplete work

Facts

The Builder entered into a contract with the owners on 14 August 2014 for the construction of a home on the Owners' property at Canowindra. The contract price was $327,640.45.

Disputes arose between the parties over claims by the Builder to payments which the Owners disputed.

The Builder served notice purporting to terminate the contract. The Owners treated the notice as a repudiation which they accepted. The Owners commenced proceedings in the Tribunal on 5 February 2016 seeking an order that the Builder complete the contract works or alternatively an order for the payment of the cost of completion which the Owners assessed at $121,266.00.

The first instance Tribunal found that the Builder had repudiated the contract. The Owners' claims for compensation were dealt with at a separate hearing following which, by a decision dated 19 October 2017, the Senior Member ordered the Builder to rectify 15 items of defective work and to pay the Owners the sum of $45,054.79 in respect of incomplete work.

Appeal

The Builder's Notice of Appeal identified five grounds of appeal each of which, the Builder asserted, involved a question of law. The Builder also sought leave to appeal on the bases that the decision was not fair and equitable and was against the weight of evidence. The matters identified as the bases for the application for leave to appeal reflected the matters raised as questions of law.

At hearing, The Builder relied only upon the three grounds of appeal, which were:

- The Member erred in finding that s 48MA of the *Home Building Act 1989* (NSW) does not apply to incomplete work.
- Further or in the alternative, even if s 48MA does not apply to incomplete work, the Member erred by failing to order the builder to complete the incomplete work, as well as the defective work, in circumstances where the builder would already be on site to rectify the defective work
- The Member erred in failing to take into consideration the second complying BASIX certificate. It shows that the argument for allowing the costs for the sliding doors due to non-compliance with the BASIX is not applicable as a complying BASIC [sic] certificate was obtained and provided to the Owners. Furthermore, the Member failed

> to give full consideration to the respondent's variations to the original plan that resulted in non-compliance with the first BASIX certificate.

The first two of the above appeal grounds challenged the decision of the Senior Member to order the Builder to pay the costs of the completion of incomplete work rather than to order the Builder to carry out the incomplete work. These grounds raised the application of section 48MA of the *Home Building Act 1989* (NSW).

The Senior Member held that section 48MA of the HBA relates to defective work and does not apply in relation to incomplete work.

Ground 3

There may be some room for debate in individual cases as to whether a particular matter complained of is incomplete or defective work. For example, a failure to install handles on kitchen cupboards may be argued to be incomplete work, but may also be characterised as defective work. However, in general terms, a failure to install major building elements such as windows or a roof would clearly constitute incomplete work and could not properly be characterised as defective work.

The Appeal panel opined that it was clear from the authorities that the common law "right to rectify" only arises prior to practical completion or during the defects liability period; that is, while the contract remains on foot. There is no suggestion the authorities that a builder has a right to complete incomplete work after a contract has been terminated. Prior to practical completion, a builder is clearly entitled to complete any incomplete works.

The parties also referred to the decision of an Appeal Panel in *Leung v Alexakis* [2018] NSWCATAP 11. In that case the Appeal Panel considered in some detail a number of issues relating to section 48MA. However that decision did not involve consideration of whether the term "defective residential building work" in section 48MA includes incomplete work.

The Appeal Panel made plain that s 48MA is not intended to apply to work which is incomplete and which cannot be characterised as defective work. We consider that such a construction is consistent with the object of the section as set out *Kurmond Homes v Marsden* [2018] NSWCATAP 23 at [31] to [32], where the Appeal Panel rejected a submission that a builder's conduct in unrelated transactions, namely other building projects in which it had been involved, was not a relevant consideration in determining what orders should be made:

> . … in our view, the language of s HB Act does not indicate such exclusion or modification. Our reasons for this view are as follows:
>
> 1. While the Tribunal is required to have regard to the principle of the "preferred outcome" s 48MA does not expressly exclude consideration of a builder's licence history.
>
> 2. There is no necessary intention disclosed by the HB Act, in s 48MA or otherwise, by which it might be inferred such an exclusion was to operate:
>
> 3. Reference to extrinsic material, including the Second Reading Speech for the *Home Building Amendment Act, 2014* (by which s 48MA was enacted), does not support such an implication. In this regard, as referred to by the Tribunal in *Leung* at [132], the Minister for Fair Trading said on 6 May 2014:
>
>> (1) A homeowner should not to be permitted to unreasonably refuse a builder access to a building site to rectify defective work;
>>
>> (2) s 48MA was intended to ensure that, at least, "builders" who were liable to a person for defective work, should be able to return to carry out necessary rectification work if they are willing; and

(3) the amendments were to "*further support the timely and cost-effective resolution of disputes*".

Ground 4

As to ground 4, the Tribunal accepted that s 48O would have allowed the Senior Member to order the Builder to complete the incomplete work. However, noted that s 48MA does not make such an order the preferred outcome. Accordingly, the Tribunal found that the Senior Member did not err in failing to make an order pursuant to s 48O that the Builder complete the incomplete work.

Further, the determination of the appropriate remedy pursuant to s 48O, once circumstances warranting a remedy have been established, is a discretionary decision. As such it is susceptible to challenge on appeal only on the bases outlined in *House v R* (1936) 55 CLR 499.

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution, for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

The Appeal Panel held that there was no error of the kind referred into in *House v R*. Nor could it be said that the decision not to make such orders was not just and equitable or was against the weight of evidence.

Ground 5

The Builder conceded that Ground 5 does not raise a question of law. Accordingly, the Builder required leave to rely upon this ground. The Appeal Panel agreed with the finding of fact made by the Tribunal Member at first instance.

The application for leave to appeal was refused and the appeal dismissed.

Renewal

The Owners, submitted that, in addition to dismissing the appeal, the Appeal Panel should make a money order in respect of the items of rectification ordered by the Senior Member which the Builder had not carried out.

The Appeal Panel held that, in the circumstances it was inappropriate to make an order of this nature given that the factual issues raised are not appropriate for determination on an appeal.

The Appeal panel made plain that its denial of the Owner's application should not be construed as denying the Owners' entitlement to apply to the Consumer and Commercial Division for renewal of their application if the Builder has not completed the work required by the Tribunal's first instance orders.

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

Coram: Basten, Meagher JA and Barrett AJA

NSW Court of Appeal

Date: 21 May 2018

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

Facts

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

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

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

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

Decision on Appeal

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

Meagher JA and Barrett AJA joined, held:

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

Accordingly, the adjudicator had not failed to comply with s 22(2) of the SOP Act; regardless of whether the determination was legally correct.

Separately, Basten JA held:

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

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

Coram: Ward CJ in Eq

Supreme Court of NSW

Date: 19 December 2017

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

ESTOPPEL – Equitable estoppels – Promissory estoppel – Relief

Facts

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

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

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

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

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

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

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

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

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

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

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

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

Conduct after meeting

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

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

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

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

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

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

Decision

Ward CJ in Eq determined that:

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

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

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

- CPB assumed the execution of the resolution sent by email on 19 September 2017 would give rise to rights and obligations;

- RdE induced this assumption by CPB by dint of RdE's post meeting conduct , which included express representations by both Mr Bagnariol and Mr Mortoni emails and implied representations, being silence after CPB's made its Called Sum payments;
- CPB relied on RdE's conduct when it made its Called Sum payments which was then paid to creditors;
- It was clear to RdE that BPB was functioning under the false pretence that there was an agreement between CPB and RdE about the payment of the Called Sum;
- CPB's action or inaction would cause detriment if RdE was not required to sign the resolution because there was a risk that the contract for design and construction could not be completed without the payment of the Called Sum; and
- RdE did not act to avoid the detriment by signing the resolution or informing CPB that it considered CPB was mistaken as to the board meeting decision.

Europlex Pty Ltd v Unique Living Australia Pty Ltd; Unique Living Australia Pty Ltd v Europlex Pty Ltd [2018] NSWSC 1291

Coram: Hammershlag J

Supreme Court of New South Wales

Date: 10 May 2018

BUILDING AND CONSTRUCTION – agreement to develop property at Terrigal - agreement to share any profit – whether any profit yet achieved – whether like agreement exists in relation to further property at East Gosford

CONTRACTS — formation — consideration – where parties entered oral agreement to develop property and share profit – where agreement confirmed by email – where parties subsequently executed formal building contract – whether formal contract is binding – whether formal contract is a sham

COMMERCE – misleading or deceptive conduct —whether directors of builder made representations that were misleading or deceptive – whether representee understood those representations were made on behalf of company of which representor a director –whether representations relied on

Facts

The dispute relates to entitlements of Europlex Pty Limited (a company of which Mr Minarovic is a director) and Unique Living Australia Pty Limited (a company of which Mr Hayek is a director) concerning the development of a property owned by Unique Living at Terrigal and the sale of another property formerly owned by Unique Living at East Gosford.

On or about 23 June 2014 Unique Living purchased the Terrigal property for some $2.1 million.

Mr Minarovic and Mr Hayek met on 8 September 2014 and agreed to develop the property. The agreement was partly written and partly oral.

It was common ground that the written part of the agreement is recorded in an email.

It is also common ground that the terms of the agreement included that:

1. 15 units and 5 townhouses would be erected on the Terrigal property;
2. Europlex would carry out the construction work;
3. Mr Minarovic would supervise and project manage the work;
4. Mr Minarovic would receive 30 per cent of any development profit after all development costs were paid; but
5. in the event that construction costs exceeded $5 million, such excess would be paid out of Mr Minarovic's profit entitlement.

Europlex commenced building work in January 2015.

On 15 July 2015 Unique Living and Europlex executed a "Formal Instrument of Agreement" which incorporated the "General conditions of contract for design and construct" in Australian Standard AS4902-2000. I will refer to this document as the "Building Contract".

Europlex contended that it was never the mutual subjective intention of the parties that their relationship be governed by the Building Contract. Europlex asserts that document is a sham: *Lewis v Condon* (2013) 85 NSWLR 99.

The terms of the Building Contract included that:

1. Europlex would carry out the necessary building work for a fixed lump sum of $4,545,454 exclusive of GST; that is $5 million inclusive of GST;
2. Europlex would execute the work under the contract to practical completion by the date for Practical Completion (1 August 2016); and
3. if Europlex failed to execute the work to practical completion by that date, it would pay liquidated damages of $2,500 per day after 1 August 2016 until, relevantly, termination of the contract (which occurred on 2 August 2017).

By May 2017 the works had not reached practical completion. Europlex ceased work on the site in about June 2017. During the course of the works, Unique Living paid Europlex some $7.85 million for the work it did on the project.

On 16 June 2017 Unique Living, by its solicitor, served on Europlex a notice pursuant to cl 39 of the General Conditions of the Building Contract calling on Europlex to show cause as to why Unique Living should not terminate the Building Contract.

On 29 June 2017 Europlex, by its solicitor, replied to that letter.

On 2 August 2017 Unique Living terminated the Building Contract.

Europlex accepted that if the Building Contract governed the parties' rights Unique Living was entitled to liquidated damages. Unique living engaged another builder to do further work on the development. The development remains incomplete.

The only relief pressed by Europlex was for declaratory and other relief concerning Europlex's entitlement to 30 per cent of the profit from the development.

The Court refused the declaratory relief sought as it was satisfied that it was far from certain that a profit will be achieved and, for that reason, see no utility in granting Europlex declaratory relief.

Accordingly, Europlex's claim was dismissed.

Was there consideration for the building contract?

Europlex submitted that "there was no consideration for the written agreement. Europlex had already promised to build and Unique Living had promised to pay $5 million".

This was rejected, it was only by the Building contract that Europlex promised to perform the work for "the fixed lump sum of $4,545,454 (ex GST)", that is $5 million inclusive of GST, and otherwise on the detailed terms of the Building Contract including as to the date by which practical completion be achieved and the payment of liquidated damages if it was not.

This shows that the parties agree their relationship was governed not merely by the oral arrangements made on 8 September 2014 but also by the Building Contract.

Is the Building Contract a sham?

The Court held that for a document to be a “sham” there must be an intention to deceive. Thus, even if a contract is entered into for an improper purpose, it will not be considered a “sham” unless “intentional deception as to the effect of a document” is also made out

Europlex alleged that the Building Contract was a sham. He put this on several bases, only two of which refer to deceitful intent.

1. the parties executed another contract later in time which Mr Allen submitted was itself a sham and thus bespoke the parties’ earlier preparedness to “create documents that purported to record contractual arrangements” when they in fact did not; and
2. Mr Hayek asked Mr Minarovic to “make up some bullshit” on a curriculum vitae to be provided to a financier of the project.

The Court found that:

1. There is no suggestion that the amount of that consideration was falsely calculated to deceive the home warranty insurer. The document was likely intended by the parties to be supplementary to their main contract.
2. Assuming the second point to be true, it was incapable of relevance to the status of the Building Contract.

Unique Living brought a cross-claim seeking $5,023,040.53 pursuant to the Building Contract. Europlex did not make any submissions in relation to Unique Living’s claim for damages for breach of contract. Judgment was entered in favour of Unique Living.

In its cross-claim, Unique Living also alleged that Europlex, Mr Minarovic, and Mr Minarovic’s co-director, Mr Roman Cerny, made a number of representations concerning works on the Terrigal property which constituted misleading or deceptive conduct. Of those seven alleged representations, the Court found no misleading and deceptive conduct had been engaged in by Mr Minarovic or Mr Cerny.

The East Gosford property

On or about 29 April 2015 Unique Living purchased a property at East Gosford for $1.57 million. There was then a development approval attached to the property for 14 units and 4 townhouses. Unique Living requested various town planning consultants and other parties (including Europlex) to prepare and submit documents to amend the development application to permit construction of 27 units and no townhouses.

Unique Living spent some $334,000 preparing that documentation. Those costs included $16,293 paid to Europlex.

Europlex lodged the amended development application. It invoiced Unique Living for that work and was paid. Unique Living did not develop the property in accordance with the amended development approval. On 16 February 2018 it sold the property to a third party for $2.87 million. Mr Minarovic did not get to play any role as project manager. The profit that Unique Living made on the property was not from a development that Mr Minarovic project managed. Accordingly, there was no occasion that arose for any commission to be paid. Accordingly, Europlex’s claim in respect of the East Gosford property was dismissed.

Exotic Retirement Living v Construct By Design Commercial [2018] NSWSC 860

Coram: McDougall J

Court: Supreme Court of New South Wales

Date: 6 June 2018

CONTRACT – assignment – deed purported to assign rights, title and interest in a car stacker to the plaintiff – at date of execution of deed, the defendant had no right, title or interest in the car stacker – deed of assignment expressed in present tense and not as an assignment of future property – assignment of car stacker ineffective.

EQUITY – assignment of future interest – only enforceable in equity if consideration paid or executed – no such consideration paid or executed in full – no assignment in equity.

Facts

Exotic Retirement Living (**ERL**) entered into a construction contract with Construct by Design Commercial (**CBD**) to construct residential apartments. The builder entered into a separate contract with Car Stackers International Pty Ltd (**CSI**) for the delivery, installation and commissioning of a car stacker at the apartments.

The construction contract between ERL and CBD came to end by no later than 24 January 2018. The evidence was that the car stacker was not delivered by CSI to CBD until 1 February 2018.

The terms of the supply contract contained a reservation of title clause which provided that all goods supplied would remain the property of CSI until full settlement of all outstanding claims deriving from the business relationship between the CSI and CBD. The wording of the clause was suggestive of CSI having a quasi-lien over the car stacker for both the purchase prince and any other claims that it may have had against CBD were paid. The final payment instalment for the car stacker remained unpaid by the CBD.

ERL brought its claim against CBD on the basis of a document entitled “Assignment and Benefit Deed” which was made between CBD, ERL and two of CBD’s directors who were designated the title of Guarantors. The Assignment Deed provided that ERL was to be responsible for the payment of the invoices issued by CSI for the car stacker (as valuable consideration) and CBD assigned all its rights, title and interest in the car stacker to ERL.

CBD failed to deliver the car stacker to the apartments. It is important to note that CSI only delivered the car stacker to the CBD after the construction contract between ERL and CBD had come to an end.

ERL brought a claim in the Supreme Court of New South Wales for a declaration that it was entitled, as between it and CBD, to possession of the car stacker and an order for delivery up of the car stacker.

Decision

His Honour found that the difficulty with ERL's argument appeared to be that what in fact was assigned by cl 2.2 of the deed is CBD's right, title and interest in the “Equipment” and the “Bank Guarantee”. The assignment of right, title and interest in the “Equipment” was qualified by the immediately following words "(if any)". It appeared to acknowledge that CBD may not have any right, title or interest in the Equipment as the deed was made.

McDougall J found that what the deed does not purport to do is assign to ERL CBD's right, title and interest in its contract with CSI.

His Honour delineated between and assignment of present property and an assignment of some future right under the contract. His Honour found that the assignment was one of present property. The reason that this is was a problem was manifest when one considered that, as at 16 August 2017, CBD had no right, title or interest in the Equipment. The Equipment had not been delivered either to CBD nor to the property at Narrabeen where it was to be installed.

In those circumstances, His Honour found that the assignment was not effective at the date it was made to transfer whatever right, title and interest in the equipment CBD had to ERL; nor was there then any right or benefit to which, by virtue of the concluding words of that cl 2.2, ERL was entitled.

If His Honour was wrong, and the assignment were construed as one of future property, it would only be enforceable in equity if the consideration were paid or executed. *Holroyd v Marshall* (1862) 10 HLC 191 and *Tailby v Official Receiver* (1888) 13 App Cas 523. Those authorities stand for the proposition that an agreement for valuable consideration to assign future property might be effective if the consideration were paid or executed. The effect of such an assignment is, in effect, coterminous with the ability to procure specific performance of it. However here, the consideration had not been paid in full and accordingly, would not have been enforceable at any rate.

Forte Sydney Construction v Lin Betty Building Group [2018] NSWSC 1429

Coram: McDougall J

Supreme Court of NSW

Date: 19 September 2018

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act – application to quash adjudicator's determination – where payment schedule provided after the statutory time limit – where claimant subsequently gave notice of its intention to apply for adjudication – where no payment schedule provided after that notice was given – whether the earlier payment schedule was a valid payment schedule – whether the adjudicator fulfilled his statutory functions – summons dismissed.

Facts

Forte Sydney Construction (**FSC**) was the head contractor for the construction of a residential apartment project at Ryde. By subcontract dated 31 January 2018, FSC engaged Lin Betty Building Group (**LBBG**) to perform Hebel block and gyprock works.

On 25 May 2018, LBBG served a payment claim on FSC. The time for providing a payment schedule in response to that payment claim expired on 8 June 2018. FSC did not provide a payment schedule within that time. It, however, purported to provide a payment schedule on 15 June 2018.

On 17 July 2018, pursuant to section 17(2) of the Act, LBBG issued a notice to FSC of its intention to apply for adjudication of the payment claim. By operation of section 17(2)(b) of the Act, FSC had five business days after service of the section 17(2) notice to respond with a payment schedule. FSC did not provide a payment schedule within this time. LBBG subsequently made an adjudication application and served its application on FSC.

Section 21(1) of the Act provides that an adjudicator must not determine an adjudication application until after the end of the period which the respondent may lodge an adjudication response.

On 10 August 2018 (prior to the end of the period mandated by section 21(1) of the Act), the adjudicator issued his determination in favour of LBBG. The adjudicator noted that:

- although a payment schedule had been provided by FSC on 15 June 2018, it was invalid because it had not been provided within ten business days after the service of LBBG's payment claim; and
- as FSC had failed to provide a valid payment schedule under either sections 14 or 17(2)(a) of the Act in response to LBBG's section 17(2)(a) notice, FSC was not entitled to serve an adjudication response by operation of section 20(2A) of the Act.

Accordingly, the adjudicator held that an adjudication determination could be made without waiting out the prescribed period under section 21(1) of the Act.

FSC commenced proceedings in the Supreme Court seeking to quash the adjudicator's determination. FSC raised three grounds in support of its application:

- The adjudicator denied FSC natural justice by failing to consider the 15 June payment schedule. FSC argued that when the 15 June payment schedule was served (ineffectively for the purposes of section 14(4) of the Act) it nonetheless stood as a payment schedule to be taken as an answer to the claimant's section 17(2)(a) notice. Accordingly, the adjudicator was bound to consider it. FSC referred to his Honour Hodgson JA's observations in *Falgat Constructions Pty Limited v Equity Australia Corporation Pty Limited* (2007) 23 BCL 292 in support of that contention. Counsel for FSC did concede that there was authority to the contrary, for instance *Taylor Projects Group Pty Limited v Brick Dept Pty Limited* [2005] NSWSC 439.

- The adjudicator had determined the application before he was entitled to do so, contrary to section 21(1) of the Act.

- The adjudicator failed to carry out his statutory functions under the Act. This argument was based upon the brief reasons that the adjudicator gave for upholding the claim and determining that LBBF was entitled to be paid the claimed amount.

Decision

First Ground

The court held that on a proper construction of the language of section 17 of the Act, a respondent is required to provide a separate payment schedule expressly in response to the claimant's section 17(2)(a) notice within 5 days of receiving the claimant's notice. The court concluded that an out of time payment schedule, such as the 15 June payment schedule provided by FSC, cannot stand as an answer to a claimant's notice. This is primarily due to the fact that the right to serve a response only commences at the date of receipt of the s17(2)(a) notice. Accordingly, it was not open for FSC to rely upon the payment schedule purportedly served pursuant to s14, albeit out of time.

Second Ground

McDougall J held that since the first ground was decided against FSC, the second ground did not arise.

Third Ground

Turning to the third ground, the Court accepted the well settled proposition that an adjudicator is not discharged from considering the merits of the claim simply because no payment schedule has been provided. However, where no arguments have been advanced, it is not incumbent upon an adjudicator to invent grounds and then deal with them.

Hodgson JA held, in *Coordinated Construction Co Pty Limited v J M Hargreaves (NSW) Pty Limited* (2005) 63 NSWLR 385, that the adjudicator's task was to determine the amount of the progress payment. That required, a determination to be made on the material available to the adjudicator and to the best of the adjudicator's ability

The Court concluded that the inference available on the adjudication determination was that the adjudicator had properly considered the material submitted in support of the payment claim, and that the material satisfied him that the claim had been validly made. Therefore, the court found that the third ground also failed.

Accordingly, the court found that each of the grounds raised by FSC failed. The court dismissed the summons and ordered that LBBG be paid $314,463.49.

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

Coram: Stevenson J

Supreme Court of NSW

Date: 26 June 2018

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

Facts

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

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

Decision

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

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

Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd [2018] NSWSC 1229

Coram: McDougall J

Supreme Court of NSW

Date: 6 August 2018

BUILDING AND CONSTRUCTION – application to quash adjudicator's determination under Security of Payment Act – whether payment claim invalid as attachment to supporting statement not included – no requirement for such attachment on the facts of this case.

BUILDING AND CONSTRUCTION – whether adjudicator failed to discharge her statutory functions in good faith – statutory formulation requires certain specified matters be given weight as fundamental elements in the determination – necessary to consider adjudicators' reasoning in light of the compressed time constraints in which they are created – importance of not overzealously or mechanically applying the description of the adjudicators' task explained in SSC Plenty Road v Construction Engineering (Aust) [2015] VSC 631 – fair reading of the adjudicator's reasons in context demonstrates no jurisdictional error.

BUILDING AND CONSTRUCTION – whether builder should be prevented from receiving adjudicated amount – where owner claims to have a substantial offsetting claim – whether owner would be prejudiced if payment out of court is ordered due to insolvency risk of builder – where Security of Payment Act effects a statutory transfer of risk from builder to owner pending final determination – necessary to point to a further risk than that inherent in the statutory allocation to justify the granting of a stay – no such grounds established.

Facts

On 10 July 2017, Goodwin Street Developments Pty Ltd (**Goodwin**) entered into a construction contract (**contract**) with DSD Builders Pty Ltd (**DSD**) as head contractor.

Goodwin purported to terminate the contract in March 2018. DSD served a payment claim on 30 April 2018. Goodwin served a payment schedule which denied liability, claimed instead that DSD owed it a substantial amount of money, and provided that the scheduled amount was nil.

DSD made an adjudication application. Goodwin failed to lodge its adjudication response in time, notwithstanding that it was notified that the application had been made.

The adjudicator dealt with the matter on the basis that the relevant dispute was constituted by the payment claim and the payment schedule. That is, she said that she could not take into account the matters alleged in the out of time adjudication response in so far as they related to the merits of the claim. She did however deal with (in favour of the builder) jurisdictional arguments advanced and elaborated upon in the adjudication response.

The adjudicator ultimately determined that DSD was entitled to $265,000 out of the claimed amount of $727,000.00. She also considered the Goodwin's offsetting claim in relation to the alleged defective and incomplete work and valued it at nil.

Goodwin commenced proceedings seeking relief in the nature of certiorari to quash that determination on two bases that were ultimately pressed:

- The payment claim was invalid because it did not include the supporting statement referred to in section 13(9) of the SOPA; and
- The adjudicator did not exercise her statutory function, or did not perform it in good faith, because she did not value the construction work and reach conclusions on the question of defects, as required by section 10(1)(b)(iv) of SOPA.

In the event that those challenges failed, Goodwin submitted that the court should, in any event, stay the enforcement of the adjudication determination on the basis that Goodwin may suffer irreparable prejudice by reason of DSD's financial position.

Validity of the supporting statement

The document relied upon as a supporting statement for the purposes of SOPA stated that DSD is the head builder and that it contracted with BH Australia Constructions Pty Ltd (the subcontractor) The supporting statement included a statement by the director of the builder providing that, to the best of her knowledge and belief all amounts due and payable to subcontractors have been paid (not including any amount identified in the attachment as an amount in dispute). There was no attachment to the supporting statement.

Goodwin submitted that the subcontractor had to be identified in some form of supporting schedule. His Honour did not agree.

The document purporting to be the supporting statement, when looked at as a whole, made plain that there was only one subcontract. It identified the name of the subcontractor and stated that no money was owing. That was all that was required by SOPA as a matter of form.

The second part of the submission was advanced suggested that the qualification contained in the words “not including any amount identified in the attachment as an amount in dispute”. Goodwin argued that in the absence of an attachment there was no identification of whether anything was owing. His Honour rejected this submission noting that when one looked at the supporting statement as a whole it was plain that nothing was said to be owing. If there were amounts owing, they would have been contained in an attachment. The absence of such an attachment would suggest that no amounts were said to be owing.

Exercise of adjudicator's statutory function in good faith

It was common ground that the contract made no express provision for the valuation of construction work. That position reflected the view expressed by the Court of Appeal in *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* (2007) 23 BCL 205.

It followed that the adjudicator was required to have regard to the matters set out in section 10(1)(b) of SOPA. The Court referred to *Zhang v Canterbury City Council* [2001] NSWSC 167, as authority for the proposition that the requirement to 'have regard to something' obliged the adjudicator to have regard to the specified considerations and that they be given weight as fundamental elements in the determination. Those consideration were to be the focal points by reference to which the relevant decision is to be made.

McDougall J held that the fundamental problem with the adjudicator's reasons was that it showed she was well aware of Goodwin's claim for defective work, but made no precise finding on the topic.

His Honour cited his earlier comments in *Laing O'Rourke Australia Construction Pty Ltd v H&M Engineering and Construction Pty Ltd* [2010] NSWSC 818 that the obligation to exercise the statutory function in good faith required at least that adjudicators should turn their minds to, grapple with and form a view on all matters that they are required to consider.

His Honour also cited with approval the detailed analysis of *Vickery J in SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631 in respect of what was required of an adjudicator in discharging the task with which he or she was saddled.

McDougall J confirmed that the task required the adjudicator to assess fairly and weigh the whole of the evidence, including by drawing necessary inferences from the absence of supporting material, to arrive at a rational conclusion. His Honour cautioned that an overzealous approach to Vickery J's decision, and the application of those requirement in a serial or dogmatic way should not be endorsed and was apt to lead parties to bring matters to the Court that cannot be properly argued as being infected by jurisdictional error.

The outcome of this issue turned upon whether the adjudicator dealt with this in a way that shows that she grappled with the underlying factual issue. His Honour stated that it would have been helpful for the adjudicator to express a clear view in clear terms as to what she found and why.

In looking at the adequacy of the reasons, the time constraints that burden adjudicators ought to be taken into account.

McDougall J held that upon reviewing the adjudicator's reasons in their entirety, she did deal with the dispute put before her, and did in substance both say that she was not satisfied that there was defective work and say why. Accordingly, the appeal ground failed.

Irreparable prejudice

The Court then turned to the stay of the adjudication determination sought by Goodwin.

McDougall J applied the decisions in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd* [2018] NSWCA 33 and *R J Neller Building Pty Ltd v Ainsworth* [2009] QCA 397, and noted Keane JA's comments in the latter of these two cases:

- The Act is directed to ensuring speedy resolution to conflicts so as to provide an effective means to ensure cashflow to builders from the parties with whom they contract.
- The Act operates on the assumption that the interruption of a builder's cashflow may cause the financial failure of the builder before a claim may be finally determined by the Courts.
- The statutory transfer of risk of insolvency is, by operation of SOPA, now borne by the owner rather than the builder.
- The risk goes not further than the risk inherent in that statutory allocation is not sufficient to justify, without something more, a stay of enforcement of an adjudication.

The Court accepted that there was a possibility that the builder would be unable to satisfy a verdict in favour of Goodwin should there be a substantial verdict. His Honour held that in the absence of any evidence that DSD had:

- taken steps to arrange its affairs to defeat any claim that may be made against it or
- engaged in delaying tactics

there were no circumstances to justify the imposition of a stay.

Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd [2018] NSWSC 1791

Coram: Stevenson J

Supreme Court of NSW

Date: 21 November 2019

BUILDING AND CONSTRUCTION – application by owner to quash adjudicator's determination in favour of builder dismissed by judge of the division and confirmed by Court of Appeal – whether funds paid into court by owner pending challenge to the determination should be retained in court pending determination of underlying building dispute – where judge hearing application to quash determination had rejected such an application – where Court of Appeal refused to entertain application – whether factors of inability of builder to repay established – whether any factors beyond those available to owner when making original application established

Facts

Goodwin Street Developments Pty Ltd and DSD Builders Pty Ltd were parties to a construction contract. DSD agreed to construct a number of boarding houses on property owned by Goodwin in Jesmond, a suburb of Newcastle.

Goodwin purported to terminate the contract on 19 March 2018. The work was not complete.

On 14 May 2018 the contract administrator under the contract issued a certificate that the cost of completion of the work was $976,497.91.

On 24 August 2018 Goodwin commenced these proceedings seeking judgment for that sum.

On 30 April 2013 DSD served on Goodwin a payment claim pursuant to s 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) claiming $727,256. On 15 June 2018 an adjudicator determined that claim pursuant to s 22 of the Act and awarded DSD $265,510.

On 6 August 2018 McDougall J dismissed a challenge to that determination: *Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd* [2018] NSWSC 1229. The appeal of that decision was unsuccessful.

By Notice of Motion filed in the Supreme Court of NSW, Goodwin sought an order that the $265,510 it paid into Court pending its challenge to the adjudication determination be retained in Court pending the outcome of these proceedings.

It was accepted that what must be demonstrated is more than a risk that DSD would be unable to repay that sum were Goodwin to be successful in the proceedings. Mr Hicks accepted that those financial risks are assigned to Goodwin by the Act.

Goodwin submitted that the justifications for retaining funds in Court contemplated by Keane JA (as his Honour then was) in *RJ Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390; [2008] QCA 397 existed in the instant case.

In *Neller* Keane JA (with whom Fraser JA and Fryberg J agreed) said at [40] and [41]:

> "The BCIP Act proceeds on the assumption that the interruption of a builder's cash flow may cause the financial failure of the builder before the rights and wrongs of claim and counterclaim between builder and owner can be finally determined by the courts. On that assumption, the BCIP Act seeks to preserve the cash flow to a builder notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder's financial failure, and inability to repay, could be expected to eventuate. Accordingly, the risk that a builder might not be able to refund moneys ultimately found to be due to a non-residential owner after a successful action by the owner must, I think, be regarded as a risk which, as a matter of policy in the commercial context in which the BCIP Act applies, the legislature has, prima facie at least, assigned to the owner.
>
> … There may, of course, be other circumstances, which, together with this risk, justify the staying of a warrant of execution based on the registration of an adjudication certificate. For example, the builder may have engaged in tactics calculated to delay the ultimate determination of the rights and liabilities of the parties so as unfairly to increase the owner's exposure to the risk of the builder's insolvency. Or the builder may have restructured its financial affairs after the making of the building contract so as to increase the risk to the owner of the possible inability of the builder to meet its liabilities to the owner when they are ultimately declared by the courts…"

Those observations have been approved in numerous authorities: *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 at [51]; *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd* [2018] NSWCA 33 at [27] (Payne JA) and *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; [2010] NSWCA 190 at [207].

Goodwin advanced several reasons why the funds ought to be retained in Court.

1. Goodwin's claims in these proceedings are prima facie strong;
2. DSD, and its officers, "have engaged in conduct to avoid paying subcontractors for works and have restructured their financial affairs to substantially increase the risk to [Goodwin] of being unable to recover amounts due upon the final and substantive determination of rights and liabilities";
3. DSD has apparently involved itself with "unregulated money lenders" to whom it is indebted for uncertain amounts; and
4. DSD and its officers have engaged "in conduct in scant regard" for the provisions of the Act which conduct has now been reported to the proper authorities.

Stevenson J proceeded on the basis that Goodwin had a prima facie case, considering himself ill placed to determine the strength of the case brought by Goodwin.

In respect of DSD's restructure of its affairs, Goodwin pointed out that DSD had subcontracted all of the work to a related company, BH Australia Pty Ltd, and that at least two subcontractors on the site had been engaged by a third related company, Blissful Developments Pty Ltd.

Goodwin also identified changes made in the shareholding and boards of each of those companies, to the fact Blissful Developments was placed into liquidation on 16 April 2018 and that the two subcontractors have not been paid by Blissful Developments.

His Honour found great difficulty in Goodwin's reliance on these matters in view of the fact that those matters were available to Goodwin at the time that it made an unsuccessful application to the Supreme Court before McDougall J.

The same was said of DSD's involvement with unregulated money lenders and the report that has been made to the NSW department of finance.

In the circumstances, his Honour was not persuaded that he should order the $265,510 remain in Court. The application made by Goodwin was therefore dismissed.

Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd [2018] NSWCA 276

Coram: Basten, Leeming, White JJA

Supreme Court of NSW Court of Appeal

Date: 20 November 2019

ADMINISTRATIVE LAW – judicial review – content of obligation to act in good faith – whether lack of good faith established by failure to "grapple with" all matters decision-maker required to consider – whether lack of good faith requires wilful blindness or conscious maladministration

BUILDING AND CONSTRUCTION – adjudication of payment claim – review of adjudicator's decision – circumstances in which adjudicator's decision invalid for lack of good faith – whether decision reviewable for failure to "grapple with" all matters adjudicator required to consider – Building and Construction Industry Security of Payment Act 1999 (NSW), ss 10(1)(b), 22(2)

Facts

Goodwin Street Developments Pty Ltd ("the owner") and DSD Builders Pty Ltd ("the builder") were parties to a construction contract. On 19 March 2018, the owner purported to terminate the contract.

On 30 April 2018 the builder served a payment claim on the owner in the amount of $727,256. On 14 May 2018 the owner served a payment schedule in response of $0, stating that the builder owed it a substantial sum for rectification of defective works and damage, and replacement of stolen items.

The builder applied for adjudication of the payment claim. The adjudicator provided her determination on 15 June 2018, awarding the builder an amount of $265,510. The owner commenced proceedings in the Equity Division seeking to have the determination quashed; the primary judge dismissed the proceedings.

Decision

The High Court confirmed in *Probuild Constructions* that review of an adjudication determination is only available on the basis of jurisdictional error. In so holding, the Court affirmed the approach consistently adopted by this Court since the decision in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421. That line of authority had been upheld in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* (2016) 95 NSWLR 147 which was the subject of the appeal to the High Court in *Probuild Constructions*.

It may be readily accepted that the statutory mandate of the adjudicator would not be satisfied by action taken in bad faith, or not bona fide, it is important to acknowledge that these phrases can have a range of meanings.

The Court held that McDougall J's decision in *Laing O'Rourke v H&M Engineering and Construction Pty Ltd* [2010] NSWSC 818, namely, the position that the obligation to exercise the statutory function in good faith 'requires at least that adjudicators should turn their minds to, grapple with and form a view on all matters that they are required to 'consider' was too wide of a construction. The Court held that *Zhang v Canterbury City Council* (2001) 51 NSWLR 589 ought not to be read as a legal principle of general application.

Basic principles of judicial review refer to a “failure to take into account a relevant [that is, mandatory] consideration”, as explained by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

Furthermore, saying that the decision-maker must “grapple with” particular material reflects statements that the decision-maker must give "proper, genuine and realistic consideration" to such material. As the High Court noted in *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 this language can invite a slide into impermissible merit review. Further, a refusal to give any weight to particular material does not demonstrate that the decision-maker failed to have regard to a mandatory consideration.

Though bad faith cannot be comprehensively defined, in this context it requires something equivalent to wilful blindness or conscious maladministration. *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 361. There was nothing approaching bad faith in the present case.

Having satisfied herself that she had jurisdiction to determine the adjudication application, the adjudicator then set out, by reference to s 22(2) of the Act, the matters required to be considered. The fact that there was no challenge to the approach adopted in the first 17 pages of the reasons, and no challenge to the last three pages, was held to demonstrate the absence of merit in the suggestion that the ultimate determination was reached in bad faith.

The Court found that the Adjudicator’s reasoning was tolerably clear; she was saying that there was no evidence provided by the owner to satisfy her that: the builder was instructed by the architect to correct particular defects or finalise incomplete work prior to the reference date, the builder failed to correct those defects or incomplete work, and because it had failed to do so the owner had invoked its right to use another person and had thereby incurred costs which it was entitled to off-set.

Appeal Grounds Advanced

Ground 1 in the notice of appeal alleged that the primary judge erred “in construing the Adjudicator’s reasons for not having regard to the estimated cost of rectifying the defects” as being based on the failure of the adjudicator to be “satisfied on the material before her that the works were defective”. The Court held for the reasons above that this ground was not made out.

Ground 2 asserted that the error in construing the adjudicator’s reasons led the judge to reject the appellant’s claim that the adjudicator “did not value the construction works … in good faith” and had not dealt with the appellant’s submissions “in good faith”. The Court made the following three findings:

1. In so far as it depended upon an error alleged in ground 1, that error was not made out.
2. To the extent that there was error in the reasoning, that error favoured the appellant.
3. There was nothing in the adjudicator’s reasons which provided any basis for an allegation that she acted otherwise than in good faith.

Ground 3 was more complex. It had two limbs, the first identified findings the adjudicator should have made. The second limb of ground 3 asserted that, presumably on the basis of those findings, the adjudicator had failed to have regard to the mandatory requirements of s 10(1)(b), and had failed to value the construction work in good faith.

For the reasons given by the Full Court of the Federal Court in *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 361, an allegation of bad faith on the part of a decision-maker is a serious matter involving personal fault and should not be made lightly. The Court held that the degree of vacillation in the reasons given by the primary judge may have suggested that there was more substance to the application than was in fact the case.

The Appeal was dismissed.

Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd [2018] NSWSC 1647

Coram: Parker J

Supreme Court of New South Wales

Date: 7 November 2018

CORPORATIONS – winding up – winding up in insolvency – application to set aside creditor's statutory demand under Corporations Act 2001 (Cth), s 459H – debt arising under the Building and Construction Industry Security of Payments Act 1999 (NSW) – offsetting claims – offsetting claim for liquidated damages for failure to complete construction contract by individual milestone dates or overall completion date – where builder prevented sub-contractor from completing works by dates specified in the contract – entitlement to recover liquidated damages

CORPORATIONS – winding up – winding up in insolvency – application to set aside creditor's statutory demand under Corporations Act 2001 (Cth), s 459H – debt arising under the Building and Construction Industry Security of Payments Act 1999 (NSW) – offsetting claims – offsetting claim for cost of completing work – claim foreshadowed in supporting affidavit but not yet accrued at time of s 459H application – not an offsetting claim

CORPORATIONS – winding up – winding up in insolvency – application to set aside creditor's statutory demand under Corporations Act 2001 (Cth), s 459H – debt arising under the Building and Construction Industry Security of Payments Act 1999 (NSW) – whether conditions should be imposed under Corporations Act 2001 (Cth), s 459M on an order varying the demand – conditions imposed requiring proceedings to be brought and claim amount paid into court

Facts

In January 2018 the defendant (Budget) served on the plaintiff (Grandview) a statutory demand in the sum of $1,024,573.36. In these proceedings Grandview applies to set that statutory demand aside.

The debt the subject of the statutory demand arises out of a sub-contract between Grandview ("Builder") and Budget (defined in the sub-contract as the "Sub-Contractor") for demolition and excavation work at a development being constructed by Grandview at Villawood.

Grandview and Budget entered into the sub-contract in June 2017. The contract work price was approximately $2.5 million. Work began in July 2017. The scheduled completion date was in December 2017.

The contract was subject to the *Building and Construction Industry Security for Payment Act 1999* (NSW) ("SOP Act"). Between July and October, Budget made five progress claims. There was some dispute, but in total about $1.2 million was paid.

The statutory demand was based on two unpaid progress claims issued in November and December 2017. The first payment schedule provided for the full amount claimed but payment was not made. The second payment claim was not responded to within the ten day period provided for under the Act.

Grandview admitted that Budget was owed the sums contained within the payment claims. It argued, however, that there were three discrete offsetting claims that exceeded the statutory demand being;

1. A liquidated damages claim for delay in completion;
2. A claim for liquidated milestone damages for failure to perform certain works at certain times; and
3. A damages claim for costs to complete the works.

In *Re Douglas Aerospace Pty Ltd* (2015) 294 FLR 186 Brereton J (as his Honour then was) considered the principles which apply when the Court is dealing with an application to set aside a statutory demand based on a debt arising under the SOP Act. His Honour applied the decision of the Western Australian Court of Appeal in *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91. His Honour said (at [91]):

> …as to whether a judgment debt arising upon a filed adjudication certificate can be the subject of a genuine dispute for the purpose of s 459H(1)(a), the general principle that a pending appeal or application to set aside a judgment cannot found a "genuine dispute" as to the existence of the judgment debt while it stands, applied in the context of [SOP Act], indicates that the existence or pendency of an arguable claim in curial proceedings that the adjudication does not reflect the true legal rights of the parties cannot amount to a "genuine dispute" about the existence or amount of a judgment debt in respect of an adjudication. That is because the judgment that arises upon filing an adjudication certificate determines that the judgment debt is indisputably due and payable, and remains so unless and until it is set aside. The fact that the judgment may be less conclusive than an ordinary judgment (because of the effect of s 32) does not affect this, because so long as it stands the debt exists. This accords with the legislative policy that adjudicated debts should be paid notwithstanding the pendency of any curial dispute as to whether they reflect the true legal rights of the parties, and that if it is ultimately found that they do not reflect those rights, can later be recovered by way of restitution.

These observations were held to apply equally to a debt that arises, as in the instant case, because the payment claim was accepted by the issue of a payment schedule or was not disputed within the period allowed by the SOP Act.

As to offsetting claims, his Honour said (at [93]):

> …a "true" offsetting claim – for example, a cross-claim for damages for negligence or breach of contract, or the recovery by way of restitution of amounts already allegedly overpaid – may be relied on to set aside a statutory demand founded on an adjudication certificate. That is because the effect of s 459H(1)(b) is that any claim the company has against the creditor falls within the definition of offsetting claim, and this is unaffected by any special features of the debt that founds the demand.

Equally, the Court held that, it remained open to Grandview to show that it had a "true" offsetting claim arising out of the building contract and the works undertaken under that contract.

In *Re J Group Constructions Pty Ltd* (2015) 303 FLR 139 the offsetting claim raised in answer to the SOP Act debt which was the subject of the statutory demand had been raised before an adjudicator and rejected. Robb J held that nevertheless it was available in a set-aside application under s 459H(1)(b).

Liquidated damages

The first offsetting claim put forward on behalf of Grandview is for liquidated damages for delay in completing the works under cl 30(a)(i). The rate prescribed for the purpose of that clause (Item 15(a)) was $4,000 plus GST per day.

Having regard to the principle that the law does not permit Grandview to recover damages from Budget for a failure to complete the work if that is a consequence of Grandview's own failure to allow access: *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* (2017) 95 NSWLR 82; [2017] NSWCA 151, the Court held that Grandview has a potentially viable claim for $4,400 in delay damages per calendar day from 13 December to 31 January inclusive. There is no viable claim after that date.

The relevant period was calculated to be 50 calendar days and, accordingly, Grandview was held to have established that it had an offsetting claim in the sum of $220,000 for the purposes of the *Corporations Act,* s 459H(1)(b).

The Court noted that, in deciding whether there is an offsetting claim, it was concerned only with whether the claim made is genuine and sustainable. Accordingly, the strength of the claim, and the likelihood of it being sustained at a hearing, was immaterial.

Liquidated milestone damages.

The fundamental problem with this offsetting claim was that it found no support in the language of the contract. Item 15(b), which was to prescribe the rate per day for failure to reach milestones for the purposes of cl 30(a)(ii), was left blank. The sub-contract thus did not, in its terms, justify the claim. The attempt to remediate this issue (by arguing a rectification claim) was rejected by the Court on the basis that to allow the argument would offend the Graywinter Principle: *Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund* (1996) 70 FCR 452.

Accordingly, this claim failed in its entirety.

Cost to complete works

In referring to termination, Mr Zhang was referring to something which would, or at least might, happen in the future. The Court noted that Grandview had taken no steps to terminate the sub-contract by the time the statutory demand was issued on 31 January and had still taken no steps to terminate the contract when the application to set the statutory demand aside was made on 20 February.

Counsel for Budget submitted that there were two short answers to the claim advanced by Grandview:

- First, Budget argued that the claim did not arise, in the sense that Grandview's cause of action did not accrue, until the contract was terminated. Only an offsetting claim in existence at the time of the statutory demand (or, perhaps, at the time the application to set aside the statutory demand was made) could be taken into account.
- Second, Budget argued that Grandview's evidence contained no details of the amount of the alleged offsetting claim; those details were only provided in a later report. Budget argued that, on the *Graywinter* principle, the alleged offsetting claim was unsustainable.

In respect of the first argument, the Court referred to *Biron Capital Ltd v Velowing Pty Ltd* [2003] NSWSC 1181 in which a defendant applied, pursuant to s459S of the Act, for leave to oppose a winding up application on the ground of its claim against the plaintiff (through the receiver) that the property had been sold at an undervalue.

Barrett J (as his Honour then was) refused the application on the ground that it was not necessary. The defendant's claim concerning the sale had arisen after the twenty-one day period within which any set-aside application had to be made. His Honour concluded that, the claim not having arisen, it could not have been relied upon in making an application under s 459G.

His Honour said that a ground under s 459S was one that was "actually available to be asserted according to facts and circumstances existing at the time when it was open to the company to resort to the s 459G procedure".

In respect of the second argument, the Court noted that this was based on the decision of Black J in *Re Infratel Networks Pty Ltd* [2012] NSWSC 943. In that case the set-aside application was dismissed because the supporting affidavit filed with the application did not state that the quantum of the offsetting claim exceeded the debt, nor did it allow any assessment of the magnitude of the offsetting claim to be undertaken. His Honour relied on earlier first instance decisions in *Broke Hills Estate Pty Ltd v Oakvale Wines Pty Ltd* (2005) 23 ACLC 1,266; [2005] NSWSC 638 (Gzell J); *Kerslake Superannuation Pty Ltd v C and L Building Pty Ltd* (2010) 4 BFRA 668; [2010] NSWSC 424 (Barrett J) and *185L6 Pty Ltd v Strata Corporation 07176 Inc* [2011] SASC 164 (Blue J).

The Court noted that Grandview relied on a case that cast doubt in respect of the correctness of both of the arguments advanced by Grandview. In *Pravenkav Group Pty Ltd v Diploma Construction (WA) Pty Ltd (No 3)* (2014) 46 WAR 483; [2014] WASCA 132, a building contractor issued a statutory demand for the amount of a progress claim which had not been disputed. The principal applied to set aside the demand on the ground of an offsetting claim for the cost of rectifying allegedly defective work. The allegation had been raised shortly before the issue of the progress claim in question. The owner did not contest the progress claim and the builder issued a statutory demand. The owner moved to set the demand aside. In a supporting affidavit, the claim was asserted on the owner's behalf and it was said that the costs were being collated, but no figure was put forward. But the claim was quantified in subsequent evidence and exceeded the amount of the debt in the statutory demand. At first instance, the statutory demand was set aside on the basis of the offsetting claim.

The Western Australian Court of Appeal dismissed the builder's appeal. In doing so, the court held that the supporting affidavit under s 459G was not required to specify the quantum of the offsetting claim, or even contain evidence from which the amount of the offsetting claim could be calculated. The Court said that to the extent that *Infratel*, *Broke Hills*, *Kerslake* and *185L6* suggested to the contrary, they were incorrect and should not be followed. There is thus intermediate appellate authority which appears to be against the second point made by Budget.

Parker J noted that, on the facts of this case, the issue did not arise. If Grandview has validly terminated the contract, it will be entitled to damages which would put it in the position in which it would be had the contract been completed in accordance with its terms. On the figures provided to the Court, the figure for loss of bargain damages is negative and nothing is recoverable.

The Court made an order reducing the amount of the statutory demand by $220,000 but only on terms that Grandview undertake to commence proceedings as quickly as reasonably practicable to assert its offsetting claim (along with any other claim arising out of the subcontract), to pay the sum of $220,000 into Court in those proceedings, and thereafter to prosecute the proceedings with all due dispatch.

Greenwood Futures v DSD Builders [2018] NSWSC 1407

Coram: McDougall J

Supreme Court of New South Wales

Date: 13 September 2018

BUILDING AND CONSTRUCTION – application to quash adjudicator's determination under Security of Payment Act – whether first and second payment claims issued were invalid because supporting statement was not included – weight of first-instance authority indicates invalidity.

BUILDING AND CONSTRUCTION – where three payment claims issued in the same terms – whether third payment claim supported by a separate reference date – prohibition on serving multiple payment claims referable to same reference date – existence of reference dates to be determined in accordance with the Security of Payment Act – third payment claim validly supported by reference date.

BUILDING AND CONSTRUCTION – whether adjudicator failed to discharge his statutory functions in good faith – where alleged that adjudicator failed to value the construction work – no requirement for adjudicator to value work as the contract determined the progress payment amounts for each milestone.

COSTS – where successful defendant caused the present litigation – where defendant proceeded with disregard for the requirements of the Security of Payment Act to harass the plaintiff – only reason for not awarding costs against defendant is the compensatory and not punitive function of costs – each party to bear its own costs.

Facts

On 4 September 2017, the plaintiff Greenwood Futures Pty Ltd (**Greenwood**) entered in a construction contract (**Contract**) with the first defendant DSD Builders Pty Ltd (**DSD**). DSD was entitled to progress payments at designated milestones of construction.

On 12 March 2018, DSD submitted a payment claim for $220,000 inclusive of GST in respect of the completion of the fourth milestone.

On 7 April 2018, DSD submitted a second identical payment claim.

On 16 April 2018, Greenwood provided a payment schedule in the scheduled sum of $nil. The reason cited by Greenwood was that the milestone had not been reached.

Neither of the payment claims issued by DSD contained a supporting statement required by s13(7) of SOPA.

On 9 April 2018, Greenwood sent an email to DSD which said, among other things, that "we don't agree that this stage is 'substantially complete'". DSD chose to treat that email as a payment schedule responding to the second payment claim.

On 17 April 2018, DSD lodged its first adjudication application with The Australian Solutions Centre (**TASC**). Greenwood lodged an adjudication response.

On 27 April 2018 Greenwood's solicitors gave notice to DSD purporting to terminate the contract for breach of an essential term. DSD denied the breach and denied that the purported termination was efficacious

On 28 April 2018, DSD sought to withdraw its application. Formal withdrawal occurred on 3 May 2018.

On 30 April 2018, DSD served the third payment claim on Greenwood. It was identical in form to the second payment claim (right down to the date of 7 April 2018 and the due date of payment, 13 April 2018), but it attached what purported to be a supporting statement pursuant to s 13(7) of the Security of Payment Act.

On 7 May 2018, the principal of DSD served what purported to be a payment schedule in respect of the third payment claim. The document said:

> I'm the appointed agent on behalf of the owner and authorised to make this assessment on behalf of the owner.
>
> I issue this payment schedule for claim 11751 served on 30/04/2018 in the amount of $220,000 with nil adjustments.
>
> There is no reason for adjustments at this stage nor is there any provision to do so, I accept this stage is substantially complete and that the claim is due for payment by 07/05/2018.

On 7 May 2018, DSD lodged the second adjudication application. That was based on the third payment claim; although it refers to the date of the payment claim as 7 April 2018, it stated that the payment claim had been served on 30 April 2018.

On 14 May 2018, Greenwood provided its own payment schedule for the third payment claim.

1. Asserted that the contract had been terminated on 27 April 2018;
2. Denied that the works had reached the Enclosure Stage;
3. In those circumstances, denied that there was a reference date and therefore denied that the payment claim was valid;
4. Denied that DSD was entitled to any payment; and
5. Claimed an entitlement to set off, against any amount owing, the cost of completing the works and rectifying defects, assessed at a sum in excess of $202,000.

On 14 May 2018, Greenwood lodged an adjudication response in answer to the second adjudication application. On 15 May 2018, DSD withdrew its second adjudication application. After a series of withdrawals, the fourth adjudication application was determined in favour of DSD in the sum of $220,000.00.

Payment claims

The first issue to be determined was whether the two payment claims submitted by DSD were valid notwithstanding that they were served without supporting statements that were required by operation of section 13 of SOPA.

DSD argued that the claims were valid and relied on the decision of *Central Projects Pty Ltd v Davidson* [2018] NSWSC 523. His Honour considered, in effect, that the subsection provided for the consequences of contravention, and that it was not necessary to add, as a further consequence, invalidation of a contravening payment claim.

The court did not accept this argument, instead chosing to follow the preponderance of first instance authority in *Kitchen Xchange v Formacon Building Services* [2014] NSWSC 1602 and *Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd* [2016] NSWCA 288.

McDougall J found the first two payment claims invalid as they were not accompanied by the requisite supporting statements.

Reference date

The Contract provided no express reference date upon which a progress payment could be claimed. Greenwood submitted that the reference date was the date of achievement of the milestone. This date coincided with the first payment claim.

The second and third payment claims were argued as invalid by operation of section 13(5) of the Act.

DSD submitted that the date when the milestone event had been achieved was not "a date determined by or in accordance with the terms of the contract" for the purposes of s 8(2)(a). Accordingly, he submitted, s 8(2)(b) applied. On the basis that some construction work had been carried out in the month of April 2018 (and this did not appear to be controversial), Mr Kaplan submitted that the reference date was 30 April 2018.

The corollary, DSD submitted, was that the first and second payment claims were ineffective because they were not supported by a reference date. It relied upon the decision of *Southern Han* in support of that proposition.

McDougall J concluded that reference dates under the contract between Greenwood and DSD are to be determined in accordance with s 8(2)(b) of the Security of Payment Act. His Honour noted that in theory, the first payment claim could have been referable to the date 28 February 2018, and the second payment claim could have been referable to the date 30 March 2018. The third payment claim, having been served on 30 April 2018, is referable to that date. It is no objection that the payment claim was served on the reference date, because s 8(1) expressly gives the entitlement to a progress payment "[o]n and from each reference date under a construction contract".

Accordingly, the Act theoretically allowed for multiple reference dates. His Honour found no contravention of section 13(5) of the Act and held that the third payment claim was valid as it was supported by an available reference date.

The validity of the second adjudication application

His Honour found that at the time the second adjudication application was lodged, the time fixed by s 14 for provision of a payment schedule (in this case, 10 business days after service of the payment claim) had not expired.

Withdrawal of first and second adjudication applications

Greenwood submitted that the only circumstances in which a claimant could withdraw an adjudication application were those specified in s 26 of the Act. That position was found by His Honour to have been supported by the decision of Nicholas J in *John Holland Pty Ltd v Made Contracting Pty Ltd* [2008] NSWSC 374.

The first adjudication application was founded on the second payment claim. That payment claim was invalid, for want of the s 13(7) supporting statement. Accordingly, the first adjudication application was a nullity, because it was not made in respect of a valid payment claim. There was nothing to withdraw.

The second adjudication application was invalid because it was made prematurely. Again, there was nothing to withdraw.

His Honour therefore found that, since both the first and second adjudication applications were nullities, the issue of withdrawal does not require resolution.

Failure to carry out the statutory task

Greenwood submitted that the adjudicator was required to value the construction works in accordance with section 10(1)(b) of the Act. The adjudicator had not done so. Accordingly, Greenwood submitted that the Adjudicator had failed to perform an essential element of his statutory function.

DSD argued that the contract provided for the validation of the progress claim: this s10(1)(b) had no operation. In the alternative, if the Adjudicator had erred, it was an error within jurisdiction. At the most, he submitted, there was an error of law in the Adjudicator's attempt to perform his statutory function. *Kembla Coal and Coke v Select Civil* [2004] NSWSC 628 and *Clyde Bergemann v Varley Power* [2011] NSWSC 1039.

The court found no failure of statutory function in the adjudicator's determination. The amount of the progress payment is to be calculated in accordance with s 9(a) of SOPA: "in accordance with the terms of the contract". The claim was made for the milestone payment and nothing else. The only relevant question was whether the milestone had been achieved. If it had, the amount of the progress payment was dictated by Schedule 2.

McDougall J stated that a consideration of defects may have been required if there was a claim for adjustments or variations, but as there was no such claim there was no room for section 10(1)(b) of the Act to operate.

Decision

The court upheld the adjudicator's determination and ordered the amended summons to be dismissed. It further ordered that the amount paid into court by Greenwood was to be paid to DSD.

As to the conduct of the matter, His Honour found that Greenwood has been plagued with a succession of payment claims and adjudication applications, each relating only to the one entitlement to payment. It has been forced to defend itself by preparing adjudication responses that were ultimately withdrawn. In addition, Greenwood had to deal with the occasion when DSD's principal arrogated to himself the right of providing a payment schedule on Greenwood's behalf that purported to acknowledge liability for the whole amount of the claim.

The court made no order as to costs.

Greenwood Futures v DSD Builders (No 2) [2018] NSWSC 1471

Coram: McDougall J

Supreme Court of New South Wales

Date: 28 September 2018

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) – respondent (contractor) has benefit of determination as against applicant (principal) to the sum of $220,000 – application by principal to continue a stay of orders preventing that sum being paid out of court to the contractor – basis for application is danger that a successful counterclaim by the principal will remain unpaid – necessary to point to more than mere risk of insolvency to justify stay – where contractor has engaged in corporate activities which justify suspicion – where contractor has placed unsatisfactory evidence of its financial position before the court – continuation of stay warranted.

Facts

The facts that underpin this case were fully ventilated in *Greenwood Futures v DSD Builders* [2018] NSWSC 1407.

Greenwood sought the continuation of the stay of the order made in the wake of the first decision for payment to DSD of money paid into court by Greenwood.

The basis on which the stay was sought to be continued is that Greenwood submitted that it had a counterclaim against DSD for an amount in excess of the adjudicated amount. The adjudicated amount was $220,000 inclusive of GST. The counterclaim was said to amount to $256,000 exclusive of GST. The counterclaim was supported by two reports of an expert in which various alleged defects in the work done by DSD are identified and a report of a quantity surveyor costing the recommended rectification works and works necessary to complete presently incomplete works.

Decision

His Honour found that there was evidence of the merits of the claim and its amount.

Greenwood submitted that if the stay was not granted and the counterclaim succeeded (which was for more than $220,000), there would be a real risk that DSD would be unable to pay any amounts should Greenwood succeed in its counterclaim.

The court reiterated the position that the ordinary risk of insolvency was itself insufficient to justify the granting of a stay *RJ Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390. However, McDougall J found that additional factors together with this ordinary risk could be sufficient.

In its submissions, Greenwood tendered evidence of DSD's finances and historic corporate dealings in an effort to demonstrate the high likelihood of its insolvency in the immediate future:

- DSD had issued shares in the sum of $165,000 but had failed to record this transaction as reducing its own equity position. Correcting the errors revealed the precarious financial position of DSD and also illustrated the inherent unreliability of the financial statements of DSD.

- DSD had subcontracted out the entirety of its role in the project and had not yet paid its subcontractors.
- DSD had substantial tax liabilities.
- The principals of DSD had a history of dealings that left open the inference that they have engaged in utilising phoenix companies.

The court was satisfied that Greenwood had demonstrated a risk that went beyond the normal risk of insolvency. The Court also was careful not to overlook the compelling evidence that DSD's principals engaged in structuring their affairs in such a way so as to avoid, wherever possible, paying their liabilities.

The Court found that DSD had engaged in a practice DSD engaged in a practice of misusing, if not abusing, the processes put in place by the Security of Payment Act for the recovery of claims.

The court granted the stay on the basis that if Greenwood were to succeed in securing a verdict in NCAT there was a high likelihood that any monetary judgment would not be paid.

The Court also made plain that the mere existence of a counterclaim did not influence the court's decision to grant the stay.

Gregorio v Cheadle **[2018] NSWCATAP 118**

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

Court: NSW Civil and Administrative Tribunal

Date: 21 May 2018

HOME BUILDING ACT – Statutory construction – s 18E proceedings for breach of statutory warranty – limitation period for bringing claim by a successor in title against owner builder – effect of amendment on limitation period – nature of right of successor in title under section 18C of the Home Building Act to bring proceedings for breach of statutory warranties.

Facts

The building works, the subject of the dispute, were carried out pursuant to an owner builder permit obtained by Robbie Cheadle on 2 April 2008. Robbie Cheadle and Robert Cheadle owned the premises. The work was carried out between 2008 and February 2014.

Richard and Lisa Gregorio purchased the premises on 20 December 2014. On August 2015 a significant weather event caused flooding to the premises.

On 31 March 2016, the Gregorios filed home building application claiming damages against the Cheadles for breach of the statutory warranties under the *Home Building Act 1989 (NSW)* (HB Act).

Between when the building works were commenced, and when the proceedings were commenced in the Tribunal, legislation amended the Home Building Act on two occasions.

The issue was whether the 2014 Amendments operated retrospectively and altered the limitation period in section 18E of the HBA for building contracts entered into before the 2011 Amendments came into effect.

Position Pre 2011 Amendment

Before the introduction of the 2011 Amending Act, someone enforcing the statutory warranties in s 18B of the HB Act as a successor in title had 7 years from the date building works were completed to commence proceedings.

Position After the 2011 Amendment

The 2011 Amending Act amended that 7-year period to 6 years for a structural defect, or in any other case 2 years, commencing from the date when the work was completed.

Position After the 2014 Amendment

The 2014 Amending Act amendments provided that a breach of statutory warranty claim had to be commenced within 6 years from the date when work was completed, in the case of a major defect, and within 2 years in any other case.

Decision at First Instance

At first instance the Tribunal determined that the 2014 Amendments applied and the limitation period was 6 years for a major defect and 2 years for other defects. Accordingly, the Tribunal dismissed the majority of the Gregorio's complaints as the defects alleged were not major defects.

Appeal

The Gregorios submitted that s 3B(3)(b) of the HB Act, introduced by the 2011 Amending Act, provided for a deeming provision for completion in respect of owner builder work.

In respect of the 2011 Amending Act, the Gregorios referred to the First and Second Reading Speeches which, they submitted, made plain that the changes made by that Act did not affect or prejudice the rights and obligations created by contracts entered into prior to 1 February 2012. This was the effect of cl 109. In this regard the Gregorio's relied on the statement of Hammerschlag J in *Owners Corporation Strata Plan 78465 v MD Constructions Pty Ltd* (2016) NSWSC 162 to that effect.

The Gregorios argued that, as an owner builder, under s 18C Robbie Cheadle is taken to have done the work under a contract with the Gregorios as successors in title. Because Robbie Cheadle had "entered into a number of contracts with subcontractors to construct the new home to at least 'lock-up stage', such work being completed by January 2009 ... there arose no requirement in the present case to infer entry by Robbie Cheadle into contracts to perform residential building works". Further, any "deemed contract" in respect of rendering work done by Robbie Cheadle was entered into on or before 1 February 2012. As the contracts came into existence prior to the commencement of the 2011 Amending Act, the 7-year limitation period applied to all defects.

The 2014 Amending Act had the effect of amending s 18E(1) (as it was after the 2011 Amending Act) to change the reference to a breach of a "structural defect" for which the six-year period applied to a breach of a "major defect" to which a 6 year period applied. The Gregiorios submitted that cl 121 of Part 20 of Sch 4 (which relates to the transitional provisions consequent on the 2014 Amending Act) had the effect that the changes to s 18E(1) from "structural defect" to "major defect" applied to residential building work commenced or completed before the commencement of the 2014 Amending Act, and to a contract to do residential building work entered into before the commencement of the 2014 Amending Act (including a contract completed before the commencement) except where proceedings had been commenced or a claim had been made under a relevant contract of insurance. In other words, the Gregorios submitted that the amendments introduced by the 2014 Amending Act were retrospective, and only proceedings that were already commenced, or insurance claims that were already made, were unaffected by the truncation of the 7-year period that had formerly applied.

The Gregiorios further submitted that, upon the proper construction of the HB Act, and the 2014 Amending Act, no changes were made to s 18E(1) as it was prior to the 2011 Amending Act, that cl 109 had not been repealed and that the 7-year period continued to apply in respect of a contract for residential building work entered into before the commencement of the 2011 Amending Act. Rather, "the sole purpose of Sch 1 cl [28] of the *Home Building Amendment Act 2014* was to delete from section 18E(1)(b) the term "structural defect" and to insert the term "major defect", with Sch 1 cl [29] of the 2014 Amending Act providing relevant definitions for a "major defect"."

Decision

The Appeal Panel held that unless there is a reasonably clear intention to the contrary, an amendment to an Act should not be construed in a manner that imposes or otherwise affects the rights or liabilities which the law previously provided in respect of past events. The principles in *Maxwell v Murphy* (1957) 96 CLR 261 were apt to be considered.

Secondly, section 30 of the Interpretation Act also had to be considered. In this regard it was worthy of note that:

1. No right, liability or obligation that is acquired, accrued or incurred is affected by the amendment and any "legal proceeding or remedy may be instituted, continued or in force as if the Act … had not been amended or repealed" (emphasis added): s 30(1)(b); and
2. The amendment or repeal of an Act does not affect the operation of any savings or transitional provisions contained in the Act: s 30(2)(d).

Thirdly, a matter of relevance is that the construction of a statute required the court or tribunal to determine a meaning consistent with all provisions in the Act. The statement of the High Court in *Project Blue Sky* (1998) 194 CLR 355 concerning statutory construction was important to remember.

Fourthly, where the legislature has provided for a particular matter, a subsequent amendment, in general terms wide enough to repeal or qualify the original provision, should not be taken as doing so unless a clear intention is expressed. *Maybury v Plowman* (1913) 16 CLR 468.

The Tribunal then turned to whether work done by Robbie Cheadle was "in respect of a contract for residential building work entered into before the commencement of the amendment" within the meaning of cl 109?

Part 2C Statutory Warranties of the HB Act "applies to residential building work only to the extent that it is done or to be done under a contract" made on or after the commencement of that Part: see s 18A.

The liability imposed upon an owner builder in respect of work done under an owner builder permit arises under s 18C of the HB Act. Relevantly, that section provides:

> **18C Warranties as to work by others**
>
> (1) A person who is the immediate successor in title to an owner-builder, a holder of a contractor licence, a former holder or a developer who has done residential building work on land is entitled to the benefit of the statutory warranties as if the owner-builder, holder, former holder or developer were required to hold a contractor licence and had done the work under a contract with that successor in title to do the work.

The liability under s 18B – Warranties as to residential building work arose because those warranties "are implied in every contract to do residential building work". As such, liability was only imposed into a relevant contract.

Under s 18C, the work was taken to have been done "under a contract … to do the work" between the owner builder and the successor in title. That provision had remained the same throughout the period with which the instant case arose.

In *The Owners Strata Plan No 66375 v Suncorp Metway Insurance Ltd (No 2)* [2017] NSWSC 739 at [60], in the context of a claim by a successor in title, Ball J said there was a "notional contract" into which the statutory warranties under s 18B were implied. Alternatively, it might be described as a contract implied by statute. In this regard, in *Allianz v Waterbrook* [2009] NSWCA 224 (*Allianz*) was apt to be considered.

As explained in *Leung v Alexakis* [2018] NSWCATAP 11 the scope of work in the notional contract contemplated all of the work undertaken in accordance with the owner builder permit, whether or not that work is contracted by the owner builder to third parties.

From *Maxwell v Murphy* (1957) 96 CLR 261, *Kraljevic v Lake View & Star* (1945) 70 CLR 647; and *Victrawl Pty Ltd v Telstra Corporation Ltd* (1995) 183 CLR 595 emerges the trite proposition that where the question arises as to whether a statute has retrospective operation, it ought not to be deemed retrospective unless the intention appears with reasonable certainty.

In the present case, the statutory warranty as it existed prior to the 2011 Amending Act gave a successor in title a right to bring proceedings for any breach for a period of 7 years. This right was subject to whether the warranty had already been enforced by a predecessor in title. The right was defined by both subject matter and time. The shortening of the time period would thus affect a substantial right that had accrued to the appellants before the 2014 Amending Act commenced.

The Tribunal held that it therefore followed that the substantial right could only be removed if the legislature expressed an intention that the amendment to s 18E by the 2014 Amending Act was to operate in respect to claims for breach of statutory warranty to which the 7-year period otherwise applied.

The Appeal Panel found in favour of the Gregorios by deciding that before the 2014 Amendments came into effect, there were two forms of section 18E of HBA in operation. That is, the 2014 Amending Act did not expressly remove the right to commence proceedings within 7- years. Accordingly, two rights existed concurrently:

- A right with a limitation period of 7 years in respect of all claims brought for breach of the statutory warranties involving works carried out under a contract entered into prior to the commencement of the 2011 Amendments; and
- A right with a limitation period of 6 years in respect of structural defects and 2 years in any other case.

The 2014 Amendments did not amend the 7-year limitation period. To have held otherwise would have led to the anomalous result that a person who acquired property as a successor in title prior to the commencement of the 2011 Amendments would have different rights than one who acquired the property after the 2011 Amendments came into force was a fortiori.

Harris v Morabito Holdings [2018] NSWSC 912

Coram: McDougall J

Supreme Court of NSW

Date: 19 June 2018

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

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

Facts

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

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

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

Decision

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

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

Icon Co (NSW) Pty Ltd v Australia Avenue Developments [2018] NSWCA 339

Coram: Basten, Meagher and Leeming JJA

Supreme Court of New South Wales Court of Appeal

Date: 21 December 2018

ADMINISTRATIVE LAW – judicial review – adjudicator's determination – jurisdictional error – scope of payment claim – duty to consider payment claim – scope of claim to be determined by adjudicator

BUILDING AND CONSTRUCTION – adjudication of payment claim – review of adjudicator's determination – whether error in construction of payment claim – respondent alleged adjudicator made allowances in award for amounts not contained in payment claim – whether adjudicator exceeded jurisdiction by determining claim other than that made by claimant – Building and Construction Industry Security of Payment Act 1999 (NSW), ss 20, 22(2)

Facts

The appellant, Icon Co (NSW) Pty Ltd ("Icon"), is the head contractor under a construction contract entered into with the respondent, Australia Avenue Developments Pty Ltd ("Australia Avenue"). The contract related to the construction of the Opal Tower at Sydney Olympic Park. The contract provided for monthly progress payments, with a reference date of the 25th day of each month.

On 30 July 2018 Icon served a payment claim on the respondent under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("Security of Payment Act") in an amount of $3,331,744 (without GST). The reference date for the claim was 25 July 2018.

On 13 August 2018 Australia Avenue served a payment schedule, which identified the total amount of the claim as $3,664,918.40 (with GST) and the scheduled amount, being the amount that Australia Avenue proposed to pay (and has in fact paid) as $1,161,143.50. It followed that the amount in dispute was a little over $2.5 million.

On 27 August 2018 Icon lodged an adjudication application, to which Australia Avenue lodged an adjudication response. The matter was referred for adjudication and a determination, made on 14 September 2018, awarded an amount of $2,638,287.58 in favour of Icon. The unpaid balance was a little over $1.477 million.

On 19 September 2018 Australia Avenue commenced proceedings in the Equity Division seeking an order quashing the adjudication determination. Pursuant to a judgment delivered on 19 October 2018 Parker J granted the relief sought by Australia Avenue

Decision

The Court reiterated the principles set out in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421, and was affirmed by the High Court in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248 that judicial review of an adjudicator's determination is available, but only for jurisdictional error on the part of the adjudicator.

It is a fundamental principle that the engagement of a statutory power may depend either upon the existence of an identified state of affairs, or a state of satisfaction of the decision-maker as to an identified state of affairs.

1. In the first category, the actual state of affairs, being the criterion of engagement of the power, is described as a "jurisdictional fact", meaning that the lawful exercise of the power may ultimately depend upon a finding of a court exercising judicial review as to whether or not the required state of affairs existed. *Gedeon v Commissioner, NSW Crime Commission* (2008) 236 CLR 120

2. The second category is sometimes also said to involve a jurisdictional fact, but only in the sense that the relevant fact is an opinion formed by the decision-maker; in that case a reviewing court can only be concerned with the existence and lawful formation of the opinion. *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611

The Security of Payment Act does not refer to the opinion or satisfaction of the adjudicator. Nevertheless, there being no right of appeal, the adjudicator's findings with respect to matters of fact, within jurisdiction, will be unreviewable. Further, there being no review for errors of law on the face of the record, the adjudicator's determination of legal issues will also be unreviewable.

While the construction of a contract will usually involve questions of law, the Act implicitly confers on the adjudicator the power to form an opinion as to the meaning of the contract, for the purposes of the adjudication. The adjudication cannot be set aside because an error of law in construing the contract appears on the face of the record, including in the reasons of the adjudicator. The same is true with respect to the scope of the payment claim.

The Court held that the reasoning of this Court in *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72 was apt to be considered. In that case, the Court found that it was within the adjudicator's power to form an opinion as to the meaning of the contract and the payment claim.

As was stated in *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [49]

> "... an error of fact or law, including an error in interpretation of the Act or of the contract, or as to what are the valid and operative terms of the contract, does not prevent a determination from being an adjudicator's determination within the meaning of the Act."

It therefore followed that it was no part of the primary judge's function to examine the payment claim to determine whether he considered that the approach adopted by the adjudicator was erroneous. Even if it were erroneous, it would not constitute jurisdictional error to act upon such an erroneous view. The concept of "jurisdictional error" was recently explained in *Hossain v Minister for Immigration and Border Protection* (2018) 96 ALJR 780.

> "Jurisdiction, in the most generic sense in which it has come to be used in this field of discourse, refers to the scope of the authority that is conferred on a repository. In its application to judicial review of administrative action the taking of which is authorised by statute, it refers to the scope of the authority which a statute confers on a decision-maker to make a decision of a kind to which the statute then attaches legal consequences. It encompasses in that application all of the preconditions which the statute requires to exist in order for the decision-maker to embark on the decision-making process. It also encompasses all of the conditions which the statute expressly or impliedly requires to be observed in or in relation to the decision-making process in order for the decision-maker to make a decision of that kind. A decision made within jurisdiction is a decision which sufficiently complies with those statutory preconditions

> and conditions to have 'such force and effect as is given to it by the law pursuant to which it was made'.
>
> Jurisdictional error, in the most generic sense in which it has come to be used to describe an error in a statutory decision-making process, correspondingly refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it. To describe a decision as 'involving jurisdictional error' is to describe that decision as having been made outside jurisdiction. A decision made outside jurisdiction is not necessarily to be regarded as a 'nullity', in that it remains a decision in fact which may yet have some status in law. But a decision made outside jurisdiction is a decision in fact which is properly to be regarded for the purposes of the law pursuant to which it was purported to be made as 'no decision at all'. To that extent, in traditional parlance, the decision is 'invalid' or 'void'." [citations omitted]

An error in construing the contract or in understanding the payment claim does not constitute jurisdictional error and therefore cannot form a basis upon which the adjudication can be quashed.

The Court held that, in any event, there was no error. There was a dispute between the parties in relation to what were described as "backcharges". Once it was accepted that there was a dispute to be resolved, the respondent identified no error in the reasoning of the adjudicator, except to say that the backcharges were not part of the payment claim as served. The respondent accepted that the payment claim as served and adjudicated upon identified the construction work, as required by s 13(2)(a). It was not deficient in that respect. The dispute was as to the calculation of the value of that work, which was the very task vested in the adjudicator.

In the matter of Powerpark Systems Pty Ltd [2018] NSWSC 793

Coram: Hammershlag J

Supreme Court of New South Wales

Date: 10 May 2018

CORPORATIONS – statutory demand – application to set aside creditor's statutory demand – demand based on judgment arising upon filing of adjudication certificate under Building and Construction Industry Security of Payment Act 1999 (NSW) – whether genuine dispute as to the existence of the debt – whether debt is subject to offsetting claim – whether "some other reason" to set aside demand – whether foreshadowed curial proceedings to quash the adjudicator's determination for jurisdictional error of law amounts to a "genuine dispute" or "some other reason" to set aside demand

Facts

Powerpark Systems Pty Ltd (**Powerpark**), is an installer of solar panels. Powerpark engaged Shoemark Electrical Pty Ltd (**Shoemark**) to undertake various supervisory roles on projects in NSW and Queensland.

In late May 2017, Shoemark sent invoices for work done in the name of the defendant. On 31 August 2017, Shoemark issued a payment claim under the B*uilding and Construction Industry Security of Payment Act 1999* (NSW) (**SOPA**) for $44,811.11 to Powerpark.

On 7 September 2017, Powerpark responded with a payment schedule alleging defective work undertaken by Shoemark at one of the NSW sites, agreeing to pay $24,956.97. Powerpark stated that it had inspected the work at Casino and noted that it would be pursuing Shoemark for rectification costs if the matter was not resolved.

On 21 September 2017, Shoemark applied for adjudication of its claim, describing the project location as 'Sydney, Central Coast' but the project name as 'Sunny Queensland LAFHA'.

On 11 October 2017, the adjudicator determined that the amount payable by Powerpark to Shoemark was $44,811.11. The adjudicator's reasons made plain that he proceeded on the basis that Shoemark's claim was for construction work at project sites within NSW.

Powerpark subsequently issued invoices to Shoemark for the rectification costs of the alleged defects in the work performed by Shoemark. Two invoices were emailed from Powerpark to Shoemark on 27 October 2017.

On 27 November 2017 judgment pursuant to section 25 of the SOPA was entered in the Local Court for Shoemark in respect of that demand for the amount of $48,230.74.

Powerpark sought an order under section 459G of the *Corporations Act 2001* (Cth) (**CA**) to set aside the demand dated 25 October 2017 on three grounds:

1. There was a 'genuine dispute' about the existence or amount of debt pursuant to section 459H(1)(a) of the Corporations Act because one of the contracts was performed in Queensland, which is outside of the jurisdiction of the SOPA, thus affecting the adjudication certificate and subsequent judgment by jurisdictional error;

2. This jurisdictional error constituted 'some other reason' why the demand should be set aside pursuant to section 459J(1)(b) of the CA; and
3. There was an offsetting claim against Shoemark pursuant to section 459H(1)(b) of the CA for its defective work and for Powerpark's loss of profits.

Decision

Gleeson JA first considered the Security of Payment Act. Citing *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4, his Honour made the following observations:

- The object of the Security of Payment Act is "to ensure that any person who undertakes to carry out construction work under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
- The means by which the Security of Payment Act ensures that a person is entitled to a progress payment is by "granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments"
- Where under s 23(2), the adjudicator determines that the respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the "relevant date" as defined in s 23(1).
- Where the respondent fails to pay the whole or any part of the adjudicated amount to the claimant, the claimant may, under s 24, request the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate, and serve notice on the respondent of the claimant's intention to suspend carrying out construction work under the contract.
- Under s 25(1), the adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.
- The Security of Payment Act creates an entitlement that is "determined informally, summarily and quickly, and then summarily enforced without prejudice to the common law rights of both parties which can be determined in the normal manner
- Where it is contended that an adjudicator has made an error of law within jurisdiction, resulting in a progress payment that is inadequate or excessive, the dispute may be resolved through civil proceedings under the construction contract. If necessary, a restitutionary order can be sought.

His Honour then considered Brereton J's judgment in *Re Douglas Aerospace Pty Ltd* [2015] NSWSC 167 where his Honour reviewed the authorities that considered the relationship between debts arising under SOPA and ss 459F and 459H of the Corporations Act.

First, as to whether a judgment debt arising upon a filed adjudication certificate can be the subject of a genuine dispute for the purpose of s 459H(1)(a), the general principle that a pending appeal or application to set aside a judgment cannot found a "genuine dispute" as to the existence of the judgment debt while it stands, applied in the context of SOPA, indicates that the existence or pendency of an arguable claim in curial proceedings that the adjudication does not reflect the true legal rights of the parties cannot amount to a "genuine dispute" about the existence or amount of a judgment debt in respect of an adjudication. That is because the judgment that arises upon filing an adjudication certificate determines that the judgment debt is indisputably due and payable, and remains so unless and until it is set aside.

Secondly, the general principle that a pending appeal may provide "some other reason" for setting aside a demand only if the judgment is stayed or security is given indicates that the pendency of curial proceedings which seek relief to the effect that the adjudicated amount is not payable because the adjudication does not reflect the true legal rights of the parties cannot of itself amount to “some other reason” for setting aside the demand. Such proceedings are, for present purposes, analogous to an application to set aside a default judgment, or an appeal.

Thirdly, as to offsetting claims, the authorities on SOPA are uniformly consistent with general principle relating to offsetting claims, a cross-claim for damages for negligence or breach of contract, or the recovery by way of restitution of amounts already allegedly overpaid – may be relied on to set aside a statutory demand founded on an adjudication certificate.

However, that leaves the critical question whether the existence or pendency of an arguable claim that the adjudication does not reflect the true legal rights of the parties amounts to an offsetting claim, where there is no cross-demand for damages, and where there has been no payment and thus no complete claim for restitution. It is on this question that *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91 and the New South Wales authorities part company.

Brereton found that the existence or pendency of an arguable claim that an adjudication does not reflect the true legal rights of the parties – involving no cross-claim for damages, and where there has been no payment and thus no complete claim for restitution – cannot be an offsetting claim for the purposes of s 459H(1)(b).

<u>Genuine Dispute</u>

Powerpark advanced this ground on the following premises:

1. The *Security of Payment Act* does not apply to a construction contract to the extent to which it deals with construction work carried out outside New South Wales and related goods and services supplied in respect of construction work carried out outside New South Wales.
2. The adjudication determination issued on 11 October 2017 was in respect of, among others, construction work carried out for Sunny Queen Australia in Queensland. This was acknowledged by Shoemark in its payment claim dated 31 August 2017.
3. Accordingly, the determination by the adjudicator issued on 11 October 2017 may be set aside upon an application for judicial review for jurisdictional error;
4. It followed, according to the submission, that an inferior court such as the Local Court had no power to register a judgment for a debt in favour of Shoemark upon the filing of the adjudication certificate pursuant to s 25(1) of the *Security of Payment Act*. Accordingly, the judgment is a nullity. Reference was made to the remarks of the High Court in *Pelechowski v The Registrar, Court of Appeal (NSW)* (1998) 198 CLR 435; [1999] HCA 19 (*Pelechowski*) at [27].

His Honour distinguished Pelechowski from the instant case. His Honour found that once the adjudication certificate had been filed pursuant to section 25 of the SOPA, the resulting judgment was not void and curial proceedings were required to disturb the judgment.

His Honour further noted that the judgment could have been quashed by judicial review on the basis of jurisdictional error. His Honour found, however, that Powerpark had not made such an application and was out of time to commence such proceedings.

<u>Offsetting Claim</u>

The relevant principles are not in dispute as to what is required to establish an off-setting claim. The test for an offsetting claim is whether the Court is satisfied that there is a serious question to be tried that the party has an offsetting claim, or that the claim is not frivolous or vexatious. The claim must be made in good faith and be arguable and not frivolous or vexatious. Good faith in this context means arguable on the basis of facts asserted with sufficient particularity to enable the Court to determine that the claim is not fanciful: *Macleay Nominees Pty Ltd v Belle Property East Pty Ltd* [2001] NSWSC 743

His Honour accepted that Powerpark had established that it has a genuine offsetting claim against Shoemark for defective work in relation to the Coles site at Casino. That claim is not spurious or lacking in *bona fides*.

However, Powerpark failed to adduce evidence beyond bare assertion to make out a claim for additional offset damages arising from the loss of chance for deprivation of commercial opportunity on other projects arising from Shoemark's defective work. Accordingly, Powerpark could not off-set the entirety of the claim that formed the subject of the statutory demand.

<u>Some other reason to set aside the claim</u>

In the alternative to its assertion of a genuine dispute, Powerpark relies upon the “some other reason” ground under s 459J(1)(b) to set aside the statutory demand, contending that the adjudication determination is affected by jurisdictional error.

In *Meehan v Glazier Holdings Pty Ltd* (2005) 53 ACSR 229 the Court approved the statement by Bryson JA in *Portrait Express (Sales) Pty Ltd v Kodak (A’asia) Pty Ltd* (1996) 20 ACSR 746 which held that the power under section 459H(1)(b) of the *Corporations Act* should not be activated unless the decision to do so is supported by a sound or positive ground or good reason relevant to the purpose of the power.

As mentioned, the pendency of curial proceedings which seek relief to the effect that the adjudicated amount is not payable because the adjudication does not reflect the true legal rights of the parties, cannot of itself amount to “some other reason” for setting aside the demand.

In the present case, the Court was not persuaded to exercise its power as:

- Powerpark had not applied to stay the judgment in the Local Court
- Powerpark had not applied for an extension of time to commence proceedings for judicial review seeking relief to quash the adjudicator's determination.
- There was no evidence going to the discretionary factors relevant to the exercise of the Court’s power to grant an extension of time for the commencement of judicial review proceedings.

The Court held that Powerpark had not established that the statutory demand should be set aside, either on the ground of a genuine dispute or for some other reason. Powerpark did establish an offsetting claim in the form of a genuine claim to sue Shoemark for defective workmanship in respect of the relevant building project at Casino Coles in an amount of $26,747.60. The Court therefore decided that the appropriate course was to vary the statutory demand by reducing it by $26,747.60 and by declaring it to have effect as so varied from the time when it was served.

Ingate v Andrews [2018] NSWCATAP 99

Coram: Deputy President Hennessy and Senior Member Goldstein

NSW Civil and Administrative Tribunal Appeal Panel

Date: 28 May 2018

HOME BUILDING – Builder's claim against owner for undocumented variations – Quantum Meruit – Relevant Principles – Application of Principles – Appeal Dismissed

Facts

On 16 June 2012, the Ingates entered into a joint venture agreement (JVA) with Jennifer Andrews and her husband, the Respondent, Dixon Andrews. Pursuant to the JVA, Mrs Ingate agreed to subdivide a parcel of land she owned. The Ingates agreed that they would transfer one of the blocks (subject to some realignments) to the Andrews in return for the demolition of their existing house and the building of a new house on the block they retained.

On 16 May 2013 the Appellants and the Andrews entered into a residential building contract. The contract provided for extras and variations. Clause 6.6 permitted the Principal at any time prior to practical completion to direct the Contractor in writing to carry out a Variation which is within the general scope of the Works. Clause 10.4 provided for valuation of variations.

Shortly after completing the construction of the house for Ingates, Andrews presented them with an account for variations. The owners disputed the amounts sought for some of those variations.

Andrews then presented the Ingates with a claim for payment of a further set of variations. The Ingates refused to pay because they had not agreed to those works.

The Ingates contended that the second set of variations were items undertaken at the discretion of Andrews without consultation or prior approval.

At first instance, Andrews successfully pursued a claim in quantum meruit for the disputed variations in the NSW Civil and Administrative Tribunal.

The Ingates sought to have the order set aside on the basis that;

(1) The Tribunal has erred in its interpretation of the contractual allocation of risk between the parties.

(2) The Tribunal has erred in finding that the joint venture agreement was one 'subsumed' into the building contract, at [18].

(3) The Tribunal has erred in its application of the law of restitution.

(4) The Tribunal has erred in relation to the concessions made by Mr Andrews before the Tribunal ($3,367.76).

Decision

In dismissing the appeal, the Appeal Panel made the following findings;

As to Grounds 1 and 2, it was open to the Tribunal to form the view it did that the appropriate reference document for the determination of the scope of the building works was the building contract. In so finding, the Appeal Panel held that a joint venture agreement is a commercial agreement between parties who have decided to engage in a common project. It is not unusual for a joint venture agreement to contemplate, in turn, a more specific contract or contracts. This was a major building project involving the demolition of an existing dwelling and the building of a new one with high level inclusions and finishes.

As to ground 3, the Tribunal had properly addressed the relevant matters regarding the variations and the claim in quantum meruit. The required elements for a successful quantum meruit claims as set out in *Liebe v Molloy* (1906) 4 CLR 347 were set out once again, they are, as articulated in *Charbel v Tanne (Home Building)* [2010] NSWCTTT 453:

a. the subject building work fell outside the requirements of the contract, specifications, and other included documents

b. the owner had actual knowledge of the variations as they were being done

c. that the owner knew that they were outside the contract

d. the owner knew that the builder expected to be paid for the work as a variation to the contract; and further

e. the builder had provided evidence that the amount claimed was fair value for the non-compliant work.

Although the Tribunal did not, at first instance make specific reference to the requirement that the owner know that the builder expected to be paid for the work as a variation to the contract the Appeal Panel did note that the Tribunal alluded to this issue when considering the variation claim.

The Appeal Panel endorsed the first instance Tribunal Member's reliance on *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5 as the leading authority on quantum meruit and concluded that the court in that case emphasised 'acceptance' as the ultimate critical issue.

The Appeal Panel found that the owners had accepted the variations because Mr Ingate:

- had an active involvement in the project and the works undertaken;
- was aware of the works being done as they unfolded and did not intervene in them; and
- acknowledged that he did not regard all of the variations as being within the scope of the original contract.

As to Ground 4, the Appeal Panel found that the notice of appeal did not allow for the ready identification what were precisely the errors of the Member and accordingly, the ground was dismissed.

The Appeal Panel dismissed the Appeal.

Kurmond Homes Pty Ltd v Marsden [2018] NSWCATAP 23

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

NSW Civil and Administrative Tribunal Appeal Panel

Date: 28 May 2018

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

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

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

Facts

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

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

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

Decision

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

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

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

Coram: Stevenson J

Supreme Court of NSW

Date: 20 April 2018

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

Facts

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

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

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

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

Decision

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

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

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

Leung v Alexakis **[2018] NSWCATAP 11**

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

NSW Civil and Administrative Tribunal Appeal Panel

Date: 5 January 2018

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

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

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

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

Facts

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

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

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

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

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

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

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

Decision

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

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

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

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

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

Coram: McCallum J

Supreme Court of NSW

Date: 28 November 2017

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

Facts

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

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

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

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

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

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

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

Decision

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

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

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

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

Maxcon Constructions Pty Ltd v Vadasz [2018] HCA 5

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

High Court of Australia

Date: 14 February 2018

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

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

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

Facts

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

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

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

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

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

Decision

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

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

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

Owners of Strata Plan 80458 v TQM Design & Construct Pty Ltd [2018] NSWSC 1304

Coram: Hammershlag J

Supreme Court of New South Wales

Date: 23 August 2018

BUILDING AND CONSTRUCTION – ss 18B, 18D of the Home Building Act 1989 (NSW) – statutory warranties as to quality of home building work – where plasterboarding, air conditioning and acoustic installation work in apartments is defective – whether the defendant builder did defective building work – the defendant suspended building work under the Building and Construction Industry (Security of Payment) Act 1999 (NSW) before being excluded from the site and not being allowed to complete the work – whether the defects are 'temporary disconformities' and therefore not in breach of the implied warranties contained in s 18B – loss or damage occasioned by defective building work is to be assessed by reference to established contractual principles of breach and causation – whether the plaintiffs' loss was caused by the defendant's building work – STATUTORY

CONSTRUCTION – s 18D(1) – meaning of the phrase 'the same rights as the person's predecessor in title in respect of the statutory warranty' – whether s 18D gives a successor in title no rights where loss was not suffered by the predecessor in title caused by breaches of s 18B –

DAMAGES – rule against double compensation – the plaintiffs entered into a Deed of Settlement with the developer's home building insurer and received payment in respect of defective work to the apartments – concurrent claim – claims made against the defendant were made in the same terms as those against the developer's insurer – whether plaintiffs have already been compensated for the loss which they allege was caused by the defendant.

Facts

The owners' corporation and individual apartment owners of a luxury residential apartment building in Narrabeen brought a claim for damages for defective building work against TQM Design & Construct Pty Ltd , the original builder (**TQM**) hired by the principal and developer of the strata scheme, PVD No.16 Lagoon Street Pty Ltd (**PVD**).

TQM Design & Construct Pty Ltd (TQM) had built a significant part of the building for the property developer, PVD No.16 Lagoon Street Pty Ltd (PVD).

Beginning on 16 April 2007, TQM served on PVD a succession of payment claims under the *Building and Construction Industry (Security of Payment) Act 1999* (NSW) (*Security of Payment Act*). It served claims numbered 9, 10 and 11 totalling $2,025,103.30 on 16 April 2007, 14 May 2007 and 15 June 2007, respectively.

On 17 July 2007, TQM served payment claim 12. On 23 August 2007, it served payment claim 13 and on 16 October 2007, it served payment claim 15. As at 28 February 2008, TQM had not received from PVD a payment schedule under the *Security of Payment Act* or payment from PVD for payment claims 9, 10 and 11.

On 29 February 2008, TQM gave PVD further notice of its intention to suspend the works for failure to pay those claims.

By 4 March 2008, TQM had not received a payment schedule or payment in respect of payment claims 12 and 13. By this time the amount claimed by TQM and unpaid was $2,524,931.33. On that day, TQM gave PVD notice of its intention to suspend works.

PVD responded by alleging breaches of contract in wrongfully suspending works and failing to proceed with due expedition and without delay. While there was no evidence of any formal termination, the parties agreed that at some stage the contract was terminated.

By a written building contract entered into on 1 June 2008 (the Intek Contract), PVD engaged Intek Solutions Pty Ltd (Intek) to complete the works for a price of $650,000 plus GST. The Intek Contract provided for practical completion by 19 August 2008. Intek, was placed into liquidation on 9 September 2009. AAI was their home building insurer.

By the time the trial commenced, TQM had become the only defendant, and the main issue to be determined by the Court was whether TQM had breached warranties under section 18B the Home Building Act 1989 (NSW) (Act), which requires that building work be performed in "a proper and workmanlike manner and that all materials supplied will be good and suitable for the purpose for which they were used" .

Owners' Claim

The Owners claimed damages from TQM for breach of the warranties imposed on TQM by s 18B(a) and (b). They claim as the immediate successors in title to PVD under s 18D(1).

The claim was ultimately reduced to three items:

- the plasterboard was defectively installed
- the air conditioning in the apartments was too noisy and did not comply with applicable noise level standards
- the drainage and sanitary pipework did not have acoustic insulation and did not comply with applicable noise level standards.

TQM's Defences

TQM ultimately only argued four matters:

- First, the plaintiffs had failed to establish that TQM did the work which is the subject of their claim.
- Second, it put that the plaintiffs failed to prove that they were caused loss or damage by any breach by TQM of the statutory warranties.
- Third, in respect of the air conditioning and drainage and sanitary pipework claims, it put that by taking the work out of TQM's hands, PVD acted unlawfully and deprived it of the opportunity of completing the work and rectifying any defects. TQM argued that it would have rectified all defects either before practical completion or during the defects liability period. Accordingly, any loss which PVD suffered was caused by its own acts. As PVD had no claim, the plaintiffs as successors in title to PVD, are in no better position than PVD was.
- Finally, TQM argued that under the Deed of Settlement, the plaintiffs received compensation from AAI for loss or damage in respect of the air conditioning and drainage and sanitary pipework claims for which it claims against TQM so that its claim against TQM involves an impermissible attempt at double recovery.

Defects

In respect of the plasterboard, the Court held that the plaintiffs were unable to discharge their onus in establishing where TQM's work finished and where Intek's work began. Notwithstanding that the Owners' claim failed on this defect, the Court expressed a view as to the rectification methodology, holding that a tried and tested methodology was to be preferred over a novel method that had not been deployed in Australia. The novel methodology was considered unreasonable.

As to air-conditioning, the plaintiffs were unable to establish where TQM's work finished and the Intek work began. The plaintiffs moved the Court to infer that all of the duct work and grilles had been installed by TQM. The Court found that the evidence did not support such an inference. Additionally, the plaintiffs did not establish that the defect extends to all apartments and that the replacement of ducts is the reasonable solution that ought to be adopted. TQM's position is that it did not complete the air conditioning works and it did not commission or certify them. This was done by Intek. The Court found that this was plainly the case.

In respect of the acoustics, the existence of the claimed pipe insulation defects was not in contest. The difficulty once again for the plaintiffs was that they had not established which of the piping work was installed by TQM. It may be accepted that TQM installed some, but the evidence did not show that it installed all of it. The plaintiffs argued that it was to be inferred that where TQM had installed suspended ceilings, they must have installed the piping above them. The difficulty with that submission is that the plaintiffs had not established which ceilings TQM installed.

The Court found that if TQM were found liable for the entirety of the air-conditioning and acoustic defects, the total damages claimable would have totalled $127,675.00 which was relevant for a reason to be dealt with later.

Temporary Disconformity Theory

In defence against the plaintiffs' claims of breaches of warranty, TQM invoked a principle enunciated by Lord Diplock in *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 All ER Rep 121 (HL) as the "temporary disconformity theory."

This was a suggested rule of law that where a builder under a building contract does defective work, no action for damages lies if the builder still has the opportunity to remedy it, which the builder can do at any time before it is to hand over the works or during any defects liability period. Until this opportunity passes, the defective work, whatever its nature or extent, is treated merely as a 'temporary disconformity' with, and not a breach of, the contract.

TQM further argued that it was denied the opportunity to remedy any defects on the basis PVD took the work out of its hands unlawfully by ending the contract, and therefore the defects were only temporary and not TQM's fault.

An element of this contention is that if TQM had been given the opportunity to rectify defects, it would have.

Hammerschlag J rejected this argument, holding that there was no such rule of law in NSW, and no such principle was espoused by Lord Diplock in the authority upon which TQM relied, much less one of general application.

Operation of 18D of the Act

TQM argued that where s 18D(1) provides that the plaintiffs, as successors in title to the benefit of the statutory warranties, are entitled to ***the same rights*** as PVD in respect of the statutory warranties, this meant that the plaintiffs are put in the same position as PVD under the contract between them which incorporates the statutory warranties.

It argued that section 18B implies warranties into a building contract and the successor's right is to have the warranties as if they were in that contract. It argues that the legislation envisages that the statutory warranties are to be 'grafted on' and to operate within the existing legal framework of the building contract under which residential building works were undertaken by TQM.

The Court rejected this submission. His Honour held that the submission incorrectly ascribes to the section an intention to bring about a statutory assignment of rights under a contract, subject to equities. This was contrary to the well-established position that this is not how the section operates. It creates new rights: *Allianz Australia Insurance Ltd v Waterbook at Yowie Bay Pty Ltd* [2009] NSWCA 224.

Double Compensation

In *Boncristiano v Lohmann* [1998] 4 VR 82, an authority to which the Court was properly referred by junior counsel for the plaintiffs, the Victorian Court of Appeal after referring to *Townsend v Stone Toms & Partners* (1984) 27 BLR 26 (a decision of Oliver LJ and Purchase LJ), said at 89:

> The starting point, and one on which there is a good deal of clear authority, is that where a plaintiff with concurrent claims against two persons has actually recovered all or part of his loss from another, that recovery goes in diminution of the damages which will be awarded against the defendant.
>
> A plaintiff can never, as I understand the law, merely because his claim may lie against more than one person, recover more than the total sum due.

The corollary of the rule against double compensation is that where a plaintiff with concurrent claims against multiple parties has actually recovered all or part of their loss from one of them, that recovery reduces the amount of damages they can be awarded from other parties.

The plaintiffs had already signed a deed of settlement with the insurer, AAI, for $1,100,000 when the instant proceedings commenced. TQM argued that under the deed of settlement, the plaintiffs received compensation from AAI for loss or damage in respect of the airconditioning and drainage and sanitary pipework claims. Such was set out in the recitals and operative provisions of the deed.

His Honour held that it was plain that the claims which were settled under the deed were concurrent to those brought pursuant to the claim as that phrase is understood in *Boncristiano v Lohmann*.

The deed of settlement did not apportion any amounts to any particular defects. As the plaintiffs made no submissions relating to the amount of compensation already received from AAI for the cost to remedy the air-conditioning and acoustic defects, Hammerschlag J found that it was to be inferred that these defects had been paid for in full by the AAI settlement. No further compensation could be sought from TQM by operation of the rule against double compensation.

The proceedings were dismissed, and the plaintiffs were ordered to pay TQM's costs.

Petropoulos v CPD Holdings Pty Ltd t/as The Bathroom Exchange (No 2) [2018] NSWCATAP 233

Coram: Deputy President Hennessy LCM and Senior Member Sarginson

NSW Civil Administrative Tribunal

Date: 8 October 2018

HOME BUILDING – where statutory warranty breached in relation to size of showers – whether damages or rectification appropriate remedy

Facts

A builder, CPD Holdings Pty Ltd t/as The Bathroom Exchange, renovated a bathroom and an ensuite bathroom for a homeowner, Ms Petropoulos. The contract for residential building work specified 900 mm x 900 mm areas for shower recesses. When the renovations were complete, the dimensions for the shower recesses was 850 mm x 850 mm. The Tribunal at first instance dismissed the homeowner's claim, other than making a work order under s 48O of the *Home Building Act 1989* (NSW) (HBA), that the builder repair a chip on the bath.

The homeowner appealed from the Tribunal's decision. In an earlier decision the Tribunal held that by making the shower recesses smaller than the dimensions specified in the contract, the builder had breached a statutory warranty: *Petropoulos v CPD Holdings Pty Ltd t/as The Bathroom Exchange* [2018] NSWCATAP 72.

That warranty was that "the work will be done … in accordance with the plans and specifications set out in the contract" in respect of the size of the shower recesses: HBA, s 18B(1)(a).

This matter related exclusively to the question of an appropriate remedy for the breach of the statutory warranty.

The issues in these proceedings were:

1. Has the homeowner waived any right she may have to damages?
2. What remedy, if any, is appropriate for the breach of the statutory warranty? In particular:
    - Should the Tribunal award damages, rather than making a work order?
    - Is the work proposed by the homeowner necessary to produce conformity with the contract?
    - Is altering the size of the shower recess areas unreasonable, impractical, unfair or inequitable?
    - Is a limited work order a reasonable course to adopt?
    - Should the homeowner be awarded damages for consequential loss?

Waiver as to Damages

The builder submitted that, based on the factual findings made at first instance, the homeowner "informally agreed to or approved the supply and installation of showers 850 mm x 850 mm". According to the builder, that conduct constituted waiver of any right to damages: *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 250 CLR 303 at 315; *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 238 CLR 570 at 599-600.

In the context of contractual obligations, a right such as the right to terminate a contract for breach or repudiation, may be waived: *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 238 CLR 570. The waiver has to be carried out by an intentional act whereby a person abandons a right by acting inconsistently with that right. The builder identified the right to damages as being the right which the homeowner has waived.

Section 48O of the HBA gives the Tribunal a discretion to make certain orders if the builder has breached a statutory warranty. Neither that provision, nor any other written or unwritten law, gives the homeowner a right to a remedy for breach of a statutory warranty.

Consequently, the doctrine of waiver was held not to apply.

Statutory powers of Tribunal when determining a building claim

Section s 48O of the HBA gives the Tribunal power to make various orders when determining a building claim.

> **48O Powers of Tribunal**
>
> (1) In determining a building claim, the Tribunal is empowered to make one or more of the following orders as it considers appropriate:
>
> > (a) an order that one party to the proceedings pay money to another party or to a person specified in the order, whether by way of debt, damages or restitution, or refund any money paid by a specified person,
> >
> > (b) an order that a specified amount of money is not due or owing by a party to the proceedings to a specified person, or that a party to the proceedings is not entitled to a refund of any money paid to another party to the proceedings,
> >
> > (c) an order that a party to the proceedings:
> >
> > > (i) do any specified work or perform any specified service or any obligation arising under this Act or the terms of any agreement, or
> > >
> > > (ii) do or perform, or refrain from doing or performing, any specified act, matter or thing.
>
> (2) The Tribunal can make an order even if it is not the order that the applicant asked for.
>
> (3) Sections 79R and 79T–79V of the *Fair Trading Act 1987* apply, with any necessary modifications, to and in respect of the determination of a building claim.

The Tribunal then restated the somewhat trite principles in respect of damages arising from a breach of statutory warranty. The Tribunal held that as far as possible, the homeowner should be put back in the position he or she would have been in had the builder not breached the statutory warranty. The measure of damages is not the diminution in value of the building, but rather the cost of rectification. In *Bellgrove v Eldridge* (1954) 90 CLR 613 the High Court set out the principles for assessing damages for breach of contract in building cases. The plurality held that the owner is entitled to "the reasonable cost of rectifying the departure or defect so far as that is possible". The High Court endorsed the proposition that:

> The measure of the damages recoverable by the building owner for the breach of a building contract is … the difference between the contract price of the work or building contracted for and the cost of making the work or building conform to the contract, with the addition, in most cases, of the amount of profits or earnings lost by the breach.

The High Court went on to qualify this proposition in the following way at p 618:

> The qualification, however to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt.

In *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 288; the High Court held that the test of "unreasonableness" is only satisfied by "fairly exceptional circumstances". See also *Walker Group Constructions Pty Ltd v Tzaneros Investments Pty Ltd* [2017] NSWCA 27.

Section 48O(1)(c)(i) allows the Tribunal to make a work order. As these proceedings involve a finding of defective residential building work, the Tribunal is to have regard to the principle that rectification of the defective work by the responsible party is the "preferred outcome".

In *Leung v Alexakis* [2018] NSWCATAP 11 the Appeal Panel summarised this provision to mean that "... unless the facts of the particular case make it inappropriate to order rectification of the defective work by the responsible party, an order should be made in terms that give effect to the principle".

In *Kurmond Homes Pty Ltd v Marsden* [2018] NSWCATAP 23 at [46] the Appeal Panel set out various relevant considerations when considering whether to make a work order. Those considerations include "whether there is a reasonable basis for any objection raised by the homeowner to the builder being permitted to rectify the defective work, the terms of any order, whether the builder is willing to return and whether such an order would support a timely and cost-effective resolution of the dispute".

Any work order must focus on rectification of the particular defect that has been found. Exercise of the discretion to make a work order is "subject to requirements of certainty, practicality, and enforceability": *Catapult Constructions Pty Ltd v Denison* [2018] NSWCATAP 158. The evidentiary onus is on the homeowner to set out an appropriate method of rectification.

When exercising its discretion to make a work order, and formulating the content of the order, the Tribunal is to have regard to the provisions of the *Fair Trading Act 1987* (NSW) that the work order is "fair and equitable to both parties" *Kurmond Homes Pty Ltd v Marsden* [2018] NSWCATAP 23. Further, the Tribunal may make a work order even if it is not the order that the homeowner seeks in the proceedings.

Should a work order be made?

In the instant case the Tribunal held that there was no basis to find that the builder should not be permitted to rectify the defective work.

The homeowner contended that the bathrooms should be totally removed, that there should be re-waterproofing, re-tiling, reconstruction of the shower recess areas and installation of new components. The Tribunal was not satisfied that the scope of works identified by the homeowner's expert was necessary to produce conformity with the contract.

The Tribunal held that it was appropriate to make a limited work order that contemplated something less than a complete retiling of all bathroom areas.

As well as damages, the homeowner submitted that she should be awarded "consequential loss" of $100 per week. The homeowner acknowledged that the contract between the parties makes no reference to damages for "consequential loss" but submitted that such damages can be awarded. The homeowner cited *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184 as authority to support the proposition that damage for "consequential loss" should be awarded.

The Tribunal was not satisfied that any damages should be awarded for "consequential loss". Damages for "consequential loss" such as the cost of a homeowner having to move out of a residence while rectification work is being performed, may be awarded for breach of the statutory warranties in s 18B(1) of the HBA . However, there is no evidence to establish any basis for the homeowner to be awarded "consequential loss" damages of $100 pw in the circumstances of this matter.

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

Coram: Stevenson J

Supreme Court of NSW

Date: 15 June 2018

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

Facts

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

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

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

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

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

Decision

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

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

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

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

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

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

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

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

Coram: McDougall J

Supreme Court of NSW

Date: 22 March 2018

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

Facts

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

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

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

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

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

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

Decision

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

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

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

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

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

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

High Court of Australia

Date: 14 February 2018

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

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

Facts

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

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

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

Decision

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

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

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

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

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

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

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

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

Quigg v O'Leary trading as Building Habitats [2018] NSWCATAP 298

Coram: Principal Member Rosser and Member DAC Robertson

NSW Civil Administrative Tribunal

Date: 13 December 2018

BUILDING AND CONSTRUCTION – Home Building – owners contracted separately with builder, waterproofer and tiler – builder penetrated waterproofing while installing balustrade – waterproofer not called to undertake second stage waterproofing – responsibility of owners to arrange contractors – no error of law – decision not against the weight of evidence

Facts

In 2015 the owners bought and moved into a house in Tathra. In early 2016 the owners separately contracted with each of the respondents to undertake work on the external deck area of their home, which was leaking into the area below.

The builder was contracted to repair the deck structure, install sheeting on the surface of the deck and install a balustrade. The waterproofer was engaged to waterproof the deck surface and the tiler was engaged to tile the deck surface.

The builder did the repair work and installed the sheeting. The waterproofer then waterproofed the surface. The next stage of work involved installing the posts for the balustrades. This involved the penetration of the waterproofing membrane by screws. The tiling was done subsequently. The waterproofing membrane failed at the screw holes, which led to water penetration under the membrane, causing damage to the tiling as well as leaking under the deck.

The Claim

The owners claimed that the builder had failed to perform work with due care and skill, in breach of the warranties in s 18B of the *Home Building Act* 1989.

At first instance, the Tribunal found:

- The owners did not understand the requirement to have the waterproofer return to undertake a second stage of waterproofing.
- The owners failed to turn their minds to the requirement to have the waterproofer return to have second stage of waterproofing done before the tiling was completed.
- The builder told the owners that they needed to get the waterproofer to return to undertake a second stage of waterproofing.
- The tiler advised the owners of the need to get the waterproofer to return to do a second stage of waterproofing.
- The owners failed to check their assumption that the post installation was waterproof, even when alerted to the issue by the tiler.
- The issues in dispute related to the scheduling and programming of the work by the owners and their failure to check their assumption that the post installation was

waterproof. In relation to this, the Tribunal noted the report from Peak Consulting, which stated “fundamentally the issue related to scheduling and programming of the work”, and further noted the lack of evidence to establish that the builder’s work was not done with due care and skill.

Scope and nature of internal appeals

The Tribunal set out the scope and nature of internal appeals. Citing *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69, the Appeal Panel restated the non-exclusive list of questions of law:

1. Whether there has been a failure to provide proper reasons;
2. Whether the Tribunal identified the wrong issue or asked the wrong question;
3. Whether a wrong principle of law has been applied;
4. Whether there was a failure to afford procedural fairness;
5. Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations;
6. Whether the Tribunal took into account an irrelevant consideration;
7. Whether there was no evidence to support a finding of fact; and
8. Whether the decision is so unreasonable that no reasonable decision-maker would make it.

The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Schedule 4 of the NCAT Act. In such cases, the Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

1. the decision of the Tribunal under appeal was not fair and equitable; or
2. the decision of the Tribunal under appeal was against the weight of evidence; or
3. significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

In *Collins v Urban* [2014] NSWCATAP 17, the Appeal Panel stated that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

(a) issues of principle;

(b) questions of public importance or matters of administration or policy which might have general application; or

(c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;

(d) a factual error that was unreasonably arrived at and clearly mistaken; or

(e) the Tribunal having gone about the fact-finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

Grounds of Appeal

The grounds of appeal specified in the Notice of Appeal are:

1. The builder stated at the hearing that he was not qualified to do waterproofing but he also said that he could have managed the whole job.
2. The Tribunal Member failed to provide reasons why she believed the builder over them.
3. During the hearing, the builder and the waterproofer said that they had not met to discuss the job. The waterproofer stated that he had not spoken to the builder about returning to do a second stage of waterproofing. The owners now seek to rely upon a text message, which was not tendered at the original hearing, referring to both the waterproofer and the builder meeting one of the owners on site.
4. The Tribunal stated that the builder was not engaged to do waterproofing but he was equally not engaged to do permanent damage to completed work. If damage is caused during the process of the job it is the responsibility of the person who caused the damage to repair it.
5. The Tribunal was biased.

The Appeal Panel held that Grounds 1 and 3 were not proper grounds of appeal. Ground 5 was not particularised and could not be made good.

Ground 2, raised adequacy of reasons as a ground. If established, that raises a question of law. The Appeal Panel cited *Pollard v RRR Corporation Pty Limited* [2009] NSWCA 110 with approval. That case identified the principles relevant to the adequacy of reasons.

Those observations were summarised as follows in *Moussa Enterprises Pty Ltd v Stanford* [2015] NSWCATAP 99 at [30]:

> (1) The giving of adequate reasons lies at the heart of the judicial process. Failure to provide sufficient reasons promotes “a sense of grievance” and denies “both the fact and the appearance of justice having been done”, thus working a miscarriage of justice.
>
> (2) The extent and content of reasons will depend upon the particular case under consideration and the matters in issue.
>
> (3) While a judge is not obliged to spell out every detail of the process of reasoning to a finding, it is essential to expose the reasons for resolving a point critical to the contest between the parties.
>
> (4) The reasons must do justice to the issues posed by the parties’ cases. Discharge of this obligation is necessary to enable the parties to identify the basis of the judge’s decision and the extent to which their arguments had been understood and accepted.
>
> (5) Because a primary judge is bound to state his or her reasons for arriving at the decision reached, the reasons actually stated are to be understood as recording the steps that were in fact taken in arriving at that result. Where it is apparent from a judgment that no analysis was made of evidence competing with evidence apparently accepted and no explanation is given in the judgment for rejecting it, it is apparent that the process of fact finding miscarried.

The Tribunal was persuaded that the weight of evidence clearly favoured the builder’s case that he did advise the owners of the need to undertake the second stage waterproofing. In such circumstances, even if the Appeal Panel were to conclude that the Tribunal’s reasons were arguably inadequate, there is no utility in allowing an appeal on this ground.

Accordingly, the Appeal Panel held that this ground was not made out.

Ground 4 took issue with the Tribunal's finding of fact in relation to the cause of the water penetration complained of by the owners. The Tribunal found nothing in the material that would warrant a departure from the Tribunal's findings at first instance.

The decision was not fair and equitable.

This ground for leave to appeal concerned the process rather than outcome.

For this ground of leave to appeal to be successful, the Appeal Panel held that it would have to be satisfied that the owners may have suffered a substantial miscarriage of justice because a failure in the way a matter was conducted or decided deprived the appellant of a chance that was fairly open of achieving a better outcome than occurred. This proposition was not made good.

Decision against the weight of evidence

In *Collins v Urban*, the Appeal Panel stated at [77] that a decision can be said to be against the weight of evidence "where the evidence in its totality preponderates so strongly against the conclusion found by the tribunal at first instance that it can be said that the conclusion was not one that a reasonable tribunal member could reach".

The Appeal Panel was not satisfied that the Tribunal's decision in this matter could be characterised as being against the weight of evidence.

The Appeal Panel

- Was not satisfied that the owners have established any of their grounds of appeal.
- Was also not satisfied that they owners have established any grounds for which leave to appeal may be granted.

The Tribunal refused leave and dismissed the Appeal.

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

Coram: Stevenson J

Supreme Court of NSW

Date: 5 April 2018

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

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

Facts

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

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

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

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

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

Decision

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

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

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

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

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

Coram: Payne JA

NSW Court of Appeal

Date: 28 February 2018

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

Facts

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

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

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

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

Decision

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

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

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

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

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

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

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

Southern Cross Electrical Engineering v Steve Magill Earthmoving [2018] NSWSC 1027

Coram: McDougall J

Supreme Court of New South Wales

Date: 5 July 2018

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) – application to quash adjudicator's determination – whether adjudicator imposed an onus of proof on plaintiff inconsistent with his statutory obligation to come to his own view on the material – whether adjudicator's determination regarding lineal metreage unreasonable – necessary to consider adjudicator's reasoning in light of statutory requirement to determine often difficult questions within tight timeframe – necessary to have regard to the statutory scheme which renders determination final as to payment claims but otherwise preserves all rights – impermissible to conduct merits inquiry under guise of jurisdictional reasonableness – fair reading of the adjudicator's reasons in context demonstrates no error with regards to onus – not shown that determination was unreasonable to the extent of invalidation – summons dismissed.

Facts

On about 23 May 2017, Southern Cross, as contractor, and Earthmoving, as subcontractor, entered into a subcontract under which Earthmoving undertook to perform excavation and trenching works for Southern Cross in connection with what was called "the Parkes Project".

On about 5 December 2017, Earthmoving served a payment claim on Southern Cross. It claimed over $470,000, including in excess of $387,000 for trenching and backfilling works, said to be "supported by surveyors [sic] report dated 18/10/2017".

On 19 December 2017, Southern Cross provided a payment schedule in which it disputed liability for the whole of the claim, and stated that there was an amount in excess of $473,000 owing to it.

On 10 January 2018, Earthmoving made an adjudication application to the third defendant (the nominating authority).

On 29 January 2018, the adjudicator provided his determination. He determined that there was $400,158, inclusive of GST, owing by Southern Cross to Earthmoving. He gave reasons for that determination.

The Application

Southern Cross sought, among other relief, a declaration that the determination is void, alternatively an order in the nature of *certiorari* quashing it, and ancillary relief.

In support of its application, Southern Cross stated two grounds of complaint. It said that:

- the adjudicator had wrongly imposed an onus on Southern Cross to prove that there had been no variation or change to the scope of works required under the subcontract; and
- it was unreasonable to double the number of lineal metres as it did not reflect the value of the work performed and to that extent it constituted a jurisdictional error.

Decision

The Court commenced its consideration by addressing itself as to the task with which an adjudicator is saddled. Vickery J in *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty* Ltd [2015] VSC 631. In that case, Vickery J said:

> Drawing the threads together, the following may be said of an adjudicator's assessment of a payment claim under the Act in Victoria:
>
> > (a) The adjudicator is required to determine and apply what the adjudicator considers to be the true construction of the Act in the light of the current case law.
> >
> > (b) The adjudicator is required to determine and apply what the adjudicator considers to be the true construction of the construction contract.
> >
> > (c) In addition to the matters to be determined and considered under ss 23(1) and (2), and excluded under s 23(2A) of the Act, an adjudication requires, as a minimum, the following critical findings to be made (the "critical findings"):
> >
> > > (i) a determination as to whether the construction work the subject of the claim has been performed (or whether the relevant goods and services have been supplied); and
> > >
> > > (ii) the value of the work performed (or the value of the goods and services supplied).
> >
> > (d) Construction work carried out or related goods and services supplied are to be valued in accordance with the terms of the construction contract (if the contract contains such terms) pursuant to ss 11(1)(a) and 11(2)(a).
> >
> > (e) In the absence of any express provision in the construction contract providing a mechanism for an adjudicator to undertake the assessment of value, the valuation assessment is to be undertaken in accordance with s 11(1)(b) (for work) and s 11(2)(b) (for goods and services), having regard to the matters set out in those sub-sections, namely:
> >
> > > (i) the contract price for the work or the goods and services;
> > >
> > > (ii) any other rates set out in the contract;
> > >
> > > (iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and
> > >
> > > (iv) if the work or goods are defective, the estimated cost of rectifying the defect.
> >
> > (f) If a construction contract contains a binding schedule of rates within the meaning of s 11(1)(b)(ii) (for work) and s 11(2)(b)(ii) (for goods and services), the adjudicator is required to have regard to the schedule in assessing value if s 11(1)(b) or s 11(2)(b) apply. Further, the adjudicator should state in the adjudication determination whether and how the schedule of rates was applied in the assessment of value, if it in fact was applied, or state why the schedule of rates was not applied.

(g) However, without measures, evidence or submissions being provided to the adjudicator in a coherent fashion in respect of defined categories of work (or goods and services) the subject of a contractual schedule of rates, in most cases it would not be possible for an adjudicator to safely apply the schedule in assessing the value of the claim. In such circumstances the adjudicator may have regard to a schedule of rates, but would not be remiss in not applying it.

(h) The adjudicator is obliged to make the critical findings on the whole of the evidence presented at the adjudication.

(i) The adjudicator, having decided that the respondent's submissions and material should be disregarded, cannot simply adopt the amount claimed by the claimant (for example, in the payment claim or in the adjudication application).

(j) The adjudicator must proceed to make the critical findings by:

(i) fairly assessing and weighing the whole of the evidence which is relevant to each issue arising for determination at the adjudication;

(ii) drawing any necessary inferences from the evidence, or from the absence of any controverting material provided by the respondent, including an inference that if there is no controverting material, no credible challenge can be made to the value of the claim advanced by the claimant. Such an inference may be considered in the context of the evidence as a whole;

(iii) arriving at a rational conclusion founded upon the evidence;

(iv) in so doing, is not called upon to act as an expert; and

(v) is not entitled to impose an onus on either party to establish a sufficient basis for payment or a sufficient basis for withholding payment.

(k) Pursuant to s 23(3) of the Act, the adjudicator must include in an adjudication determination both the reasons for the determination and the basis upon which any amount or date has been decided. In providing these reasons the adjudicator must summarise the central reasons for the making of the critical findings in the adjudication determination with as much completeness as the time permitted under the Act will allow.

The Court re-iterated the views expressed in *Suprima Bakeries Pty Ltd v Australian Weighing Equipment Pty Ltd* [2016] NSWSC 998 and *Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd (No 2)*[2016] NSWSC 1229 that there was sufficient similarity between the legislation considered by Vickery J and the *Security of Payment Act* so as "to make his Honour's observations directly applicable" to the latter.

The Court that that one must bear in mind, however, that the reasons given by adjudicators for their determinations are not to be analysed closely and parsed pedantically, with a predisposition to discerning error. *Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd* [2018] NSWCA 107; *Avopiling (NSW) Pty Ltd v Menard Bachy Pty Ltd* [2012] NSWSC 1466 at [38]; *Bauen Constructions v Westwood Interiors* [2010] NSWSC 1359; *Waterways Authority v Fitzgibbons* (2005) 79 ALJR 1816; *Fulton Hogan Construction Pty Ltd v Cockram Construction Ltd* [2018] NSWSC 264.

The reasons for this are manifold and include time pressures and the quality and complexity of the evidence in support of any given application.

Onus

The Court rejected the submission that the adjudicator regarded Southern Cross as having borne, and failed to discharge, some evidentiary onus. His Honour held that the adjudicator had noted the competing arguments and the evidence in relation to variations. The adjudicator recognised that there had been informal procedures followed in relation to other areas of trenching, and concluded that it was at least conceivable that there were also informal procedures followed in relation to the subject trenching. The adjudicator drew from the statutory declaration of a witness to form the basis of this view.

Accuracy of the Measurement Method

As to the accuracy of the method used by Earthmoving to measure the number of metres that were the subject of its claim for extra-width trenches his Honour noted that Sothern Cross did not raise this issue in the payment schedule it served. Southern Cross had not raised its objection to the measurement methodology. Southern Cross could therefore not raise these matters subsequently in its adjudication response.

Reasonableness of the Adjudication Determination

It is well-recognised in the authorities that a decision made pursuant to the conferral of a statutory power or discretion may be regarded as unreasonable if it is something that no reasonable person could have arrived at in all the relevant circumstances.

That formulation is often associated with the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. In *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 the plurality synthesised the duty in the following way: when something is to be done within the discretion of an authority, it is to be done according to the rules of reason and justice; it is to be legal and regular, not arbitrary, vague or fanciful. That formulation is not exhaustive of the legal concept of unreasonableness. It will be informed by the architecture of the statutory framework that confers the power. *Fulton Hogan Construction Pty Ltd v Cockram Construction Ltd* [2018] NSWSC 264

The Court held that parties must not use the concept of reasonableness to disguise an inquiry into the merits of the decision. As the Court held in *Li,* there is an area (denoted by the concept of reasonableness) within which the decision maker has a genuinely free discretion. The courts must not exceed their supervisory role by intervening within that area.

In the context of the *Security of Payment Act*, that principle finds expression in, or helps to justify, the proposition that mere error of law, not resulting in or associated with jurisdictional error, does not entitle the court to intervene

Factually, the adjudicator’s approach may have been (and probably was) incorrect. It is no doubt something that could have been improved upon if the adjudicator had “world enough and time”. But looking at his approach in the context of the adjudication application in particular and the statutory framework in general, the Court was far from persuaded that it was unreasonable to the extent that it must be taken to invalidate the adjudication determination.

The Application was dismissed.

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

Coram: N Adams J

Supreme Court of NSW

Date: 28 May 2018

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

Facts

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

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

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

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

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

Decision

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

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

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

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

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

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

Syed Ahmad Shoaib Ali Pty Ltd v Jandson Pty Ltd; Jandson Pty Ltd v Syed Ahmad Shoaib Ali Pty Ltd [2018] NSWCATAP 228

Coram: Deputy President Westgarth and Senior Member G Curtin SC

NSW Civil and Administrative Tribunal Appeal Panel

Date: 28 September 2018

APPEALS – arguments not addressed – failure to accord natural justice – damages – liability under contract - whole contract not in evidence – proper construction of contract - deposit – implied term - repudiation by depositor – forfeiture of deposit

BUILDING AND CONSTRUCTION – meaning of "residential building work" in ss 92 and 94 of the Home Building Act 19898 (NSW) – requirements for insurance – issue and cancellation of insurance – argument raised in final submissions – procedural fairness - quantum meruit

GUARANTEE AND INDEMNITY – construction and effect

Facts

From time to time the Builder would enter into put and call options with various land developers for the purchase of land. The Builder then marketed that land packaged with one of its designs for a dwelling.

Interested purchasers would purchase the land from the developer (after the Builder exercised the call option) and would enter into a residential building contract with the Builder.

In respect of the land that is the subject of the instant dispute, the Builder had also entered into a Sales Inspection Report & Sole Selling Agency Agreement (the "Agency Agreement") with a third party.

The Owner contacted the Builder via its sales office culminating in the Owner agreeing to purchase the land and have the Builder build a dwelling on it. In accordance with the regime outlined above, the Owner then purchased the land from St Marys Land Limited (the "Developer"), and entered into a NSW Residential Building Contract for New Dwellings dated 9 September 2015 (the "Contract") with the Builder.

On 25 August 2015, Mr Syed Ahmad Shoaib Ali (the "Guarantor") had signed a written Deed of Guarantee and Indemnity (the "Guarantee") pursuant to which the Guarantor agreed to guarantee the fulfilment of the Owner's obligations to the Builder under the Contract.

No HOW Insurance was taken out until, 8 December 2016, approximately 15 months after the date of the Contract, a little over one year since the work (for which the Builder claimed) was done and about 10 months after the Contract was terminated.

After execution of the Contract and Guarantee, the Builder exercised the call option and the Owner entered into a contract for the purchase of the land with the Developer.

The Builder then undertook some preliminary work which consisted of obtaining structural engineering drawings, a BASIX report, a BAL certificate, a s 149 certificate, a pre assessment for the CDC application and landscape architectural services. In relation to each of those matters the Builder incurred some costs. The Builder also submitted that it became liable to pay Lend Lease Realty a commission pursuant to the terms of the Agency Agreement said to have arisen from the sale of the land to the Owner by the Developer. We shall refer to all of those matters collectively as the "preliminary work" unless some differentiation between them is necessary.

On 7 January 2016, the Owner issued a Notice of Termination of the Contract.

The Builder claimed that that purported termination was wrongful, invalid and amounted to a repudiation of the Contract by the Owner. The Builder accepted that repudiation and terminated the Contract on or about 4 February 2016.

The parties agreed, at first instance, that the Owner had repudiated the Contract and that the Builder had validly terminated the Contract.

After termination of the contract, the Owner entered into a residential building contract with another builder (the "Second Builder"). The Second Builder obtained HOW insurance and constructed a dwelling. Practical completion of that dwelling was achieved on 25 November 2016.

As a result of the Owner's wrongful termination of the Contract the Builder commenced proceedings in the Tribunal claiming damages in the sum of $17,930.56 for the preliminary work and damages in the sum of $85,104 for lost profit on the Contract. The Builder claimed those sums from both the Owner and Guarantor.

The Builder commenced proceedings for those amounts on 7 March 2016.

One of the respondents' defences to the Builder's claims was that the Builder had failed to take out HOW insurance and that, in those circumstances, ss 92 and 94 of the HBA precluded the Builder from bringing any claim against the Owner.

In response to that defence, and on 8 December 2016, the Builder sought and, it submitted, obtained HOW insurance issued by QBE Insurance (Australia) Limited. A document headed "Certificate in Respect of Insurance, Residential Building Works by Contractors" (the "Certificate of Insurance") dated 8 December 2016 was issued.

On 20 December 2016, the underwriter confirmed that the Certificate of Insurance had been issued in error and was ultimately cancelled.

Parties Arguments at First Instance

The Builder argued that it was entitled to damages for breach of contract from the Owner for the costs of the preliminary work (including its liability for the commission) and for lost profit on the contract and that the Guarantor was liable for those same amounts pursuant to the Guarantee.

The Owner and Guarantor argued that the Builder was precluded from claiming any damages from the Owner because the Builder had not taken out HOW insurance, and ss 92 and 94 of the HBA precluded recovery of damages in those circumstances.

The Builder responded by submitting:

- Sections 92 and 94 of the HBA did not apply because the Builder had not undertaken any "residential building work" within the meaning of that term in those sections. The work for which it sought compensation was preliminary work and not, itself, residential building work.
- A HOW insurance policy was taken out. There was no documentary evidence before the Tribunal to establish that the policy had been cancelled.

- The Tribunal ought to award it the sums claimed for the preliminary work on a *quantum meruit* basis because it was "just and equitable" to do so as provided for in s 94(1A) of the HBA.

First Instance Reasons

In its reasons, the Tribunal distilled the issues to be decided as follows:

1. Did the Builder perform "residential building work" within the meaning of that term in s 94 of the HBA?
2. Was a HOW insurance policy (taken out by the Builder) in force?
3. Was the Builder precluded from claiming any amounts by the operation of ss 92 and 94 of the HBA?
4. If the answer to (3) above was in the negative, was it "just and equitable" for the Builder to recover on a *quantum meruit* basis?

<u>The First Issue</u>

The Tribunal held that the decision of the Court of Appeal in *Grygiel v Baine* [2005] NSWCA 218 was determinative of the issue whether work was or was not "residential building work", and was binding on the Tribunal. The Tribunal held that preparatory work which had a sufficient connection to the carrying out of building work was itself "residential building work" within the meaning of that term in the HBA. Accordingly, the Tribunal held that the Builder was required to have taken out HOW insurance in order to avoid the preclusion set out in s 92 of the HBA against the demanding of any payment under a contract for residential building work in the absence of such insurance.

<u>The Second Issue</u>

The Tribunal rejected the Builder's submission that it had obtained retrospective HOW insurance. The Tribunal held that there was no "valid HOW insurance at material times".

<u>The Third Issue</u>

The Tribunal found that the residential building work performed by the Builder was "uninsured work" for the purposes of s 94 of the HBA, and s 94(1) precluded the Builder from claiming any damages against the Owner or Guarantor.

<u>The Fourth Issue</u>

As to whether the Builder could make a claim against the Owner (and Guarantor) on a *quantum meruit* basis the Tribunal rejected the Builder's claim for lost profit on a *quantum meruit* basis because the Tribunal said, in the circumstances, it was not just and equitable that the Builder be entitled to do so.

Both parties appealed the first instance decision

Owner's Grounds of Appeal

The Owner argued that The Tribunal erred in law in failing to address substantial, clearly articulated arguments raised by it in defence to the Builder's claim, namely that:

1. There was no evidence that the Builder had an obligation to pay the developer under the Agency Agreement as the complete Agency Agreement was not in evidence;
    a. on the proper construction of such of the terms of the Agency Agreement as were in evidence;
    b. the Builder had no liability to pay the developer anything; or

   c. had no obligation to pay anything in circumstances where the (building) Contract had been terminated.

2. The Tribunal erred in finding that the terms of the Agency Agreement, properly construed, gave rise to a liability of the Builder to pay the developer.
3. The award of $2,972.76 to the Builder for expenses incurred was erroneous because that amount ought to have been offset against the deposit paid by the Owner (of $5,000).

The Tribunal summarised the relevant authorities in determining whether leave was required:

- Where a decision-maker has failed to respond to a substantial argument there is a failure to accord natural justice, that is, procedural fairness - *Rodger v De Gelder* [2015] NSWCA 211.
- A denial of procedural fairness is an error of law - *Italiano v Carbone* [2005] NSWCA 177; *Clements v Independent Indigenous Advisory Committee* [2003] FCAFC 143
- The proper construction of vital contracts is a question of law - *Re R* [2000] NSWSC 886; *C v W* [2015] NSWSC 1774.

Accordingly, the Tribunal held that all of the grounds articulated by the Owner gave rise to questions of law.

Owner's Submissions on the Appeal

On Appeal, the Owner argued that:

- The liability the Builder had to the agent for a commission was a contingent liability, and a contingent liability could not be recovered on a *quantum meruit* basis. The contingency was said to be whether the agent sought to enforce a claim against the Builder under the Agency Agreement, and there was no evidence that it had done so.
- The evidence before the Tribunal was that no commission had in fact been paid by the Builder to the agent. It submitted that, if there was a liability to pay the commission (which it disputed), the contingency referred to above had not occurred, and therefore the commission was not recoverable on a *quantum meruit*.
- Alternatively, no benefit had accrued to the Owner as a result of that commission, and, because the Builder had not paid it, there was no detriment to the Builder. The Owner submitted that both benefit and detriment were essential conditions for the awarding of a sum in *quantum meruit*.
- Further, the Agency Agreement, or the totality of it, was not in evidence, and therefore the terms of that agreement (including the circumstances in which the commission became payable) were unknown
- Any award in favour of the Builder ought to have been off-set against the deposit paid by the Owner.

The Builder's Submissions on the Appeal

The Builder submitted that:

- The Owner had only submitted at the hearing before the Tribunal that the Agency Agreement was not in evidence, and not that *the totality* of the Agency Agreement was not in evidence. The Owner should not be allowed to raise the totality argument for the first time on appeal.

- The totality of the Agency Agreement was, in fact, in evidence, and the Tribunal had not erred in construing its terms in the manner it had.

The Builder accepted that the Tribunal's reasons were silent as to the submissions by the Owner that the Agency Agreement, or the totality of it, was not in evidence. However, the Builder maintained this was irrelevant because there was no issue that the land had been sold to the Owner, that the land had been sold for the price stated in the Schedule to the document tendered, that the package price was as stated in that Schedule and that the commission became a liability owed by the Builder to the agent upon the sale of the land to the Owner.

The Builder argued that it was never put to Mr Matheson (a director of the Builder) in cross-examination that the totality of the Agency Agreement was not in evidence, nor that the quantum of the commission was other than that claimed. Accordingly, the Owner was precluded from running this argument by operation of the rule in *Browne v Dunn* (1893) 6 R. 67.

The Builder submitted that such a commission was recoverable in *quantum meruit* and that the Owner had derived the benefit identified by the Tribunal.

In relation to the deposit, the Builder submitted that the deposit was paid pursuant to clause 17 of the Contract, that clause provided that the deposit would be brought to account with the first progress payment, no progress claims were issued by the Builder because of the Owner's repudiation of the Contract, and therefore there was no obligation to bring the deposit to account.

The Builder submitted there was no right of set-off (to set off the deposit against any amounts owed) because of clause 17.6 of the Contract which said that other than in relation to the final progress claim the "owner has no right of set off".

The Builder also submitted that the deposit was an assurance or security for the performance of the Owner's obligations under the Contract, and thus it was entitled to retain the deposit when the Owner had repudiated the Contract.

The Builder further submitted that the deposit issue was not raised before the Tribunal and should not be allowed to be raised on appeal.

Decision

<u>Ground 1</u>

The Appeal Panel held that the Owner had submitted below that the totality of the Agency Agreement was not in evidence, and the Tribunal erred in law in failing to consider and determine that submission. The Tribunal ought to have found that the totality of the Agency Agreement was not in evidence and therefore the Builder had failed to prove that a commission was payable to the agent.

The submission by the Owner set out was a substantial argument, and the Tribunal failed to address it. It follows, that the Tribunal erred in law in failing to address that substantial argument, and thus deprived the Owner of procedural fairness.

The Appeal Panel held that the Tribunal ought to have found that the totality of the Agency Agreement was not in evidence, and ought to have found that it was unknown whether there was, in fact, any liability on the part of the Builder to pay the commission.

<u>Ground 2</u>

In the absence of the totality of the Agency Agreement's terms, it is (and was) not possible for a finding to be made that there was a liability owed by the Builder to pay the commission

In the absence of the full agreement it was not possible for the Appeal Panel to construe the Agency Agreement, and so it could not further consider grounds 1(b) and 2 other than to observe that the Tribunal was not in a position to construe the Agency Agreement in circumstances where the full terms of that agreement were not in evidence.

As to the question of whether the commission was contingent, the Appeal Panel held that the Owner's submissions conflated the separate notions of the existence of a liability and satisfaction of that liability.

The liability in this case, on the assumption the commission was owed, was the legal obligation to pay the commission, the chose in action. Again, on the assumption it was owed, as the Builder submits, there was nothing contingent about the existence of that liability. This a situation far removed from the case of *Wardley Australia Ltd v State of Western Australia* [1992] HCA 55; (1992) 175 CLR 514 where liability arose if and when the indemnity was called on.

Citing Edelman J's exposition on quantum meruit in *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd (No 3)* [2014] WASC 162, the Appeal Panel held that in an ordinary case of *quantum meruit* the owner receives something of value for which it has not paid. Value is, generally speaking, arrived at by valuing the work done which has enriched the owner. But in this case the owner paid exactly what the property was worth. Further, the Owner paid the purchase sum to the owner of the land, the Developer. The Builder was not the owner of the land, and so could not be said to be the one supplying the benefit (the land) to the Owner.

<u>Ground 3</u>

The final matter argued by the Owner was in relation to the deposit paid to the Builder. No oral or written submissions were made by the Owner in relation to the deposit other than a submission that any amount awarded to the Builder ought be offset against the deposit.

In our opinion the Builder's submissions on the deposit issue are correct as far as they go. That is, ordinarily, it would be entitled to keep the deposit. But it is not entitled to do so in this case because of its failure to take out HOW insurance.

In *Eddy Lau Constructions Pty Ltd v Transdevelopment Enterprise Pty Ltd* [2004] NSWSC 273 Barrett J, held that s94 of the Home Building Act (or its counterpart) did not have the effect of rendering the building contract void. The Contract was not void by reason of the Builder's failure to take out HOW insurance.

However, to be entitled to retain the deposit, the Builder must rely upon the implied term as to forfeiture in the Contract (and cl 17.6 if the Builder wished to assert there is a contractual bar to a set off). It is only by reason of contractual rights that the Builder would be entitled to the deposit. To keep the deposit the Builder would be asserting an "entitlement flowing from the breach of the contract" by the Owner (to use Barrett J's words). Whilst the Contract was not void, the Builder could not, because of ss 92 and 94 of the HBA, rely on the Contract as a source of entitlement to retain the deposit.

Additionally, the Appeal Panel noted:

1. Contrary to the Builder's submissions, the Owner did raise the issue of the deposit before the Tribunal.
2. The Tribunal's reasons are silent on this issue. Accordingly, this was a substantial argument not addressed by the Tribunal and was therefore an error of law.
3. The Appeal Panel accepted that Contract is silent as to what was to happen if the Contract was terminated early due to the repudiation by the Owner ie. it is silent as to forfeiture. In those circumstances, as *Howe v Smith* (1884) 27 ChD 89 held, a right to forfeiture of the deposit is implied.

Builder's Appeal

The starting point for the Builder was an application for extension of time to Appeal. The application was resisted by the Owner who relied upon the judgment of McHugh J in *Gallo v Dawson* (1990) 93 ALR 479. The Owner submitted that the absence of that "proof" was fatal to an application to extend time.

In *Jackson v NSW Land and Housing Corporation* [2014] NSWCATAP 22 the Appeal Panel held there is no absolute requirement for an affidavit to support an application for an extension of time, there just need to be grounds.

The Appeal Panel decided to grant the application to extend time.

Builder's Grounds of Appeal

The Appeal Panel distilled the grounds of appeal thusly:

1. The Tribunal erred in finding that the preliminary work was "residential building work" within the meaning of that term in ss 92 and 94 of the HBA.
2. The Tribunal erred in finding that the Builder had not retrospectively obtained HOW insurance in relation to that preliminary work in that the Tribunal erred in:
    1. finding there had been no policy in force;
    2. if there had been a policy in force it did not cover the work for which the Builder claimed;
    3. refusing to consider the non-cancellation argument raised by the Builder, erred in failing to find that the cancellation provisions of the *Insurance Contracts Act* applied in this case, had not been followed by the insurer and therefore the policy had not been cancelled.
3. On the assumption insurance was required, and had not been obtained, the Tribunal erred in holding that s 94 precluded the Builder from claiming for lost profits.
4. The Tribunal erred in failing to find the Guarantor liable to the Builder for such amounts as the Owner was found liable to the Builder, whether as damages for breach of contract or in quantum meruit.
5. The Tribunal failed to give adequate reasons in relation to the matters referred to in grounds 1, 2 and 4.

All of these grounds of appeal were held to raise questions of law. *Chapman v Taylor* [2004] NSWCA 456; *Wesiak v D & R Constructions (Aust) Pty Ltd* [2016] NSWCA 353; *Re R* [2000] NSWSC 886; *C v W* [[2015] NSWSC 1774; *toker v Adecco Gemuale Constructions Pty Ltd* [2004] NSWCA 449.

<u>Ground 1</u>

The Builder contended that the preliminary work in relation to which it seeks compensation was not "residential building work" within the meaning of that term in ss 92 and 94 of the HBA.

Accordingly, whilst the Tribunal has jurisdiction to hear claims arising from building goods or services supplied "for or in connection with" the carrying out of residential building work, it is only work involved in the construction of a dwelling that is required to be insured, and not for goods or services supplied *in connection with* work involved in the construction of a dwelling.

The Tribunal undertook an analysis of the seemingly conflicting authorities.

In *Woolfe v Alexander Sussman* [2001] NSWSC 702 McLelland J held that residential building work is, as the definition makes plain, confined to building work in pursuance of the physical construction or alteration of a dwelling and that services, which went to the Court holding that studies and work directed to the feasibility of developments did not fall within the definition of residential building work.

In *Collings Homes v Head* [2002] NSWSC 1219, Master Malpass held that to satisfy the definition of "residential building work", the work must be involved in or involved in co-ordinating or supervising any work involved in the construction of a dwelling**.**

McDougall J, in *AIM Partnership v Rathchime* [2010] NSWSC 860 at [21], considered that in *Grygiel v Baine* [2005] NSWCA 218 implicitly disapproved of the approach of Malpass M in *Collings Homes v Head.*.

In *Provincial Homes v Doyle* [2004] NSWSC 624 Wood CJ at CL expressed the view that the focus of attention, in relation to jurisdiction, was the nature of the claim rather than the nature of the contract between the parties. In deciding whether the preparation of plans and specifications for a proposed home and the obtaining of the necessary approvals fell within the contemplation of building services under the Act.

In *Gygiel v Baine* [2005] NSWCA 218*,* Basten JA held that a claim may be a building claim if it specifically involves the terms of the contract between the homeowner and the builder. Reference to preparatory works possibly falling within the definition of residential building work in Basten JA's decision was obiter, a view that found support in the decision of Bell J in *Stevens v Gary Lewin t/a Gary Lewin Architecture* [2006] NSWSC 1232.

In *Vero Insurance Ltd v Buckle; Reynell v Buckle* [2008] NSWSC 73 the Court held that the Tribunal will have jurisdiction if the claim is one that arises from either a supply of building goods or services or arises under a contract that is collateral to a contract for the supply of building goods or services.

The Appeal Panel held that the significance of the ratio in Grygiel, and its inconsistency with the reasoning process in *Woolfe*, *Collings Head* and *Provincial Homes* is that *Grygiel* impliedly overruled the reasoning in those three cases.

If that reasoning process has been overruled, the Appeal Panel found itself not bound by the holdings in those first instance cases as to what is, or is not, "residential building work" because their Honours' consideration of that issue was part of their reasoning process on jurisdiction which are inconsistent with that in *Grygiel*.

The Appeal Panel ultimately held that:

1. The construction of a dwelling refers to the building process itself.
2. Work that is "involved in" the construction of a dwelling is "residential building work". Thus, work of a preparatory nature (that which precedes construction) is "involved in" the construction of a dwelling if that work is included as a necessary or integral part of the construction, or associated with, connected with or concerned with the construction work.
3. The "carrying out of residential building work" is descriptive of (and not a factual pre-condition to) the goods or services with which a connection must be established.
4. Goods or services supplied could be said to be sufficiently "connected with" the carrying out of residential building work if:
    a. their purpose was to give rise to residential building work; and
    b. they had a sufficient causal nexus with such work.

5. A building claim may “arise” from the supply of building goods or services under a contract if the claim specifically involves the terms of the contract between the homeowner and the builder.

Accordingly, the Appeal Panel held that the Tribunal was correct in finding that the work for which the Builder was claiming in the proceedings (excluding the commission) was residential building work for the purposes of ss 92 and 94 of the HBA.

Ground 1 was dismissed.

<u>Ground 2</u>

The Appeal Panel did not consider that the Tribunal erred in rejecting consideration of the non-cancellation argument. That is because it would have been procedurally unfair to the Owner for the Tribunal to have considered the argument.

This was so because the Owner was denied the opportunity to investigate with QBE whether a notice of cancellation had been sent to the Builder and, depending upon the answer to that inquiry, cross-examine witnesses on that issue.

The Appeal Panel did not consider other challenges to this finding because, even if the HOW insurance was obtained and did cover the work, it was not “a contract of insurance required by section 92” as stipulated in s 94. This was so because the HOW insurance was only in existence from 8 December 2016 to 3 January 2017, and, that term failed the requirements of the HBA in that it did not provide cover for loss arising from non-completion of the work for 12 months from either 7 January or 4 February 2016.

Ground 2 was dismissed

<u>Ground 3</u>

The Appeal Panel held that the Tribunal did not err in holding that s 94 precluded the Builder from claiming for lost profits. The Appeal Panel referred to Barrett J’s judgment in *Eddy Lau Constructions v Transdevelopment Enterprise Pty Ltd & Anor* in which his Honour determined that s94 precludes claims for damages for lost profit.

Ground 3 was dismissed.

<u>Ground 4</u>

The Builder contended, in its fourth appeal ground, that the Tribunal erred in holding that the Guarantor was not liable to the Builder under the Guarantee in relation to the amounts awarded to the Builder in quantum meruit.

The Appeal Panel examined the express terms of the Guarantee which provided as follows:

> 1. Guarantee
>
> The Guarantor guarantees to the Builder the fulfilment of the Owner’s obligations under the Contract including but not limited to the due payment of all moneys arising out of the subject matter of the Contract.
>
> 2. Indemnity
>
> The Guarantor indemnifies the Builder against any claim, loss or damage arising out of the subject matter of the contract caused by or resulting from any non-fulfilment of the Owner’s obligations under the Contract.”

The Appeal Panel held that the reasoning of the Tribunal was not clear and the reasons were inadequate in respect of this issue.

In deciding the matter, the Appeal Panel invoked general contractual principles of construction that apply to the terms of a guarantee or indemnity.

As to the Guarantee, it was not engaged in circumstances where the Builder only succeeded against the Owner on the basis of quantum meruit. That is because the Guarantee only guaranteed the fulfilment of the Owner's obligations "under the Contract" and the claim in *quantum meruit* did not arise "under the Contract". The cause of action upon which the Builder relied arose from general law principles and arose because the Builder could not claim damages under the Contract.

The claim in quantum meruit did fall within the contemplation of the indemnity. This was so because:

- The phrase "arising out of" is a wide expression, that is usually given a wide meaning - *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160.
- There was little doubt that the claim has arisen from the Owner's repudiation of the Contract and thus from the non-fulfilment of the Owner's obligations under the Contract.
- Accordingly, the Builder would be entitled to indemnity from the Guarantor but for s94(1)(b) and the absence of the HOW insurance policy.

Applying the approach to statutory construction set out in *Project Blue Sky*, the meaning to be given to sub-sec 94(1A) is that if a court or tribunal considers it just and equitable, a contractor may recover money from a contracting party, the same sum could be received from a guarantor or indemnifier, to be calculated by reference to *quantum meruit* principles.

The Appeal Panel found that the Tribunal erred in its reasoning but arrived at the correct result. Ground 4 was dismissed accordingly

<u>Ground 5</u>

The Builder submitted that the Tribunal failed to provide adequate reasons in relation to its findings which are the subject of Grounds 1, 2 and 4 of its appeal.

The requirements for reasons were summarised in *Qushair v Raffoul* [2009] NSWCA 329.

The Appeal Panel held that, to the extent that there was merit to the complaint, it did not have to decide the ground because those issues were properly decided in the instant appeal and had no moment on the outcome.

Orders

The Owner's Appeal was allowed and the Builder's Appeal was dismissed.

The Owners – Strata Plan No 66375 v King [2018] NSWCA 170

Coram: Ward, Leeming and White JJA

Supreme Court of New South Wales

Date: 3 August 2018

BUILDING AND CONSTRUCTION – claim by owners corporation against persons alleged to be "developers" as defined by Home Building Act 1989 (NSW) s 3A – question of fact as to whether alleged "developers" were parties to building contract

APPEALS – drawing of inferences on appeal – evaluation of competing inferences – where primary judge failed to draw inference that respondents were parties to the building contract

BUILDING AND CONSTRUCTION – whether developers liable for "design defects" – statutory construction of Home Building Act 1989 (NSW) ss 18B and 18C – scope of notional contract pursuant to s 18C – whether breach of statutory warranty pursuant to s 18B(c)

Facts

David and Gwendoline King acquired the land at Camperdown in 1990 and used the warehouse complex on the land for a number of years in their furniture business.

In or about February 2000, the Kings engaged Beach Constructions Pty Ltd (**Builder**) to redevelop the warehouse to construct a mixed residential and commercial strata development on land owned by the Kings.

They were also sole directors of the developer, Meridian Estates. Meridian Estates engaged Beach Constructions to construct the development.

The contract only covered construction and contained no design obligations.

Works commenced on 26 February 2000. After the development was completed, the Kings sold the property and the Owners Corporation became the immediate successor in title to the common property.

It was only after the sale that design defects were discovered. Numerous design defects became apparent after the units had been sold, including fire and safety defects, acoustic defects, seals on doors to goods lifts, absence of heat detectors in the residential units, and inadequate provision for stormwater overflow in the balconies' drainage system. These defects arose because of errors in the design plans and specifications, not the builder's construction work, which was completed in accordance with those plans and specifications.

First Instance

The Owners Corporation brought a claim for various defects that exist within the development.

The Owners Corporation argued that the Kings were developers and therefore bound by section 18C of the HBA. Section 18C (now section 18C(1)) provided that:

> "*a person who is the immediate successor in title to … a developer who has done residential building work on land is entitled to the benefit of the statutory warranties as*

> *if the … developer were required to hold a contractor licence and had done the work under a contract with that successor in title to do the work*.'

The purport of the provision is to ensure that the successor benefits from the statutory warranties under the Act.

The Owners Corporation argued that they had a notional contract under section 18C of the Act and that this contract included the statutory warranties in section 18B.

It was not contested that the design defects contravened the Building Code of Australia.

The three questions to be determined by the Court at first instance were:

- Whether the Kings fell within the meaning of 'developers' as set out in the Home Building Act.
- Whether the Kings were liable for the defects.
- Whether the Kings' liability extended to the defects that were the subject of the claim.

Decision at First Instance

The court held that the Kings were not 'developers' within the meaning of the Home Building Act.

Section 3A of the HBA defines that a developer is 'an individual, a partnership or a corporation on whose behalf residential building work is done in the circumstances set out in subsection (2)'.

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

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

The agency argument was rejected by the Court on two grounds. If the parties intended Meridian to act as agent to the Kings then the documents would have said so, but remained silent.

Secondly, if Meridian was acting as agent of the Kings, the agency was not disclosed. An exception to the principle that an undisclosed principal may sue and be sued on a contract exists where the relevant contract prevents an assignment without consent.

The AS2124 contract contains such a prohibition against assignment without consent and the court accepted that Meridian was not acting as agent for the Kings when it engaged the Builder.

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

The Appeal

The Owners Corporation appealed the decision. The appeal was distilled to two fundamental questions by Ward JA after reviewing the detailed notice of appeal. Those two questions were:

- Whether the primary judge drew the proper inference on the issue as to whether the Kings were parties to the construction contract with Beach, and therefore developers within the meaning of s 3A of the *Home Building Act*
- Whether (if the Kings are found to be developers) the Kings are liable for breach of statutory warranties for what the primary judge described as design defects.

Were the Kings Developers?

The Court of Appeal unanimously held that the Kings were 'developers' within the meaning of section 3A of the Home Building Act. This was a finding that largely turned on the facts of the case. The court inferred from site meeting minutes that it was most likely that the Kings had executed the construction contract in their personal capacities. This was putting aside the submissions advanced on behalf of the Owners Corporation that adverse Jones v Dunkel inferences ought to have been drawn by the fact that neither the Kings nor Mr Bonus gave evidence.

The Court of Appeal held that the matters relied upon by the primary judge as tending against the conclusion that the Kings executed the contract did not outweigh the conclusion to be drawn from the progression of events recorded in the minutes.

Reference was made to the principles articulated by the High Court in *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5, namely that “where direct proof is not available it is enough [if] the circumstances appearing in the evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture” (and see also *Holloway v McFeeters* (1956) 94 CLR 470; [1956] HCA 25 at 480-481 per Williams, Webb and Taylor JJ).

Ward JA thereby inferred that the Kings did sign the contract documents, which named them and Meridian as Principal to the contract (“David & Gwen King/Meridian Estates P/L”).

As to the significance of the conclusion that it should be inferred that the Kings did sign the Formal Instrument of Agreement, that raises the question as to whether it should be inferred that they did so in their personal capacities or only as directors of Meridian.

Her Honour cited *Clark Equipment Credit of Australia Ltd v Kiyose Holdings Pty Ltd* (1989) 21 NSWLR 160, in which Giles J, having considered what was said in *National Commercial Banking Corporation of Australia Ltd v Cheung* (1983) 1 ACLC 1326; *NEC Information Systems Australia Pty Limited v Linton* (1985) NSW ConvR 55-240 and *Scottish Amicable Life Assurance Society v Reg Austin Insurances Pty Ltd* (1985) 9 ACLR 909, concluded that the proper approach in determining whether a signatory has assented to be personally bound is to ascertain the objective (not subjective) intention as to that issue, having regard to the construction of the document as a whole and the surrounding circumstances.

Her Honour found that the description of the Principal as “David & Gwen King/Meridian Estates P/L” was a powerful indicated that the parties’ objective intention was that each of the Kings and Meridian was to be bound by the contract documents.

Were the Kings liable for breaching a statutory warranty?

Ward JA held that a developer's liability for breaching statutory warranties covered all work done on behalf of the developer, not just work done under the contract between the developer and builder.

Her Honour commenced the analysis by reference to the well settled principles of statutory construction that had been recently restated by the High Court in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose [citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [69]-[71]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 at [47]]. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense [citing *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2]. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

Her Honour emphasised that the main regulatory purpose of section 18C was to ensure immediate subsequent purchasers could have recourse to the person responsible for defective building work where there is otherwise no legal relationship.

A developer cannot escape liability for breaching statutory warranties simply because the breach related to work beyond the scope of its particular building contract with the builder.

Ward JA by contrast considered that the contract between Owners Corporation and the Kings was wider than the scope of the contract between the builder and developer. Her Honour relied on three examples to support this proposition.

- Section 18C referenced the four categories of persons who might be party to a notional contract (an owner-builder, a holder of a licence, a former holder and a developer).
- Section 18C is not predicated on the existence of an actual contract.
- Her Honour considered cases in which a developer may be liable to an Owners Corporation for a decision about design and planning, even though the builder was not at fault. Her Honour referred to the cases of *Pisano v Dandris* [2014] NSWSC 1070; C*han v Acres* [2015] NSWSC 1885; A*tkinson v Crowley* [2011] NSWCA 194 in aide of this statutory construction.

Her Honour did not accept that the only rights possessed by a successor in title against a developer, pursuant to s 18C, are those rights which the developer had against the builder pursuant to its actual contract with that builder.

Her Honour further held that and the Kings' liability to the Owners Corporation *is* coterminous with the liability of Beach to the Kings, I would conclude that the Kings remain liable for breach of the warranty implied by s 18B(c). This is because, under the actual building contract, Beach have impliedly warranted that the work done in accordance with the plans and specifications will comply with the law and, as White JA has explained, the work done did not do so.

Ward JA therefore allowed the Appeal.

Leeming JA (and White JA) both concurred with the expressed view of Ball J and held that the scope of the notional contract created between the developer and subsequent owner by section 18C of the HBA was limited to the terms of the building contract between the developer and builder.

White JA held there was insufficient reason to depart from the view of the Court of Appeal in *The Owners – Strata Plan No. 64757 v MJA Group Pty Ltd* (2011) 81 NSWLR 426; [2011] NSWCA 236 that where there is a contract between the developer and the builder, s 18C requires the creation of a notional contract between the developer and the owners' corporation on the same terms as the actual contract between the developer and the builder.

Further Leeming and White JJA reasoned that section 18C was intended to ensure that subsequent homeowners had the benefit of statutory warranties in cases where there was no contract for residential building work. Section 18C did not operate to widen the scope of the notional contract over and above that of the actual construction contract.

Leeming JA dissented and found that the Kings did not breach the statutory warranty implied by section 18B(c) of the HBA because the statutory warranties should not be construed so as to impose on a builder liability for failing to identify defects in plans and specifications that it had not been engaged to prepare. To so construe the provision would be counter-intuitive.

Leeming allowed the appeal on a more confined basis than that of Ward and White JJA.

White JA agreed with Leeming JA's view that s 18C requires the making of the counter-factual assumptions to which his Honour refers and that leads to the conclusion that the written contract included the plans and specifications for the residential building work that were contained in Bonus' building contract.

His Honour held, however, that the Kings were liable for breaching the warranty that the building work will comply with the law. It did not matter that the Builder had complied with the plans and specifications of the construction contract; the work ultimately did not comply with the Building Code of Australia.

His Honour examined the operation of Section 18B, holding that the statutory warranties can be read together. The builder warrants both that the work will be carried out in accordance with the plans and specifications and that it will comply with the law. Impliedly the builder warrants that the construction of the work in accordance with the plans and specifications will comply with the law. The order of precedence does not mean that s 18B(c) has no application if the non-compliance with the law is the result of design defects in the plans and specifications

Accordingly, the developer warrants the same, as a corollary, by way of the notional contract created by section 18C of the HBA.

White JA accordingly agreed with the orders made by Ward JA.

The Owners – Strata Plan 81837 v Multiplex Hurstville Pty Ltd [2018] NSWSC 1488

Coram: Stevenson J

Supreme Court of New South Wales

Date: 4 October 2018

BUILDING AND CONSTRUCTION – separate questions – "owner" – Home Building Act 1989 – whether development manager and another party named in development management agreement were owners and thus developers of land for the purposes of the Home Building Act 1989

BUILDING AND CONSTRUCTION – separate questions – "contract to do residential building work" – Home Building Act 1989 – development management agreement – whether development management agreement is a contract to do residential building work

MISLEADING OR DECEPTIVE CONDUCT – separate questions - representations made to principal certifying authority under Environmental Planning and Assessment Act 1979 – whether made in trade or commerce

Facts

In June 2002 Sydney Land Holdings Pty Ltd ("SLH") purchased an industrial site in Hurstville ("the Property").

In June 2004, SLH obtained development consent for redevelopment of the Property as a mixed residential, retail and commercial development comprising seven buildings ("the Project"). It became the registered proprietor in July 2004.

On 22 June 2005 SLH, and a number of other companies, including SLH 22 Pty Ltd, entered into a "Development Management Agreement" ("the DMA") with Multiplex Hurstville Pty Ltd. By the DMA, SLH and the other parties appointed Multiplex as development manager of the Project.

By the DMA Multiplex:

1. was authorised to and obliged to select a builder to construct the Project and procure that the builder enter into a building contract with Multiplex to carry out the Project works; and
2. agreed to ensure that the builder was the holder of licence under the *Home Building Act 1989* (NSW) ("the HBA") to the extent that the Project works involved residential building work within the meaning of the HBA.

The DMA contained detailed provisions concerning the manner in which Multiplex would manage the development. There were 12 parties to the DMA. Apart from SLH and Multiplex, the deed included eight companies which were together defined as the "Trustees". SLH 22 was one of the Trustees. SLH 22 it entered the DMA as trustee for the River 2 Trust No 2.

In 2007 Multiplex entered into a Design and Construct contract ("the D&C Contract") with Baseline Constructions Pty Ltd to construct the Project. Baseline had a contractor licence under the HBA and was permitted to do the work. Baseline carried out the work.

Multiplex was not licensed to carry out residential building work. The DMA contemplated that up to seven buildings might be constructed on the Property, however, only two buildings were built before the Project was discontinued.

One of them is the Vantage building. It comprises 116 residential apartments. On 7 May 2009 Strata Plan 81837 was registered in respect of the land on which the Vantage building is erected.

On registration of the strata plan, the plaintiff Owners Corporation came into existence and became the registered proprietor of the common property of the Vantage apartments.

The Owners Corporation alleges that the Vantage building has a number of defects.

Section 18B of the HBA implies warranties into every contract to do residential building work, including warranties that the "work will be done with due care and skill" and "that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used" ("the Statutory Warranties").

The Owners Corporation had the benefit of the Statutory Warranties by reason of ss 18C and 18D of the HBA, against both SLH (as an "owner" and "developer" of the building) and Baseline (as the builder). Those warranties are evidently thought to be of no value. SLH is deregistered and Baseline is subject to a deed of company arrangement.

The Owners Corporation now looks to Multiplex and to SLH 22. It contends that those companies were "owners" and thus "developers" of the Property within the meaning of s 3A of the HBA, that it is the "successor in title" to those companies for the purposes of s 18C of the HBA and that it has benefit of the Statutory Warranties against those two companies.

The Court ordered that a number of questions be determined separately and in advance of other questions in the proceedings. The matters for separate determination are:

1. whether either Multiplex or SLH 22 was an "owner" (and thus a "developer") of the land within the meaning of the HBA;
2. if so, whether the Owners Corporation is a "successor in title" to Multiplex or SLH 22 (as "developer") for the purposes of s 18C of the HBA; and thus entitled to the benefit of the Statutory Warranties against those companies;
3. alternatively, whether the DMA was itself a contract to do residential building work and thus a contract into which the Statutory Warranties were implied; and
4. whether certain representations, made by Multiplex to a principal certifying authority ("PCA") under Pt 4A of the *Environmental Planning and Assessment Act 1979* (NSW) ("the EPA Act"), were made "in trade or commerce" for the purposes of ss 52 and 53 of the *Trade Practices Act 1974* (Cth) or Pt 5 of the *Fair Trading Act 1987* (NSW).

Was Multiplex an "owner" of the land for the purposes of the HBA?

The Meaning of Owner under the HBA

"Owner" is defined in Sch 1 of the HBA as follows:

"the only person who, or each person who jointly or severally, at law or in equity:

(a) is entitled to the land for an estate of freehold in possession, or

> (b) is entitled to receive, or receives, or if the land were let to a tenant would be entitled to receive, the rents and profits of the land, whether as beneficial owner, trustee, mortgagee in possession or otherwise."

Multiplex submitted that the definition of Owner in Schedule 1 of the Home Building Act is the same definition that has been used in land tax legislation and local government legislation. Accordingly, the wording has been considered in a great number of authorities and are apt to be considered in the instant case.

The Owners Corporation argued that that the use of authorities dealing with "analogous statutes" is of "little weight in the determination of this case" because the objects of the land tax legislation were materially different to the objects of the HBA.

The Court considered the principles to be considered when interpreting a statute.

In *Wik Peoples v The State of Queensland* (1996) 187 CLR 1; [1996] HCA 40 Brennan CJ said at 76:

> "…the ordinary rules of interpretation require that, in the absence of any contrary indication, the use in a statute of a term that has acquired a technical legal meaning is taken prima facie to bear that meaning…". (Citations omitted.)

In *Re Alcan Australia Ltd; Ex Parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96; [1994] HCA 34 at 106 the Court (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) said:

> "There is abundant authority for the proposition that where the parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already 'judicially attributed to [them]' although the validity of that proposition has been questioned". (Citations omitted.)

The definition of "owner" was inserted into the HBA by the *Home Building Amendment (Warranties and Insurance) Act 2010* (NSW) ("the 2010 Amending Act").

The 2010 Amending Act also inserted into the HBA a definition of "non-contracting owner" as well as ss 18D(1A), 18D(1B) and s 18D(2) which conferred rights on "non-contracting owners" (a matter not relevant to this dispute).

In *Ace Woollahra Pty Ltd v The Owners – Strata Plan 61424* (2010) 77 NSWLR 613, the Court of Appeal held that where the owner of land did not contract with the builder, the residential building work carried out by the builder was not done "on behalf" of the owner; and that therefore the owner was not a developer.

The object of the amendments was to remedy the difficulty perceived to result from this decision and to extend liability, as a "developer", to an owner of land even if that owner did not contract with the builder.

In 2011 further legislative amendments were made to deem the owner to be a developer in various circumstances. Both amendments were directed to broadening the ambit of those liable under the Act.

The Court held that the extended definition of owner was purposive and the legislature was aware of the judicial consideration of the definition.

Limb (a) - Was Multiplex entitled to the land for an estate of freehold in possession?

As to whether Multiplex was an owner under the Act, the Owners Corporation argued that the DMA synthesised for Multiplex an equitable or beneficial estate in the land. The Court dealt with the relevant clauses referred to by the Owners Corporation. Many of the powers referred to by the Owners Corporation that arose from the DMA were qualified by the interests of SLH, who was the owner. The Court was also quick to distinguish between income and interests arising from the land, and the contractual entitlement, pursuant to the DMA, of sums equivalent to those sums.

The Call Option

The Owners Corporation relied upon the call option in the DMA.

Unless and until Multiplex exercised the call option, its interest in the Property remained contingent. It could not call for a conveyance "or demand to exercise any of those rights to which [it was] contingently entitled" until it exercised the option: see *Barba v Gas & Fuel Corporation of Victoria* (1976) 136 CLR 120; [1976] HCA 60 at 138 (Gibbs J).

Ward JA put the matter this way in *Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd; Guan v Linfield Developments Pty Ltd* [2017] NSWCA 99 at [102]:

> "Farrands notes (*The Law of Options* at 40) that two concurrent equitable interests arise on the grant of an option: 'an immediate equitable interest…measured by the relief a court of equity will grant to the grantee to prevent the grantor from disposing of the property inconsistently with the option or acting inconsistently with conditions attaching to the option'…; and a contingent equitable interest 'measured by the relief a court of equity will decree if the option is exercised'…The reason that the latter is referred to as a contingent (or executory) equitable interest is that *until* exercise of the option the grantee has no right to call for a conveyance of the property."

If Multiplex exercised the option, Multiplex's contingent interest would be converted into an actual interest to which it could give effect by exercising its power under cl 20.1(d). Had Multiplex exercised the call option and thereby affected the transfer of the Property to itself, the relationship between the parties would have been transformed.

The Court held that none of the clauses of the DMA, taken individually, or together, compelled the conclusion that Multiplex was an "owner" within the meaning of the first limb of the definition of "owner" in the HBA. Multiplex could not deal with the Property "as its own". It could have exercised the call option. If that had happened, it would of course have become an "owner". But unless it did so, it was not.

Limb (b) - was Multiplex entitled to receive the rents and profits of the land?

The Court held that the DMA did not give Multiplex any entitlement to the rents and profits of the land; let alone one arising "directly" from its "ownership" of the Property. The DMA gave Multiplex an entitlement to a Development Management Fee that was calculated by reference to an amount equivalent to rent, licence fee or other money paid by any person for use or occupation of any part of the property. The Court held that even if the DMA provided Multiplex was entitled to rents and profits under the contract, that would not be sufficient to enliven limb (b) of the definition. That is because in order for a party to be an "owner" within the meaning of limb (b) that party must be "directly" entitled to receive such rents and profits; that is "by virtue of an estate in freehold."

Was SLH 22 an owner of the land within the meaning of the HBA

The Owners Corporation argued that SLH 22 was also an owner of the Property and that SLH held the Property on trust for SLH 22 and the other parties to the DMA. In support of this proposition, the Owners Corporation relied upon terms of documents executed by SLH and SLH 22 at the time. This was so because there was no evidence of a deed of trust or other document creating any trust relationship between SLH and SLH22. There is no evidence of any oral declaration of trust.

The Documents referred to by the Owners Corporation included:

- The Mortgages given by SLH over the Property. These documents were held to point against the existence of a trust.
- The terms of the DMA were held not to compel the conclusion that a trust relationship existed. Some provisions did contemplate the possibility that SLH may be a trustee for the Trustees but the language was not conclusive of the fact.
- The Heads of Agreement included a statement that SLH would retain income from property sales "beneficially". That statement, made in a document to which SLH 22 and the other Trustees is a party, was held to point against the conclusion of a trust relationship between SLH and the Trustees.
- A Deed of Cross Indemnity alluded to an "arrangement" that was one of trustee and beneficiary. The Court rejected the submission and found that the Deed of Cross Indemnity did not compel that conclusion.
- The accounts relied upon by the Owners Corporation were inconclusive.

The Court accepted that there appeared to have been some kind of arrangement between SLH and the various Trustees named in the DMA, including SLH 22. The Court was unable to reach any conclusion as to what that relationship was. There was insufficient evidence to support that the relationship was that of trustee and beneficiary.

Is the Owners Corporation a "successor in title" to Multiplex/SLH 22 for the purpose of s 18C of the HBA?

The Court concluded that Multiplex was not an "owner" of the Property for the purposes of the HBA. It follows that Multiplex is not a "developer" of the Property for the purposes of the HBA.

Assuming this to be incorrect Stevenson J considered whether the Owners Corporation is the immediate successor in title to Multiplex. The court held that if Multiplex was an "owner" of the Property, it was because of the contractual rights conferred upon it by the DMA.

Put another way, assuming that Multiplex was within the definition of "owner" in the HBA by operation of the DMA, it did not pass on that interest to the Owners Corporation so as to make the Owners Corporation a "successor in title" for the purposes of s 18C of the Act.

The Court held, on the same reasoning, that the Owners Corporation was not a successor in title to SLH22.

Was the DMA a contract to do residential building work?

Residential building work is defined as any work involved in, or involved in co-ordinating or supervising any work involved in the construction of a dwelling. However, the definition expressly excludes the supervision only of residential building work by any other person, if all the residential building work is being done or supervised by the holder of a contractor licence authorising its holder to contract to do that work.

The Court held that the question is whether the DMA was a contract by which Multiplex agreed to be:

1. "involved in" the construction (that is the "building process itself") of the Vantage building; or
2. "involved in" "coordinating" the construction work; or
3. involved in supervising construction work

beyond merely supervising Baseline, being the holder of a contractor licence and itself a party which, by virtue of the D&C Contract, was doing and supervising the actual building process.

The Court held that Multiplex was not, by operation of the DMA, contracted to do residential building work. It was engaged to procure the work be done by an appropriately licensed building.

Although an express provision containing words "Multiplex has not contracted to do work in contravention of, Division 1 of Part 2 of the Home Building Act" was not conclusive on the question, in the absence of any express provision that militated against this stated expression, the statement of intention contained in the provision must be afforded significant weight.

Stevenson J found that there were some provisions that were ambiguous, however, his Honour found that the intention was that Multiplex was procuring the works be carried our rather than carrying out the works itself. In so finding, his Honour relied upon the well settled principle that where a contract is ambiguous, the construction of the contract which results in the parties (or one of them) acting lawfully is to be preferred to a construction which results in the party or parties acting unlawfully: *Global Network Services Pty Ltd v Legion Telecall Pty Ltd* [2001] NSWCA 279.

Accordingly, his Honour found that the DMA was not a contract to do residential building work.

Were the representations made by Multiplex to the PCA in trade or commerce?

On 27 April 2009 Multiplex completed an "Occupation Certificate Application" pursuant to the then s 109C(1)(c) of the EPA Act in which certified "that the works have been completed in accordance with the relevant Development Consent".

That representation is said to have been misleading or deceptive. The Court was asked to decide whether any representation was made "in trade or commerce".

Conduct will only be "in trade or commerce" if it is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character: *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; [1990] HCA 17 at 604; *Houghton v Arms* (2006) 225 CLR 553; [2006] HCA 59 at 565 [32]-[33]; *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62; [2001] FCA 1106 at [165] – [166].

Generally, representations made to a statutory authority in order to satisfy a statutory condition, or to obtain an exercise of statutory power, are not made in trade or commerce. *GlaxoSmithKline Australia Pty Ltd v Pharmacor Pty Ltd* [2014] FCA 1202.

The Owners Corporation argued that the dealings between Multiplex and City Plan Services should be seen as being in trade or commerce for two reasons.

- First, City Plan Services was engaged by Multiplex on a private basis and was performing a commercial function for which it was being paid a fee. The Court held that this did not render Multiplex's conduct to be in trade or commerce.
- Second, because the obtaining of an occupation certificate was a condition precedent to the sale of the units in the development and development itself was an activity carried out in trade or commerce, the function of issuing an occupation certificate was itself in trade or commerce. The Court held that it did not follow that the representations to the PCA constituted conduct to be in trade and commerce.

Accordingly, the Court held that the representations made by PCA were not representations made in trade or commerce.

Tom v Jenkins [2018] NSWCATCD 7

Coram: Senior Member Goldstein

Civil and Administrative Tribunal

Date: 8 March 2018

HOME BUILDING ACT - Time for bringing proceedings – section 48K(3) of the Home Building Act 1989

Facts

In 2009, Mr Tom constructed a residential property. Prior to construction, the owners had engaged Mr Jenkins to prepare a geotechnical report and a footings and slab plan for the residence. The engineer prepared the report and plan in May 2009. Tom followed the footings and slab plan in constructing the residence.

There was no dispute that Tom's claim against Jenkins is a building claim for the purposes of the *Home Building Act 1989* and that the Tribunal had the jurisdiction to determine the claim.

Structural defects in the residence became known or manifest in August 2014.

On 2 August 2016, the builder brought an action against the engineer seeking indemnification for any liability in respect of the owners' separate proceedings against the builder for the cost of demolishing and rebuilding the residence.

The engineer argued that the builder was statute barred from bringing an action against the engineer as more than 6 years had passed since the report and plan were prepared. The builder argued that the 6-year limitation period did not start to run until the defects became known or manifest. As the defects only became known in August 2014, the builder contended that the cause of action did not accrue until August 2014.

Decision

The Tribunal dismissed the builder's claim on the basis that it had no jurisdiction to determine the matter by operation of section 48K(3) of the HBA.

Under section 48K(3) of the HBA, the Tribunal has no jurisdiction in respect of any building claim relating to building goods or services if the claim is lodged more than 3 years after the date of supply.

Provision by the engineer of a geotechnical report and a footings and slab plan for the construction of a residential building satisfied the statutory definition of 'building goods or services'.

As the engineer's services were supplied in May 2009, no claim in respect of such works could be brought before the Tribunal after May 2012. Since the builder's claim was brought in 2 August 2016, it was time barred notwithstanding that the relevant defects only became known in August 2014.

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

Coram: McDougall J

Supreme Court of NSW

Date: 6 March 2018

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

Facts

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

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

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

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

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

The adjudication

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

Decision

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

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

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

Was there a reference date?

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

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

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

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

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

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

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