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# BUILDING AND CONSTRUCTION CASES 2019

## A REVIEW OF BUILDING AND CONSTRUCTION CASES AT FIRST INSTANCE AND ON APPEAL DECIDED IN NEW SOUTH WALES FROM JANUARY TO DECEMBER 2019

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## *Advanced National Services Pty Ltd v Daintree Contractors Pty Ltd*

## [2019] NSWCA 270

Coram: Gleeson, White JJA and Barrett AJA

Court: New South Wales Court of Appeal

Date: 5 November 2019

**CONTRACTS** — performance — discharge by performance — valid termination of cleaning services contract — express term prohibiting use of unauthorised subcontracted labour — where unauthorised subcontractors undertook 90 per cent of cleaning services — whether cleaning obligation could be performed vicariously — consideration of personal contracts — no claim for quantum meruit..

### Facts

Daintree Contractors Pty Ltd (**"the Principal"**) entered into a contract with Advanced National Services Pty Ltd (**"the Contractor"**) for the provision of commercial cleaning services.

Clause 4.5 of the agreement expressly prohibited the Contractor from assigning or subcontracting any portion of the contract without the prior written consent of the Principal. Despite this, the Contractor went on to subcontract 90 per cent of the cleaning services without approval.

The Principal purported to terminate the contract for a number of alleged breaches. The Contractor claimed payment of monies owed under the contract for cleaning services that it had provided.

### Decision of the District Court of New South Wales and Reason for Appeal

At first instance, the District Court of NSW held that the Principal had validly terminated the contract as the Contractor's breach of cl 4.5 constituted a fundamental breach of contract.

The Court also held that the Contractor was only entitled to 10% of the amount claimed as this represented the portion of work validly completed under the contract. The remaining 90% could not be claimed as it represented work undertaken by unauthorised subcontractors in breach of cl 4.5.

The Contractor appealed to the Court of Appeal. On appeal, the Contractor argued that the agreement could not be accurately characterised as a personal contract. This was so because it did not involve an element of personal skill or personal confidence. The Contractor contended that it was a contract to produce a result (i.e. commercial cleaning services). According to this analysis, the Contractor's obligation to provide cleaning services could be performed vicariously by unauthorised subcontractors.

### Decision

The New South Wales Court of Appeal dismissed the appeal and held that:

- The contract was not simply a contract to produce a result. While the performance of cleaning services did not require any particular skill, the parties were not indifferent to who performed the work and the conditions of such work.

- Pursuant to the terms of the contract, the Contractor was required to undertake cleaning services personally unless the Principal approved the use of subcontracted labour in writing.

- Accordingly, the Contractor was not entitled to the sum of money attributable to cleaning services undertaken by unauthorised subcontracted labourers.

***A-Tech Australia Pty Ltd v Top Pacific Construction Aust Pty Ltd***

**[2019] NSWSC 404**

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 12 April 2019

**BUILDING AND CONSTRUCTION —** construction contracts — Building and Construction Industry Security of Payment Act 1999 (NSW) — application for recovery of "claimed amount" as a debt due — validity of payment claims — whether payment claims sufficiently identified contract work — validity of service of payment claims.

**BUILDING AND CONSTRUCTION** — construction contracts — Building and Construction Industry Security of Payment Act 1999 (NSW) — cross-claim for breach of contract and set off for damages — contractual effect of consent orders — whether agreement by consent bore contractual force such that application for judgment could not be sought in advance of determination of cross-claim — whether notwithstanding agreement cross-claim may be used as a defence pursuant to s 15(4) — whether s 34 would otherwise invalidate an agreement purporting to contract out of the jurisdiction of the Act.

**Facts**

These proceedings concerned a contract between Top Pacific Construction Pty Ltd (**"Head Contractor"**) and A-Tech Australia Pty Ltd (**"Subcontractor"**). The contract required the Subcontractor to supply and install windows and sliding doors in a development being constructed by the Head Contractor.

The Subcontractor commenced proceedings in September 2018 under the *Building and Construction Industry Security for Payment Act 1999* (NSW) (**"the Act"**) for the payment of two invoices amounting to $466,120.80. In so doing, the Subcontractor contended that the invoices constituted payment claims within the meaning of the Act; that they were validly served on TPC; and that TPC failed, within the time allowed by the Act, to serve payment schedules contesting them. Specifically, the Subcontractor sought to recover the amounts as debts due under s.15 of the Act.

A cross-claim was filed by the Head Contractor alleging that the works completed by the Subcontractor were defective. The Head Contractor claimed damages for breach of contract and a set-off of those damages against any amounts which might be found due to the Subcontractor on its claim.

Relying on s 15(4) of the Act, the Subcontractor argued that the Head Contractor's cross-claim could not be used as a defence against its claim.

In November 2018, a motion was filed on behalf of the Subcontractor seeking summary judgement. The application was dealt with on 7 December 2018 by agreement and the Court made orders by consent that required the Head Contractor to pay the amount claimed by the Subcontractor into Court. Further directions were made in respect of the cross-claim.

In February 2019, an order was made to the effect that the Subcontractor's claim was to be determined separately, and in advance, of the Head Contractor's cross-claim. This was contested by the Head Contractor who argued that the agreed resolution, reflected in the consent orders on 7 December 2018, constituted a contractual settlement preventing the Subcontractor from seeking judgment on its claim before the cross-claim was determined. To this, the Subcontractor argued that there was no contractual obstacle to its claim, and even if there was, it was invalidated by s 34 of the Act which prohibits contracting out of the Act's provisions.

**Contractual effect of 7 December 2018 Consent Orders**

The Court found that while an agreement for the resolution of an application to the Court by means of consent order may satisfy the requirements of a valid contract, the Court is never bound by such an agreement. Indeed, the Court can never be compelled to make consent orders; rather, the Court may always choose, when presented by consent orders, to reject them, even though they are agreed by both parties.

With respect to the 7 December consent orders, the court found that no promise was made by the Subcontractor to have it claim heard in conjunction with the head contractor's cross-claim.

**Effect of s 34 of the Act**

The Court gave further consideration to s 34 of the Act which renders void any provision in an agreement which causes "the operation of the Act" to be excluded, modified, or restricted. The Court determined the "operation of the Act" was not limited to the creation of substantive rights, but extended to matters of procedure. This included s 15 upon which the Subcontractor's claim was based. And so, even if it could be said that the Subcontractor was contractually bound not the pursue its claim until determination of the cross-claim, s 34 would have operated to nullify such an agreement.

**Decision**

The Court found in favour of the Subcontractor and concluded that:

(1) the Subcontractor was entitled to pursue its claim for judgment under the Act despite the consent orders made on 7 December;

(2) both invoices were valid payment claims under the Act; and

(3) the Head Contractor failed to respond to either invoice with a payment schedule within the time allowed by the Act.

However, given that the Head Contractor indicated that it would seek a stay of proceedings, the Court made an order to adjourn the proceedings for the entry of final orders and the hearing of any application by the defendant for a stay.

## *A-Tech Australia Pty Ltd v Top Pacific Construction Aust Pty Ltd (No 2)*

## [2019] NSWSC 624

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 27 May 2019

**BUILDING AND CONSTRUCTION** — construction contracts — Building And Construction Industry Security Of Payment Act 1999 (NSW) — application for stay of enforcement of judgment entered in favour of the plaintiff — application opposed and orders sought for payment of monies previously paid into court pending determination of claim for judgment — where owner or head contractor is liable to contractor but has an offsetting claim against that contractor under the Building And Construction Industry Security Of Payment Act 1999 (NSW) — principles for the grant of a stay of payment pending determination of claim — orders for stay of enforcement of judgment conceptually distinct from orders for release of monies paid into court — interim nature of entitlements under the Act relevant to application for stay where evidence establishes that payment will be final for practical purposes — evidence of $1 company does not itself establish that monies paid into court could not be later recovered from owner or head contractor — application for stay sought on further basis of prior agreement by consent that plaintiff's application for summary judgment be dismissed in return for monies to be paid into court — prior agreement compromised immediate application for summary judgment but did not prevent determination of contractor's claim and payment of judgment sum.

### Facts

This case follows on from the judgement in *A-Tech Australia Pty Ltd v Top Pacific Construction Aust Pty Ltd* [2019] NSWSC 404. The case concerned a claim made by A-Tech Australia Pty Ltd (**"Subcontractor"**) against Top Pacific Construction Pty Ltd **("Head Contractor"**) for payment of two invoices with interest amounting to $487,324.38.

In the first judgment the Court held that the Subcontractor was entitled to the amount claimed under s 15 of *the Building and Construction Industry Security for Payment Act 1999* (NSW) (**"the Act"**). However, at issue was whether the Head Contractor should be granted a stay of enforcement of judgement. The Subcontractor opposed this application and instead sought an order that the money previously paid into Court ($466,120.80, together with any interest which has accrued) be paid out to it.

While the question of whether moneys in court should be paid out is separate from the question of whether a stay should be granted, in the present case, the fate of the stay application would determine whether the money was to be paid out.

**Decision**

The Court recognised that where an owner or head contractor is liable under the Act to make a payment to a contractor, but has a claim against that contractor, the Court may in some circumstances grant a stay of payment pending the determination of the claim.

The Court rejected the application in this instance. This was because although the consent orders of 7 December 2018 contemplated the possibility that the Subcontractor's claim and Head Contractor's cross-claim would be dealt with together, all the parties actually agreed to was the dismissal of the application for summary judgment in return for payment into court. There was no express agreement that the two claims be heard together or that the subcontractor would be unable to seek payment in the meantime.

The Court made the following orders:

(1) Judgment be entered in favour of the plaintiff in $487, 324.38.
(2) The defendant's application for a stay of enforcement of the judgment to be refused.
(3) The sum of $466,120.80 paid into Court by the defendant together with any interest accrued on that sum be paid out to the plaintiff.
(4) The defendant to pay the plaintiff's costs of the proceedings on its claim.

## *BH Australia Construction Pty Ltd v Kappeller*

## [2019] NSWSC 1086

Coram: Lemming JA

Court: Supreme Court of New South Wales

Date: 22 August 2019

**CONTRACT —** wholly written contract — dispute as to identity of builder to perform residential building — whether regard may be had to post-contractual conduct — where contract identified one company as builder but gave another company's licence and insurance details — parties taken to have agreed to a contract which was lawful and enforceable.

### Facts

Mr. Kappeller and his wife (**"the Owners"**) entered into a standard form building contract for the construction of their home. The key question for determination in this case was whether "Blissful Constructions Pty Ltd" (later renamed "BH Australia Constructions Pty Ltd") (**"BH Constructions"**) or "Blissful Developments Pty Ltd" (**"BH Developments"**) was the relevant contracting party.

Previously, the Consumer and Commercial Division of NCAT had identified BH Developments as the relevant contracting party. However, the Appeal Panel later identified BH Constructions as the relevant contracting party. The Owners sought to appeal this decision.

The confusion surrounding the identity of the builder was caused by a number of inconsistencies and errors within the terms of the contract. Where the terms of the contract described the relevant builder as BH Developments and cited its ABN, it referenced the licence number and insurance details of BH Constructions. BH Developments was neither licensed nor insured. Furthermore, while the contract was signed by the sole director and secretary of BH Constructions, beneath that signature was a note which read "signed for and on behalf of Blissful Developments Pty Ltd".

In identifying who the relevant builder was, a range of post-contractual documents were tendered. These included:

- A development application lodged by BH Developments to Maitland City Council;
- Three invoices in the name of BH Developments sent to the Owners;
- A statement of insurance cover which identified BH Constructions as the builder;
- A certificate concerning a framework inspection which was expressed to have been requested by BH Constructions;
- A letter from the Owners' solicitors which was addressed to BH Developments, that referred to BH Developments as the builder, and noted that BH Developments was not licensed or insured; and
- A response letter from the director of BH Constructions offering to assign and novate the contract to BH Constructions which was licensed and insured.

**Decision**

The Court held that such post-contractual evidence could not be used to determine the identity of a contracting party where the contract in question was wholly written.

While the Appeal Panel was incorrect in its consideration of post-contractual conduct (and documents), the Court held that it had arrived at the correct decision in identifying BH Constructions as the builder. This was because there had been an obvious mistake on the face of the contract; where the contract referred to the name and ABN of BH Developments, it listed the insurance and licence number of BH Constructions. The Court found that the parties must have intended that BH Constructions be the contracting party as neither party could reasonably have intended to enter into a contract under which the builder was both unlicensed and uninsured.

## *BM Sydney Building Materials Pty Ltd v AWT Building Group (Aust) Pty Ltd; BM Sydney Building Materials Pty Ltd v AWT Building Pty Ltd; Harpro Group Pty Ltd v BM Sydney Building Materials Pty Ltd*

**[2019] NSWSC 421**

Coram: Hammerschlag J

Court: Supreme Court of New South Wales

Date: 16 April 2019

**EQUITY** — estoppel — debtors raised, as a defence to admitted debts, an equitable estoppel based on a disputed oral conversation in which it alleged that the plaintiffs agreed, on certain conditions, not to claim payment — debtors claimed that they suffered prejudice in buying goods from the plaintiff and in procuring another party not to sue the plaintiffs on a different claim — approach to be taken to factual findings where the terms of an oral conversation are relied upon; HELD: conversation not established — no sufficient basis to ground an estoppel in equity

**EQUITY** — alleged breaches of statutory and equitable duties on the part of a de facto director and knowing participation by his company in the alleged breaches — alleged breaches consist of procuring payment to another party of monies due to the plaintiff object of the duties — where the recipient lent money to the plaintiff and the payments were made in reduction of the loan; HELD: no breach established and in any event no loss caused to the plaintiff — claim dismissed

### Facts

Mr Teng of AWT Building Pty Ltd and AWT Building Group Pty Ltd (together, **"AWT"**) and Mr Lee of BM Sydney Building Materials Pty Ltd) (**"BMS"**) entered into a joint venture agreement to import and supply concrete panels from China.

The venture was conducted through a company, Harpro Group Pty Ltd (**"Harpro"**) that was incorporated on 6 January 2014. At the time of incorporation, Harpro had three issued shares – two were held by Mr Teng and one by Mr Lee's nominee.

It was envisaged that AWT would be responsible for arranging the importation of the panels and dealing with technical issues, and that BMS would be in charge of sales.

The facts of the business dealings between the parties may be summarised as follows:

- Harpro's day-to-day operations were funded by BMS.
- BMS loaned Harpro $509,389.39 which represented expenses recorded in the ledger of Harpro for the period between 17 January 2014 and 17 February 2015.
- On 14 August 2014, in suspicious circumstances, the electronic records of Harpro's company details held by ASIC were changed to remove Mr Teng as a director and

to reflect the transfer of his shares to Ms Le. Mr Teng was not aware of this change.

- On 18 August 2014, Harpro entered into a written Distribution & Stock Transfer Agreement with Hume Plasterboard Pty Ltd (**"Hume"**). Under this agreement, Hume agreed to purchase Harpro's existing stock of panels at a price which was less than the market rate. Mr Teng was not aware of this agreement.

- Of the $297,794.60 payable to Harpro, Hume only paid a sum of $150,000; the entirety of which went directly to BMS thereby reducing BMS' loan to Harpro.

- Mr Teng alleged that he and Mr Lee orally agreed in December 2014 that Mr Teng would refrain from commencing legal proceedings against Mr Lee in respect of the share transfer and the Hume transaction. This was provided that BMS continued to supply building materials to AWT. Mr Lee denied the existence of this agreement.

- On 24 March 2015, AWT sent a payment schedule to BMS setting out payments it would make in instalments to BMS for goods sold and delivered.

- In early June 2015, AWT gave BMS a cheque for $37,265.04 for goods sold and delivered. However, the cheque was dishonoured on presentment.

- AWT did not pay for building materials supplied by BMS, and AWT continued to order from BMS further building materials amounting to $811,809.05.

**Claims**

In this case, three suits where heard together:

(1) BMS commenced proceedings against AWT Building Group (Aust) Pty Ltd for goods sold and delivered having a total invoice price of $449,190.92.

(2) BMS also sued AWT Building Pty Ltd for goods sold and delivered having a total invoice price of $275,558.15.

(3) Harpro commenced proceedings against Mr Lee for breaches of his statutory and fiduciary duties that he owed Harpro (as a de facto director of Harpro). The breaches involved procuring, to Harpro's disadvantage, payment to BMS of monies owed to Harpro by third parties. Harpro claimed these amounts as damages or equitable compensation.

**Debt Proceedings (BMS v AWT)**

While it was common ground that AWT had not paid BMS for the goods sold and delivered, AWT sought to argue that BMS should be estopped from claiming the amount owed in view of AWT's reliance on the oral agreement.

Whether AWT could rely on estoppel was dependent upon whether it could successfully establish, on the probabilities, that the agreement conversation occurred.

His Honour held that where a party seeks to rely upon spoken words as a foundation for a cause of action, the conversation must be proved to the reasonable satisfaction of the Court. To this, his Honour provided a useful statement of principles for determining whether reasonable satisfaction is achieved:

(1) First, the Court must feel an actual persuasion of the conversation's occurrence or its existence. In the absence of reliable contemporaneous record or other satisfactory corroboration, a party may face serious difficulties of proof

(2) Further, reasonable satisfaction is not a state of mind that is obtained or established independently of the nature and consequences of the fact or facts to be proved. Rather, the Court is to consider
   (a) the seriousness of an allegation made;
   (b) the inherent unlikelihood of an occurrence of a given description; and
   (c) the gravity of the consequences flowing from a particular finding

(3) Finally, reasonable satisfaction should not be produced by:
   (a) inexact proofs;
   (b) indefinite testimony; or
   (c) indirect inferences

Applying these principles to the present case, his Honour felt no actual persuasion of the existence of the oral agreement.

It was further noted that even if AWT had established the oral agreement, it would nevertheless have failed to adequately establish the alleged prejudice suffered that would found the estoppel. This was because there would have been no prejudice to have to pay the proper price for goods bought and received.

**Breach of Duty Proceedings (Harpro v BMS)**

Harpro conceded that if the payments "diverted" to BMS were in discharge of Harpro's loan obligations to BMS, its claim must fail because Harpro would not have suffered any detriment by BMS being paid.

The Court rejected Harpro's contention that BMS' advances were by way of equity and it would ultimately have recouped its investment by receipt of dividends out of Harpro's profits. This was because Harpro's own accounting records record the loan and the repayments.

Harpro 's claim was therefore dismissed.

## *Boss Constructions (NSW) Pty Ltd v Rohrig (NSW) Pty Ltd*

**[2019] NSWSC 374**

Coram: Hammerschlag J

Court: Supreme Court of New South Wales

Date: 5 April 2019

**BUILIDNG AND CONSTRUCTION — CONTRACT —** where each party seeks to sue for breach of contract — where various versions of contracts were exchanged — where there is no version of contract executed by both parties — where each party asserts a different contract; HELD: no binding contract; claims of both parties fail.

### Facts

This case concerned a building company, Rohrig (NSW) Pty Ltd (**"Rohrig"**), and its dealings with an engineering and construction company, Boss Constructions Pty Ltd (**"Boss"**).

Rohrig had been contracted by Penrith Anglican College to design and construct a performing arts centre in Orchard Hills, NSW. The works included the fabrication and supply of structural steel for which Boss was engaged by Rohrig to complete (**"Works"**).

What ensued was a lengthy course of dealings between the parties between November 2017 and July 2018 regarding the terms of Boss' engagement. While the parties exchanged a number of formal contract documents, neither party signed the documents nor communicated acceptance.

The parties later fell into dispute, with each alleging breach on the part of the other.

- Boss sought to claim payment of unpaid invoices for the amount of $224,928.88 including GST, plus $200,000 in damages for Rohrig's termination of the contract.

- Rohrig cross-claimed for breach of contract and claimed liquidated damages and loss of bargain damages. It alleged that the late completion of the Works by Boss and subsequent termination required the engagement of a second contractor.

The difficulty that arose was that both Boss and Rohrig were seeking to enforce different contracts.

### Decision

The Court held that it may be appropriate, where there have been lengthy dealings between the parties, to strive to find the existence of some binding contract.

However, the Court found in this instance that on an objective assessment of the parties' behaviour, no contract could be said to have been formed. Rather, the conduct of each party was characterised by the Court as seeking to impose, unsuccessfully, its terms on the other. Accordingly, the claim and cross-claim were both dismissed.

## *Canterbury-Bankstown Council v Payce Communities Pty Ltd*

## [2019] NSWSC 1419

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 18 October 2019

**BUILDING AND CONSTRUCTION** — whether pursuit of statutory adjudication process under the Building and Construction Industry Security of Payment Act 1999 (NSW) and concurrent Supreme Court proceedings constitutes an abuse of process — whether conduct of concurrent processes caused insurmountable prejudice to plaintiff — whether prejudice caused unintentionally or by design — held no abuse of process

**CIVIL PROCEDURE** — implied undertakings — whether implied undertaking applies to list response and particulars — release nunc pro tunc

### Facts

On 12 September 2014, Canterbury-Bankstown Council (**"Council"**) entered into an Umbrella Agreement with Payce Communities Pty Ltd (**"Payce"**) for the redevelopment of an existing Senior Citizens Centre located in Riverwood, NSW. The Umbrella Agreement contained a number of other agreements, including a Fit Out Agreement under which Payce was required to complete the fit out of a library and Senior Citizens Community Centre.

### Adjudication Application

In October 2018, Payce served a payment claim on Council seeking the amount of $1.772 million in respect of 41 items of variation works. Council responded with a payment schedule of nil. Payce referred the matter to adjudication where it was determined that Payce was not entitled to payment as there was no reference date available in respect of the claim.

### Supreme Court Proceedings

In April 2019, Payce commenced Supreme Court proceedings against Council for payment of $1.748 million in respect of a number of disputed variations. In September 2019, while the Supreme Court proceedings were on foot, Payce served its final payment claim for the amount of $1.666 million (incl GST) on Council. Attached to the payment claim was the report of expert witness, Mr Daubney, who was provided with the Council's defence documents in his brief.

In October 2019, Council served a payment schedule in response stating that it proposed to pay nil. Council also commenced court proceedings to restrain Payce from lodging any adjudication application pursuant to s 17 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**"SoP Act"**).

The basis of Council's application was that it would be abuse of process for Payce to invoke the SoP Act adjudication regime. This was argued to be the case given that Payce was already pursuing Supreme Court proceedings for essentially the same claim and that this would cause

Council to suffer significant prejudice if it were required to respond to both processes concurrently. Council argued that Payce had obtained an unfair advantage by using the Supreme Court proceedings to obtain information that assisted them in the Adjudication process in a manner inconsistent with that regime. This rendered Council at a disadvantage in that it required to meet a case in Adjudication that would otherwise have taken months to answer in the Supreme Court proceedings. This, Council argued, rendered the Adjudication process an abuse of process. Further, it was asserted by Council that Payce had breached the Harman Undertaking by using Council's defence in aid of its final payment claim.

**Decision**

*Abuse of Process*

It was held that unless there is some additional circumstance, such as an “improper or illegitimate purpose” or the use of a process that is “seriously or unfairly burdensome, prejudicial or damaging,” the concurrent pursuit of claims under the SoP Act and in court does not constitute an abuse of process.

Here, the Court was not satisfied that the Council had shown that allowing Payce to invoke the adjudication process would interfere with the orderly preparation and presentation of its case. Payce was therefore free to refer the matter to adjudication under the SoP Act whilst maintaining the existing Supreme Court proceedings.

*Implied Undertaking*

On the question of whether Payce had breached the implied undertaking by serving on Council a copy of Mr Daubney's expert report as an attachment to its final payment claim, the Court turned to the purpose of the Harman Undertaking. It was held that its purpose was to protect the privacy of persons disclosing documents under the compulsion of the Court.

Given that the Council’s defence documents were not documents produced under compulsion, they were not subject to the Harman Undertaking. Payce was therefore not in breach of the implied undertaking.

## *Canterbury-Bankstown Council v Payce Communities Pty Limited*

## [2019] NSWSC 1803

Coram: Ball J

Court: Supreme Court of New South Wales

Date: 18 December 2019

**BUILDING AND CONSTRUCTION —** Building and Construction Industry Security of Payment Act 1999 (NSW) — adjudication determination — whether to set aside determination — whether determination void — whether relevant payment claim related to more than one construction contract — whether legislation does not apply by virtue of exclusion in section 7(2)(c) of legislation — whether legislation does not apply to relevant contracts because consideration payable was to be calculated otherwise than with reference to the value of the relevant work — whether denial of natural justice because adjudicator determined application on basis advanced by neither party — whether failure to give adequate reasons — whether any requirement that reasons be adequate — requirements of section 22(3) of legislation considered

### Facts

This case concerned an application by Canterbury-Bankstown Council (**"Council"**), to set aside an adjudication determination (**"the Determination"**) made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**"the Act"**). In the Determination, the Adjudicator held that the Council was liable to pay Payce Communities Pty Ltd (**"Payce"**), the sum of $1,414,226.11 inclusive of GST.

The background to the current proceedings may be summarised as follows:

- By an Umbrella Agreement dated 12 September 2014, Payce agreed to construct a library and senior citizens centre for the Council, in exchange for the transfer of Council land to Payce. The parcel of land was described as "Lot 447."

- The Umbrella Agreement also provided that Payce was to fit out the library and senior citizens centre in accordance with "the Fit Out Agreement" which was to come into force upon the satisfaction of a number of conditions set out in cl 9.1. One of these conditions was the completion of the Purchase Contract for Lot 447.

- The Fit Out Agreement consisted of a Formal Instrument of Agreement, General Conditions and a Specification.

- The Fit Out Agreement came into effect in December 2015.

- The parties did not follow the procedure for agreeing the scope and price of the fit out work in accordance with the Umbrella Agreement. Agreement was reached on a proposed design and a letter from Council dated 24 February 2017 resolved any dispute as to price.

- Practical completion of the works was achieved in August 2018.

- In April 2019, Payce commenced proceedings in the NSW Supreme Court (**"Construction List Proceeding"**) seeking payment of $1,748,000 in respect of a number of unpaid variations.

- On 19 September 2019, Payce served its final payment claim for the amount of $1,666,000 (including GST) on the Council. The final payment claim included a schedule listing each variation the subject of the claim in the Construction List Proceeding.

- On 3 October 2019, the Council served a payment schedule in response to the payment claim stating the scheduled amount as Nil.

- On 18 October 2019, Payce filed an adjudication application with the second defendant, which was served on the Council on 21 October 2019. The Council lodged its adjudication response on 28 October 2019 and on 7 November 2019, the Adjudicator delivered the Determination.

**Claims**

The Council claimed that the Determination was void for three reasons:

(1) First, the payment claim made by Payce did not comply with the requirements of the Act because it was made in respect of more than one construction contract.

(2) Secondly, the exclusion contained in s 7(2)(c) of the Act applies as the consideration payable for the work carried out under the contracts was not to be calculated by reference to the value of that work.

(3) Thirdly, Council was denied natural justice as the Adjudicator determined the application on a basis that was advanced by neither party and failed to give adequate reasons for his decision.

By a cross-summons, in the event that the Court found that the Council was denied natural justice because the Adjudicator did not give adequate reasons for his decision, Payce sought an order remitting the matter back to the Adjudicator.

**Was the Payment Claim in respect of multiple contracts?**

While the Court accepted that there were a number of documents governing the terms on which Payce was to carry out the fit out work on the library and senior citizens centre, it found that the documents were not separate contracts for the performance of different work.

Rather, when properly characterised, they constituted a single contract for the purposes of characterising any payment claim made under them. It was therefore held that the payment claim which was the subject of the Determination was a single payment claim in respect of the relevant work.

**Did the s7(2) exclusion apply?**

Section 7(2) of the Act relevantly excludes from the operation of the Act:

> "a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied."

The argument advanced by Council invoking the s 7(2) exclusion was based on two claims:

(1) The work performed under the Fit Out Agreement was part of a broader agreement governed by the Umbrella Agreement. The consideration payable under the Umbrella Agreement was not calculated by reference to the value of the work performed. It involved a series of transactions including the transfer of property.

(2) Before the Fit Out Agreement could operate, the parties had to agree on the scope of work in accordance with the Umbrella Agreement. They never did so.

These arguments were rejected by the Court.

With respect to the first argument, the Court found that the Fit Out Agreement came into effect on satisfaction of the conditions referred to in cl 9.1 of the Umbrella Agreement. The Fit Out Agreement governed the terms on which the fit out of the library and senior citizens centre was to be performed and plainly provided for periodic payments to be calculated by reference to the value of the works under contract that were completed. By the agreement recorded in the Council's letter dated 24 February 2017, the parties agreed a price for that work and the work was performed.

In dealing with the second argument, the Court accepted that there may be a question as to the scope of the work covered by the agreed price. However, the Court held that the fact that agreement on the scope of the work was not reached did not alter the nature of the agreement on payment.

**Was the determination made on a basis not advanced by either party such that there was a denial of natural justice?**

The Council relied on two arguments in support of this ground:

(1) First, Council submitted that the Adjudicator determined the matter by reference to cl 9 and cl 10 of the Umbrella Agreement as well as the Fit Out Agreement, whereas both parties put their submissions on the basis of the Fit Out Agreement alone.

(2) Secondly, the Council submitted that the Adjudicator determined the matter relying on an estoppel argument not advanced by Payce.

Both these arguments were rejected by the Court.

In the submissions in support of its adjudication application, Payce explained the obligations on the parties that arose from clauses 9 and 10 of the Umbrella Agreement as well as the Fit Out Agreement. Plainly, the relevance of the clauses was drawn to the Adjudicator's attention and he was entitled to take them into account in forming a view on the parties' respective obligations.

The short answer to the Council's estoppel point was that the Adjudicator did not rely on an estoppel. He simply advanced it as an alternative argument to the one based on the express terms of the contract. Even accepting that the Council was not given an opportunity to address the argument based on an estoppel that was identified by the Adjudicator, that cannot amount to a denial of natural justice when the Adjudicator's conclusion did not depend on that argument.

**Did the Adjudicator fail to give reasons such that there was a denial of natural justice?**

It was argued by Council that it was denied natural justice because the Adjudicator gave no reasons for rejecting its submissions.

The Court rejected this argument and held that the approach taken by the Adjudicator satisfied his obligation to provide reasons. The Adjudicator set out his conclusion in relation to each variation. He explained that he had considered the parties' submissions and, in the case of the items in question, had decided to accept Payce’s submissions in relation to those items. They were the reasons for the Adjudicator's conclusions. It was not necessary for the Adjudicator to do more.

**The cross-claim**

Given the conclusions reached by the Court in respect of the validity of the Determination, it found that it was not necessary to consider Payce's cross-claim.

## *Castle Constructions Pty Ltd v N & R Younis Plumbing Pty Ltd*

## [2019] NSWSC 225

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 11 March 2019

**BUILDING AND CONSTRUCTION** — construction contracts — Building and Construction Industry Security of Payment Act 1999 (NSW) — challenge to adjudication determination — entitlement to progress payment — whether payment claim supported by valid reference date — whether reference dates may arise following termination of the relevant contract — operation of ss 8(2)(a) and 8(2)(b) — whether existence of a reference date is a jurisdictional fact — whether validity of a termination is a jurisdictional fact — review of adjudication determination.

### Facts

Castle Constructions Pty Ltd ("**the Builder**") entered into three contracts with N & R Younis Plumbing Pty Ltd ("**the Contractor**") for works in relation to a building project in Northbridge. One of the three contracts concerned the provision of hydraulic services for a sum of $517,000 (**"Hydraulic Contract"**)

Dispute arose between the parties in respect of a payment claim issued by the Contractor on 20 November 2018. The amount claimed was $142,140.51, which covered both the completion of the works and variations. The Builder refused to pay the payment claim.

The background to this dispute may be summarised as follows:

- On 3 October 2018, the Builder wrote to the Contractor asserting that the Contractor had failed to comply with the Hydraulic Contract and that its staff had left the site. The letter stated that this conduct amounted to repudiation of the contract and purported to accept the repudiation by terminating the contract.

- On 17 October 2018, the Contractor responded and asserted that the purported termination of the Hydraulic Contract was invalid. It asserted that the Hydraulic Contract remained on foot and that the Contractor remained ready, willing and able to carry out its contractual obligations.

- After negotiations between the parties, it was agreed on 29 October 2018 that the Contract was 'reinstated and on foot' (**"Reinstatement Agreement"**) The agreement provided that a further claim would be made upon completion of the work under the Contract.

- On 12 November 2018, the Builder wrote to the Contractor complaining that the work was incomplete. The letter identified 98 aspects of the work that were incomplete.

The letter purportedly terminated the Reinstatement Agreement and directed that the Contractor's workers should not return to the site without prior written authority.

- On 20 November 2018, the Contractor issued its payment claim which took the form of an invoice. It contained an invoice number and a reference which read "final claim". Under the description of the work it stated that the job was "now complete" and that the invoice represented the final claim. The sum claimed included the 5% retention provided for in the contract.

- The invoice also stated that it represented a payment claim for the purposes of the Act. Although, it did not state what the relevant reference date was.

*Adjudication*

The Contractor brought an adjudication application which was referred to the Adjudicator. In its application the Contractor reduced its claim to $120,654.50. The Adjudicator awarded the whole of this amount in the Contractor's favour.

What was at issue was whether the Contractor's payment claim was a payment claim within the meaning of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("**the Act**"). Relevantly, s 8 of the Act provides that a contractor under a construction contract is not entitled to a progress claim unless there is an available reference date.

The Hydraulic Contract provided that payment claims are to be made "on the 28th day of the month." It is worth noting that the relevant clause had been previously amended so as to substitute the word "by" for the word "on". That said, the clause was interpreted by the Adjudicator to indicate that a payment claim could be served prior to such a date, and that any works claimed were to be calculated to the reference date of the 28th day of any month.

*Current proceedings*

In these proceedings, the Builder sought to challenge the adjudication determination. Specifically, Builder claimed that, at the time the Contractor issued its November progress claim, it had no entitlement to a progress payment under the Act. The Builder advanced two separate contentions to support this conclusion.

(1) First, the Builder contended that it terminated the relevant contract before the progress claim was issued by the Contractor. According to the Builder, once the contract was terminated there was no remaining reference date upon which the progress claim could be based.

(2) Secondly, the Builder's alternative contention was that, if the contract was not terminated, then as a matter of construction of the contract and the Act, the relevant reference date was 28 November 2018. According to the Builder, the Contractor's progress claim dated 20 November 2018 was invalid because it was issued before the relevant reference date.

The Contractor disputed that the Builder's purported termination of the contract was valid, and disputed the Builder's contention concerning the available reference date. In addition to this, the Contractor contended that the resolution of these contentions was a matter for the Adjudicator, and there was no jurisdictional error by the Adjudicator which would permit this Court to intervene.

**Decision**

The Court first turned to consider whether the existence or otherwise of a reference date was a jurisdictional fact capable of judicial determination. Following the decision of the Court of Appeal in *Abergeldie Contractors Pty Ltd v Fairfield City Council [2017]* NSWCA 113, it held that it was. The Court thus had jurisdiction to consider for itself whether the Claim was supported by a valid reference date.

The Court then turned to consider the validity of the Contractor's payment claim. Following the authority of the Court of Appeal decision in *All Seasons Air v Regal Consulting Services Pty Ltd* [2017] NSWCA 289, the Court held that the Contractor's Claim was invalid because it was lodged on 20 November 2018, predating the reference date of 28 November.

Given the above conclusion, the Court did not think it was necessary to decide on whether the Contract was terminated prior to the Claim being issued.

The Court thus upheld the Builder's appeal and set aside the Adjudicator's determination.

## *CC Builders (Aust) Pty Ltd v Milestone Civil Pty Ltd*

**[2019] NSWSC 1251**

Coram: Rein J

Court: Supreme Court of New South Wales

Date: 6 September 2019

**BUILDING AND CONSTRUCTION** — Building and Construction Industry Security of Payment Act 1999 (NSW) — Whether adjudicator's determination should be quashed where the adjudicator refused to consider the plaintiff's submissions in respect of an extension of time claim on the basis that the plaintiff had not advanced the claim in its payment schedule when in fact it had done so, and the adjudicator referred, in part, to that claim being part of the payment schedule elsewhere in his determination — Whether adjudicator made an error in respect of a carryover claim and, if so, whether it was a jurisdictional error

**BUILDING AND CONSTRUCTION** — Building and Construction Industry Security of Payment Act 1999 (NSW) — Adjudicator's fees — Where the adjudicator had determined that the plaintiff should pay all of the adjudicator's fees, but the adjudicator's determination is set aside due to jurisdictional error involving part of the determination, and the Court uses its discretion to impose a condition on the successful plaintiff that it will accept liability for half of the adjudicator's fees

### Facts

These proceedings concern a challenge advanced by CC Builders (Aust) Pty Ltd ("**CCB**") against an adjudication determination in favour of Milestone Civil Pty Ltd ("**Milestone**"). Specifically, the Adjudicator determined that CCB owed an amount of $113,767.87 (inclusive of GST) to Milestone.

CCB's challenge was based on the following bases:

<u>*A denial of natural justice and procedural fairness*</u>

The first ground of challenge concerned s 20(2B) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**"the SOP Act"**) which precludes a respondent from including reasons for withholding payment in its adjudication response, which were not included in the payment schedule

By its payment schedule, CCB had stated that Milestone delayed the completion of the Contract on two occasions. The first being the period between 21 November 2018 - 22 February 2019 ("**First EOT claim**"), and the second being a period between 23 February 2019 - 24 April 2019 ("**Second EOT claim**").

However, relying on s 20(2B) of the SOP Act, the Adjudicator determined that CCB was prevented from including its Second EOT claim in its adjudication response. This was based on the (erroneous) view that CCB had not advanced the Second EOT claim in its payment schedule.

CCB contended that the Adjudicator had wrongly precluded himself from considering CCB's submissions regarding the Second EOT claim and in turn, failed to consider CCB's submissions on the Second EOT claim. This was alleged by CCB to amount to a failure to accord procedural fairness.

*A jurisdictional error in relation to a claim for carry over work*

The second challenge advanced by CCB was that the Adjudication determination was infected by jurisdictional error in allowing a claim raised by Milestone for carry over work amounting to $77,000.

Specifically, Milestone claimed that $245,046 had been assessed by the parties as due (of which $168,000 had been paid). CCB disputed this and argued that there was no evidence before the Adjudicator that the $245,000 had been assessed and, hence, that $77,000 was due.

*Adjudicator fees amounting to $10,000*

The final ground of challenge was directed at the adjudicator's decision to instruct CCB to pay the adjudication fees in entirety, even though Milestone did not recover all the money it claimed from CCB.

**Decision**

*Denial of natural justice and procedural fairness*

The Court accepted that if an Adjudicator has found that a submission was not duly made, it is not the Court's role to determine whether or not the Adjudicator was correct to so conclude. However, it was held that if the Adjudicator's determination lacks reasonableness or rationality, the Court may intervene to correct the decision.

Here, the Court was persuaded that the Adjudicator's decision to reject CCB's submission on the Second EOT claim had no rational or reasonable basis. This was because the Adjudicator took the view (for which there was no identifiable basis) that the payment schedule did not include the Second EOT claim.

The Adjudicator's decision to exclude the submission was thus found by the Court to amount to a denial of procedural fairness establishing jurisdictional error. It was further found that the failure to consider the submissions, duly made, also constituted jurisdictional error on the issue of the Second EOT claim.

*Jurisdictional error*

On the issue of the carry over claim, the court rejected CCB's claim that there was a jurisdictional error. The Court found that the Adjudicator had relied on an assessment progress claim produced by CCB itself. This was taken by the Adjudicator to constitute an admission on the part of CCB to the sum owed.

*Adjudicator fees*

The Court noted that the question of what fees are payable is a matter of discretion. It further noted that there have been cases before the Courts in which the successful party has recovered all of its costs, even on matters on which it was unsuccessful.

However, given that CCB was successful in showing that there had been a denial of procedural fairness, and Milestone was successful in the claim relating to carry over work, the Court directed CCB to accept liability for 50% of the adjudicator's fees, in accordance with section 29 of the SOP Act.

**Outcome**

As CCG was successful in establishing procedural unfairness, the Court was left to decide whether the Adjudication Determination was to be set aside. While CCB contended that the entire adjudication should be set aside, Milestone argued that only the part of the adjudication relating to the delay claim should be set aside.

In determining this, the Court relied on the decision of McDougall J in *Emergency Services Superannuation Board v Davenport* [2004] NSWSC 697 in which only individual items subject to reviewable error within the determination were set aside. This was based on the rationale that to set aside the entire determination would in effect, deprive the other party of the benefit of the determination.

Using this approach, the Court granted CCB the relief it sought but on condition that it will not re-agitate the carry over work claim at any further adjudication or seek to recover the carry over amount from Milestone other than at a final hearing pursuant to section 32 of the SOP Act.

## *Cincotta v Russo*

## [2019] NSWSC 272

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 15 March 2019

**CONTRACTS** — particular parties — principal and agent — undisclosed principal — building contract — where licensed supervisor contracted as agent for builder — identity of contracting parties — agent personally liable in circumstances where reasonable person in position of the parties would conclude agent was contracting party

### Facts

These proceedings concerned a contract (**"the Contract"**) entered into by Mr and Mrs Cincotta (**"the Owners"**) with Mr Russo (**"Russo"**) under which Russo was to undertake residential building work for a contract price of $610,000.

Russo was not himself a licenced builder. Rather, he was employed by Bespeak 3 Pty Ltd (**"Bespeak"**) as a building supervisor and was the nominated supervisor on Bespeak's Contractor Licence. Relevantly, Russo's Supervisor Certificate stipulated that he could not contract directly with consumers.

The contract identified Russo as the builder and referenced his supervisor certificate number in the Contract. However, the ABN listed was that of Bespeak.

Russo had informed the Owners that he had a builder's licence and that he was the person with whom the Owners would be dealing under the Contact. These representations were indeed false.

In May 2014 the Owners received a Quotation Report of an amount of $19,800 including GST in relation to the supply and installation of materials to build an attic. That document was on the letterhead of "S.E.R. Constructions". The footer read "A Nominee of Bespeak 3 Pty Ltd" and set out Bespeak's ABN. Thereafter the Cincottas received a series of invoices from "S.E.R Constructions" each of which recorded a "Builder Licence" of 266447C, the number of Bespeak's Contractor Licence.

A dispute arose between the parties, with the Owners claiming that the work was not done in accordance with the Contract, nor in accordance with the warranties implied by the *Home Building Act 1989* (NSW) (**"the Act"**).

While the Owners were granted leave to proceed against Bespeak which subsequently went into liquidation, the liquidator of Bespeak indicated that neither he nor the company proposed to defend the proceedings. The Owners instead commenced proceedings against Russo for damages. As such, the central question at issue was whether the Owners were entitled to relief against Russo.

### Contracting party

Referencing the general principle established in *Cooke v Wilson* (1856) 1 CBNS 153, the Court noted that where a person signs a written contract, that person is to be considered the contracting party unless it clearly appears that they are executing it as agent only.

Whether an agent is liable where he or she contracts as agent for a named or unidentified principal will turn on the facts of each case. Central to this is the intention of the parties which is to be deduced by construing the terms of the contract and considering what a reasonable person, with the knowledge of the communications between the parties and the surrounding circumstances, would conclude that the parties had intended.

### Decision

While the Court acknowledged that Russo had entered into the Contract as agent for Bespeak, Bespeak was an undisclosed principal.

Specifically, the Court noted that the present case was not a situation where the *identity* of the principal was not disclosed. Rather, it was the *fact* that a principal, Bespeak, was to carry out the building work which was not disclosed.

Given that there was no reasonable basis upon which the Owners could have concluded that they were in fact contracting with Bespeak, the Court found in favour of the Owners and held Russo personally liable for the damages (to be assessed).

## *Dyldam Developments Pty Ltd v The Owners — Strata Plan No 85305*

## [2019] NSWCATAP 229

Coram: Armstrong P, Pearson Principal Member

Court: NSW Civil and Administrative Tribunal

Date: 16 September 2019

**BUILDING AND CONSTRUCTION -** Home building — Time to commence proceedings — consideration of interim and final occupation certificates — collateral review

### Facts

Dyldam Developments Pty Ltd (**"Dyldam"**) carried out the construction of a three-storey residential building (**"Development"**) between 2010 and 2011.

In September 2011, two interim occupation certificates were issued by Dix Gardner, a private certifier engaged by Dyldam. The first was issued on 5 September 2011, and an amended certificate (the second) was issued on 9 September 2011. These two Interim OCs permitted the occupation of the "Whole" of the building to the exclusion of various conditions required under the development consent. On 12 October 2011, a final occupation certificate was issued which stated that it applied to the "Whole" of the building works without any exclusions.

On 4 October 2018, the Owners filed a Home Building Application against Dyldam in the Consumer and Commercial Division of the NSW Civil and Administrative Tribunal in relation to the building works carried out at the site. The Owners alleged that Dyldam had breached a number of statutory warranties under the *Home Building Act 1989* (NSW) (**"the HB Act"**).

The proceedings were listed for a preliminary hearing before Senior Member Goldstein on 26 February 2019 to determine whether the proceedings were commenced within the relevant limitation period.

### Relevant time limitation

The relevant limitation period is provided in section 18E(1) of the HB Act which requires that proceedings for breach of statutory warranty be commenced within seven years after "the completion of the work to which it relates." The meaning of "completion of the work" is determined by section 3C(2) of the HB Act, being "the date of issue of an occupation certificate that authorises the occupation and use of the whole of the building."

Dyldam argued that, in view of this definition, by commencing proceedings in October 2018, the Owners' claim fell outside the seven year limitation period. It referenced the Interims Occupation Certificates issued in September 2011, and claimed that they had authorised occupation of the whole of the Development.

### Tribunal Decision

On 8 March 2019, Senior Member Goldstein published his reasons for decision in relation to the preliminary question, and found that the proceedings had been commenced in time.

Central to Senior Member Goldstein's decision was his construal of section 3C(2) of the HB Act as requiring an occupation certificate that is validly issued under the Environmental Planning and Assessment Act 1979 (**"EPA Act"**). Specific reference was made to the mandatory requirement in section 109H(2) of the EPA Act which required that "an occupation certificate must not be issued unless any preconditions to the issue of the certificate that are specified in a development consent have been complied with."

In that regard, the Tribunal held that the Interims Occupation Certificates had not been validly issued by the certifier pursuant to section 109H(2) of the EPA Act as they both identified mandatory conditions of the development consent that had not yet been satisfied.

**The Appeal**

On 2 April 2019, Dyldam appealed the decision of the Tribunal. The two key issues to be determined were described by the Appeal Panel as follows:

(1) Whether s 3C(2) of the HB Act requires, in determining the date of completion of residential building work, that an occupation certificate be validly or properly issued under the EPA Act; and

(2) Whether the Tribunal has jurisdiction to determine whether an occupation certificate has been validly issued under the EPA Act for the purpose of determining whether a building claim is made within time under the HB Act.

**Decision**

The Appeal Panel found that the Tribunal had jurisdiction to consider whether the interim occupation certificates issued in September 2011 had been validly issued under the EPA Act.

It was noted that in the absence of some clear legislative indication to the contrary, the Tribunal is not precluded, in proceedings in which its jurisdiction to hear and determine a matter involving the exercise of judicial power depends on the validity of an administrative act, to consider the validity of that administrative act.

It was also held that the Tribunal did not err in finding that neither certificate had been validly issued, and that, as a consequence, the reference to an "occupation certificate" in section 3C(2) of the HB Act did not apply to those documents.

The appeal was dismissed.

## *Futurepower Developments Pty Ltd v TJ & RF Fordham Pty Ltd t/as TRN Group*

## [2019] NSWSC 1554

Coram: Rein J

Court: Supreme Court of New South Wales

Date: 18 October 2019

**BUILDING AND CONSTRUCTION** — Contract — Builder reported asbestos contaminated material found on site; variations for removal of the contaminated fill, as well as other variations; owner claims that the person acting as superintendent on the job was not the person contractually agreed to be the superintendent and denies the efficacy of certification and approvals given by that person — Whether owner in breach of contract for failing to ensure the named superintendent acted in that role — Whether variations had to be in writing — Effect of instructions from the owner's representative to the builder in the presence of the superintendent

**BUILDING AND CONSTRUCTION** — Quantum meruit — Where owner instructed builder to remove contaminated fill from the site and builder did so

**ESTOPPEL** — Estoppel by convention — Mutual assumption — Whether owner estopped from denying that the person acting as superintendent was the superintendent for the purposes of the contract

**CONTRACT** — Misleading conduct under statute — Misleading or deceptive conduct — claim under s 18 of the Australian Consumer Law — Where owner claims that the builder engaged in misleading or deceptive conduct in relation to the need to excavate and remove contaminated fill from site; the builder was instructed to remove the fill and to do so in accordance with the advice of an authorised subcontractor approved by the owner

### Facts

This case concerns a building contract (**"the Contract"**) entered into by Futurepower Developments Pty Ltd (**"Futurepower"**) and builder, TJ & RF Fordham Pty Ltd t/as TRN Group (**"TRN"**). Under the Contract, TRN was to carry out road and drainage works at a development site in Edmondson Park NSW (**"the Site"**).

Futurepower also engaged North Western Surveys Pty Ltd **("NWS"**) to act as its surveyors and project managers, with the Contract identifying Mr Attard as the Superintendent.

During the process of excavating the Site, areas of uncontrolled fill and asbestos contaminated soil were discovered. On the instruction of Mr Harding, an employee of NWS, TRN engaged Enviromanage Systems Pty Ltd ("**EMS"**) and Pacific Environmental Australia Pty Ltd (**"PEA"**) to provide for a quote for the removal of asbestos at the Site. Following this, there was a site meeting attended by a representative of Futurepower and Mr Harding where pricing and removal of the material was discussed. TRN then arranged for EMS to remove the asbestos contaminated material in two lots in line with the instructions of Mr Harding.

**The Dispute**

The matter at issue was whether TRN was entitled to a number of payment claims for work which had been accepted and certified by Mr Harding. This included a variation for the removal of the asbestos contaminated fill (**"Fill Removal Variation"**) and a number of other variations (**"Miscellaneous Variations"**).

At the Adjudication hearing, it was determined that a total of $922,622.12 was payable to TRN, representing both the Fill Removal Variation and the Miscellaneous Variations. Futurepower paid TRN the adjudicated amount, but retained a total of $24,723.68 (inclusive of GST).

Futurepower then commenced Supreme Court proceedings seeking to recover the amount adjudicated on the basis that Mr Harding was not the Superintendent, and thus, none of his approvals, directions or certificates have any force or relevance. Alternatively, it was contended that TRN engaged in misleading or deceptive conduct which led Mr Harding to agree to the Fill Removal Variation.

Futurepower also claimed liquidated damages for delay by TRN.

By its cross-claim, TRN made a claim in quantum meruit for the value of its work performed. Specifically, it sought payment of the $24,723.68 withheld by Futurepower.

**Decision**

*Superintendent Issue*

In determining whether Futurepower could recover money paid to TRN on the basis that Mr Harding was not the agreed Superintendent, the Court considered cl.20 of the Contract. Relevantly, it provided that Futurepower was required to ensure that its Superintendent fulfilled all aspects of its role at all times. In view of this, the Court found numerous indications that the named Superintendent, Mr Attard, had failed to fulfil his obligations as Superintendent. As such, Futurepower was necessarily in breach of cl.20 of the Contract. The Court held that Futurepower could not deny payment to TRN on the basis that it was certified by Mr Harding as to accept this argument would enable Futurepower to take advantage of its own breach of contract.

The Court also found that Futurepower could not recover payment from TRN by operation of estoppel by convention. It was held that while Mr Harding was not the identified Superintendent in the Contract, it was clear that both TRN and Futurepower were proceeding on the basis that Mr Harding was the Superintendent. Departure from this assumption would cause TRN significant loss because it would potentially entitle Futurepower to recover payments made for work done and approved by Mr Harding and entitle Futurepower to recover damages for delay because the named Superintendent had not received the claims for extension and had not approved them.

*Misleading and deceptive conduct*

The Court did not accept this argument, given that Futurepower did not adduce evidence to support this contention. Specifically, Futurepower did not establish that the fill that was removed did not contain asbestos contaminated materials.

*Liquidated damages*

The Contract provided for liquidated damages of $500 per day for delay beyond the contracted period. Futurepower claimed $500 per day for 325 days for a total of $162,500.

The Court found that the Mr Harding had validly granted TRN extensions of time, pushing the Date for Completion to 24 August 2016. While the Notice of Practical Completion specified the Date for Completion as 2 September 2016, the Court did not grant liquidated damages to Futurepower for the period between 24 August 2016 and 2 September 2016. This was because it found that cl. 34.7 of the Contract required certification by the Superintendent of liquidated damages and no such certification by the Superintendent (Mr Harding or Mr Attard) was in evidence.

*Cross-claim*

Futurepower argued that for TRN to be able to succeed in its quantum meruit claim, it was required to prove that Futurepower had benefitted from the work. To do so, Futurepower contends that that would require TRN to prove that the fill and soil removed were in fact contaminated by asbestos and that it was therefore necessary for TRN to carry out the work to remove the soil.

The Court rejected this argument and held that Futurepower had instructed TRN to proceed with the work, notwithstanding the absence of further investigations (which had been offered by TRN). TRN completed the work as instructed and Futurepower had obtained a clean Site, known to be free of asbestos, as a result. It was added that if Futurepower wanted further testing to be done, it was incumbent upon Futurepower to direct TRN to do so.

The Court thus found in favour of TRN and awarded it judgment of the sum of $24,723.68.

## *G&S Engineering Services Pty Ltd v MACH Energy Australia Pty Ltd*

## [2019] NSWSC 407

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 11 April 2019

**EQUITY** — equitable remedies — injunctions — interlocutory injunction — whether defendant should be restrained from calling on security surety bonds — whether serious question to be tried that bonds should be returned — whether serious question to be tried that neither first nor second defendants entitled to have recourse to surety bond

**CONTRACTS** — construction — purpose of security bonds — whether a risk allocation device — whether recourse to security bonds available before dispute under contract determined

### Facts

G&S Engineering Services Pty Ltd and DRA Pacific Pty Ltd (**"the Contractors"**) entered into a contract with MACH Energy Australia Pty Ltd (**"MACH Energy"**) to carry out works relating to a coal handling and preparation plant, and train load out facility for a coal mine in the Hunter Valley, NSW. In the Contract, MACH Energy was referred to as "the Company".

On 14 August 2018, MACH Mount Pleasant Operations Pty Ltd (**"MACH Operations"**) and the Contractors entered a "Deed of Novation." By this agreement, MACH Operations, as an agent for MACH Energy, became "the Company" for the purposes of the Contract.

The contract required the Contractors to lodge unconditional surety bonds in favour of "the Company" for a specified amount (**"the Security"**). The Contractors did so.

On 1 March 2019 MACH Energy gave notice to the Contractors of its intention to have recourse to the Security. On 18 March 2019 MACH Operations also gave notice of its intention to have recourse to the Security.

Both the First and Second Drawdown Notices were made pursuant to cl 45.4(a) of the Contract on the basis that the Contractors had allegedly failed to achieve practical completion of various "Separable Portions" of the Works by the dates for practical completion. Specifically, MACH Energy and MACH Operations argued that they were entitled to claim from the Contractors liquidated damages in an amount of $3.8 million, and were thereby entitled to have recourse to the Security.

### Interlocutory injunction

In this case, the Contractors sought an interlocutory injunction restraining MACH Energy and MACH Operations from calling on the Security.

Relevantly, the Contract contained a clause ostensibly preventing the contractors from seeking an injunction to prevent the principal drawing down on the security. Specifically, subclause 45.4(d) constituted a promise by the Contractors not to seek to restrain the

Company from exercising its right under the Security "even where the Contractor disputes the Company's right to payment"

**Decision**

With respect to the "no injunction" clause contained in subcl. 45.4(d), the Court held that it was unenforceable as it sought to oust the jurisdiction of the Court. That said, the Court insisted that regard may still be had to subclause 45.4(d) for the purpose of ascertaining the parties' intention and construing cl 45.4 as a whole.

The Court found that subclause 45.4(d), while unenforceable, demonstrated that the parties intended cl 45.4 to operate not merely as security for the Company, but also as a risk allocation mechanism. Put simply, the clause was intended to enable the Company to gain access to the amount it contended to be due, even if its entitlement to that amount was in dispute, and even if it was ultimately found not to be entitled to that amount.

## *Galileo Miranda Nominee Pty Ltd v Duffy Kennedy Pty Ltd*

**[2019] NSWSC 1157**

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 6 September 2019

**CONTRACT** — Breach of Contract — where Principal sought order that Contractor complete penetration schedule and provide copies of subcontracts — whether Principal's take-out notice valid — whether Contractor entitled to suspend works by non-payment of interest on progress claim under Building and Construction Industry Security of Payment Act 1999 (NSW) — whether Contractor failed to proceed with due diligence in a competent manner and failed to comply with principal certifier's occupation certificate requirements — whether Contractor otherwise validly suspended works with 'reasonable cause'

**BUILDING AND CONSTRUCTION** — construction contracts — Building and Construction Industry Security of Payment Act 1999 (NSW) — whether Contractor entitled to suspend works by Principal's non-payment of interest on progress payment — whether interest accrued under s 11 forms part of 'scheduled amount' under s 27(1) — 'scheduled amount' comprises amount respondent 'proposes to make' identified in payment schedule but excludes interest under s 11 — need to quantify interest in final way — accrual of interest to be interpreted consistently with statutory entitlement under Civil Procedure Act 2005 (NSW), s 100

**CONTRACT** — Breach of Contract — whether Contractor entitled to suspend contract with 'reasonable cause' by acting reasonably and in good faith — whether 'reasonable cause' determined subjectively or objectively — suspension without 'reasonable cause'

**CONTRACT** — Breach of Contract — whether Contractor failed to proceed with due diligence in a competent manner and failed to comply with principle certifier's occupation certificate requirements — whether error by PCA deprives its determination of contractual effect — Legal & General v A Hudson — erroneous view taken by PCA no answer to Contractor's failure to satisfy preconditions to issue of occupation certificate — foreshadowed claim for extension no answer to Contractor's failure to proceed with works in diligent manner

**CONTRACT** — Breach of Contract — whether default notice valid — whether notice 'issued' by Principal's Representative — whether Principal's Representative gave adequate or proper consideration to whether notice should be issued — notice 'issued' where Principal's Representative authorised release of notice without taking active role in preparation — notice acts as precursor to rights to terminate and not invalidated by technical deficiencies where commercial purpose achieved

**CONTRACT** — Breach of Contract — whether Principal's show-cause and take-out notices valid — whether power to take work out of Contractor's hands subject to implied obligations of good faith and reasonableness — determination by Principal's Representative closely connected with Principal's exercise of power to terminate — Principal's Representative validly formed determination

**Facts**

This case concerns a design and construction contract between Galileo Miranda Nominee Pty Ltd (**“the Principal”**) and Duffy Kennedy Pty Ltd (**“the Contractor”**) for the development of two residential tower blocks comprising of 197 units.

The original date for practical completion under the Contract was in February 2019. This date was not met and the Principal imposed liquidated damages on the Contractor for the delay.

A critical remaining step in achieving practical completion was to obtain an occupation certificate from the principal certifying authority – McKenzie Group Consulting (NSW) Pty Ltd (**“the PCA”**). The PCA’s requirements for the issue of the occupation certificate were set out in a checklist. The Contractor was yet to satisfy two of the requirements in the list:

(1) The provision of a penetration schedule indicating where pipes, wires and other services penetrated through structural walls, ceilings or floors of the building; and

(2) The heightening of balustrades on the external balconies on level 7 of the towers to comply with safety requirements set out in the Building Code of Australia (**“BCA”**)

The Contractor argued that it had satisfied both these requirements. It held that the necessary information had been supplied or was otherwise available to the PCA regarding the penetration schedule, and also argued that the PCA’s interpretation of the BCA requirements was incorrect and no heightening of the balustrades was necessary.

On 28 March, the Contractor gave notice of the suspension of works under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**“the Act”**) on the grounds that its progress payment had not been paid in full. Specifically, it was interest charged on a late progress claim payment which had not been paid by the Principal. The amount of interest was not large, being a few hundred dollars.

The Principal subsequently issued the Contractor with a default notice and relied on a number of grounds of alleged default (**“Default Notice”**). One was the Contractor’s suspension of work. Another was the Contractor’s alleged failure to proceed with due diligence and in a competent manner so as to complete the works. This ground was based on the failure to comply with the PCA’s occupation certificate requirements concerning the penetration schedule and the balustrades.

The Contractor responded to the notice by issuing a show-cause submission. The Principal was not satisfied with it and proceeded to issue a notice purporting to take the remaining works out of the Contractor’s hands (**“Take Out Notice”**). In issuing its Take Out Notice, the Principal relied upon the same breaches as it did for its Default Notice.

The main issues for determination by the court were:

(1) whether the Contractor had:

  (a) a statutory entitlement to suspend the works at any time when there was unpaid interest; or

  (b) the right to rely on the provisions of the contract in suspending performance for a 'reasonable cause';

(2) whether the Principal validly issued the default and take out notices to the contractor.

## Decision

*Statutory entitlement to suspend*

In interpreting section 27(2) of the Act (which entitles a contractor to suspend works on the grounds of non-payment), the Court held that the “amount that is payable” under the Act refers the amount specified in the payment schedule and does not include interest. As such, it was held that the Contractor was not entitled to suspend the works on the basis of a statutory entitlement as section 27(2) was not engaged in this instance.

*Suspension without “reasonable cause”*

The Court held that when dealing with a commercial contract, the questions of whether or not the Contractor had reasonable cause depends upon objective considerations.

In this case, the Court found that the amount of interest which had not been paid was minuscule in the scheme of things. Thus, it was held that the suspension of work by the Contractor remained completely disproportionate and the failure to pay interest did not constitute “reasonable cause”.

*Default Notice and Take Out Notice*

The Court held that the Contractor was in default of its obligation under the contract by reason of its suspension of works and refusal to provide the penetration schedule and raise the balustrades as required by the PCA. The principal therefore validly issued the default and take out notices to the contractor.

## *Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd*

## [2018] NSWSC 1647

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 1 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

This case concerns a debt arising out of a subcontract between Grandview Ausbuilder Pty Ltd (**"Builder"**) and Budget Demolitions Pty Ltd (**"Subcontractor"**) for demolition and excavation works at a development being constructed by the Builder in Villawood. 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"**).

In January 2018, the Subcontractor served on the Builder a statutory demand in the sum of $1,024,573.36. The statutory demand was based on two progress claims:

(1) The first progress claim was issued in November 2017. While the Builder served a payment schedule providing for payment of the full amount claimed, it did not pay that amount.

(2) The second progress claim was issued in December 2017. The Builder made no response to this claim within the ten-day period allowed by the SOP Act, s 14(4).

While the Builder conceded that the payment claims issued by the Subcontractor were valid, it sought to set the statutory demand aside on the basis that it had three separate offsetting claims which exceeded the amount of the statutory demand.

These claims included:

(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 loss of bargain claim for costs to complete the works.

**Decision**

The Court noted that the establishment of an offsetting claim for the purposes of s 459H of the *Corporations Act 2001* (Cth) does not constitute a finding that the claim is a good one, or that it has been made out. It represents nothing more than a finding that;

- there is a serious question as to the existence of an offsetting claim; or
- an issue deserving of a hearing as to whether the company has such a claim against the creditor; and
- that the claim is made in good faith, is arguable and not frivolous or vexatious.

*Liquidated damages for delay in completion*

In making its determination in respect of liquidated damages, the Court had regard to the terms of the contract. Relevantly, cl.30(a)(i) provided for liquidated damages for delay in completing the works at a rate of $4,000 plus GST per day (item 15(a)).

The Court specifically noted that, contrary to the Builder's submissions, liquidated damages provided by cl. 30(a)(i) only concerned delay beyond the scheduled date of practical completion. It did not include delays prior to that date.

Furthermore, although it was submitted by the Sub-contractor that only working days should be included in the Court's calculation of liquidated damages, it was held that there was nothing in the contract which expressly limited the phrase "per day" in Item 15(a) to dates specified in the contract as working dates.

The Court did accept that the Builder could not be entitled to liquidated damages for any period of time when it had excluded the Subcontractor from the site. This was because the Builder had an obligation under the contract to provide the Subcontractor access to the site in order to carry out the works. And so, given that the Subcontractor's failure to complete the work was a consequence of the Builder's own failure to allow access, the Builder was necessarily precluded from recovering damages for that period.

Taking the above into account, the Court held that the Builder had a potentially viable claim in the sum of $220,000 for liquidated damages. The Court was thus prepared to reduce the statutory demand by that amount provided that the Builder pay the sum of $220,000 into Court and commence proceedings for its offsetting claim as soon as reasonably practicable.

*Liquidated milestone damages*

The Builder's claim with respect to liquidated milestone damages was found by the Court to fail in its entirety. This was because the Builder's calculation of the sum claimed could not be justified by the terms of the contract as Item 15(b), which was to prescribe the rate per day for failure to reach milestones, was left blank.

While the Builder sought to assert that such was a mistake to be rectified, the Court rejected this submission on the basis of the "Graywinter principle" from *Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund* (1996) 70 FCR 452. The principle provides that it was not open to a plaintiff applying to set aside a statutory demand to introduce at the hearing a new ground not supported by the affidavit filed in support of the application.

*Costs to complete works*

On this issue, the Court proceeded on the assumption that the Builder had validly terminated the contract and was therefore entitled to damages which would put it in the position it would have been in had the contract been completed in accordance with its terms. However, the Court found that the loss of bargain damages was in fact negative and thus nothing was recoverable. This was because the amount required to complete the works to the contractual standard ($1.1 million) and the amount already paid by the Builder ($1.2 million) was less than the contract price ($2.5 million).

The Court did note that if the Builder paid the amounts demanded, it could make a "true" restitution claim for defective work. However, if the Builder does not pay, then it cannot, consistently with the SOP Act, make an offsetting claim for that work.

## *Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd*

## [2019] NSWCA 60

Coram: Bell P, White JA, Sackville AJA

Court: New South Wales Court of Appeal

Date: 29 March 2019

**BUILDING AND CONSTRUCTION** — statutory debt under s 14 of Building and Construction Industry Security of Payment Act 1999 (Cth) — creditor's statutory demand — suspension of work pending payment of demand — application to set aside statutory demand under s 459G of Corporations Act 2001 (Cth) — whether debtor had offsetting claim within meaning of s 459H

**CONTRACTS** — purported termination — whether purported termination precluded by election to affirm contract

**CORPORATIONS** — creditor's statutory demand — application to set aside statutory demand under s 459G of Corporations Act 2001 (Cth) — offsetting claim arising after filing of setting-aside application — Graywinter principle — offsetting claim foreshadowed by s 459G affidavit — whether offsetting claim 'genuine'

**PRACTICE AND PROCEDURE** — funds paid into Court — discretion in relation to release of funds

### Facts

This case concerns the judgement in *Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd* [2018] NSWSC 1647. In the first instance decision, the Court dismissed the application of Grandview Ausbuilder Pty Ltd (**"Grandview"**) to set aside a statutory demand made by Budget Demolitions Pty Ltd (**"Budget"**).

Here, Grandview sought to challenge the primary judge's conclusions that neither the Milestone Damages Claim nor the Loss of Bargain Claim was available to it as an offsetting claim within the meaning of s 459H of the *Corporations Act 2001* (Cth) (**"the Corporations Act"**).

### Decision

The Court affirmed the decision of the primary judge in respect of both the Milestone Damages Claim and the Loss of Bargain Claim and dismissed the appeal.

*Milestone Damages Claim*

It was argued by Grandview that, contrary to the view of the primary judge, the need to rectify Item 15(b) of the contract did not amount to a "new ground" which was barred by the Graywinter principle. Rather, it was simply a means to present a claim that had been articulated in the accompanying affidavit.

The Court rejected this argument and affirmed that the primary judge was correct in his application of the Graywinter principle. Specifically, the Court noted that an affidavit accompanying an application to offset a statutory demand must both "state any material facts relied upon by the applicant in support of the application" and "identify the grounds on which it is said that the Court should make the order." The affidavit filed by Grandview did not set out any material facts that could sustain a claim to rectify the contract. Nor did any of the other evidence filed on behalf of Grandview.

*Loss of Bargain Claim*

While the Court upheld the primary judge's decision that Grandview had no offsetting claim with respect to loss of bargain damages, they did so on the basis of different reasoning.

Specifically, the Court took issue with the primary judge's conclusion that "the figure for loss of bargain damages is negative and nothing is recoverable." This is because such was found to overlook the existing liability of Grandview to Budget in relation to the statutory debt that had arisen from the November and December Payment Claims which totalled $1,024,573.36. The offsetting claim based upon the alleged loss of bargain damages, was approximately $1.1 million, which exceeded the amount of the statutory demand. It was thus held that prima facie, Grandview had a potential claim for loss of bargain damages and a valid basis for setting Budget's statutory demand aside.

The Court also took issue with the primary judge's failure to properly consider whether the offsetting claim for Loss of Bargain Damages was a "genuine one" within the meaning of s 459H(5) of the Corporations Act. Yet, it was on this point that the Court found Grandview's offsetting claim failed – its claim was not a "genuine one."

This was because while Budget failed to achieve practical completion on the date agreed, Grandview had made no complaint regarding this failure. Rather, Grandview indicated to Budget that it looked forward to Budget continuing its work. This was found by the Court to constitute an unequivocal statement wholly inconsistent with any intention to terminate the contract. It was not until Budget had taken advantage of its statutory right to suspend works on the basis of non-payment that Grandview purported to terminate the contract on the basis of non-completion of work by the date for practical completion.

Given this, the Court held that Grandview had no plausible claim for Loss of Bargain Damages following its purported termination of the contract for it was not a genuine claim.

## *Greencapital Aust Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd (Subject to Deed of Company Arrangement)*

**[2019] NSWCA 53**

Coram: Leeming JA, Sackville AJA, Emmett AJA

Court: New South Wales Court of Appeal

Date: 26 March 2019

**CONTRACT** — construction — conflict between contractual powers — conditional contract for sale of land — vendor had right to rescind if conditions precedent not satisfied — contract amended so as to confer right upon purchaser to 'step-in' to attempt to achieve satisfaction of conditions precedent — whether vendor's contractual right qualified by purchaser's right

**CONTRACT** — frustration — conditional contract for sale of land — land contaminated — whether amendment to State Environmental Planning Policy preventing subdivision until remediation conditions satisfied amounted to frustration

### Facts

This case concerned a contract for the sale of land (**"the Contract"**) between Pasminco Cockle Creek Smelter Pty Ltd (**"the Vendor"**) and Greencapital Aust Pty Ltd (**"the Purchaser"**). The land was subject to an Environmental Protection Authority contamination order which required the Vendor to remediate the land. The Vendor obtained approval from the Minister to construct a containment cell for the purposes of remediating the land. The approval contemplated completion of all remediation works within 8 years.

The Contract was entered into by the parties on 23 December 2015 and contained the following key terms:

- Clause 30 – defined 'Sunset Date' to mean 30 June 2017; and
- Clause 37 – provided that the contract was conditional upon the satisfaction of a number conditions precedent; and further provided that in the event the conditions precedent were not satisfied by the Sunset Date, either party was entitled to rescind the Contract

In December 2016, the parties entered into a Deed of Contract Amendment which provided for the following key amendments:

- Clause 30 was amended such that 'Sunset Date' was pushed back by one year to 30 June 2018; and
- Clause 37 was amended by adding an additional subclause 37.8 which granted the Purchaser the right to "step-in" and assume responsibility for the conditions precedent if they remained unsatisfied by the Sunset Date

The conditions precedent were not satisfied by the amended sunset date of 30 June 2018.

On 1 July 2018, and again on 2 July 2018, the Vendor purported to exercise its right to rescind. The Purchaser on the other hand, purported to exercise its step-in right on 2 July 2018, and again on 3 July 2018.

Later, on 31 August 2018, an amendment to State Environmental Planning Policy No 55 - Remediation of Land (NSW) (**"SEPP 55"**) was made. The effect of this was that the Council was prevented from consenting to any significant development on the land unless the Planning Secretary certified that adequate arrangements had been made for the perpetual care of the containment cell.

**Trial judgement**

The Purchaser commenced proceedings seeking to enforce its "step-in" right.

The trial judge dismissed the proceedings on the basis that the competing and inconsistent nature of the parties' rights indicated that they had agreed to a 'first past the post' regime whereby there was a 'race' between the parties to exercise their inconsistent right first. Given that the Vendor had effectively rescinded the Contract first, the Purchaser could not exercise its step-in right. The trial judge did however, make an interlocutory order restraining the Vendor from selling or otherwise dealing with the land.

**Submissions on Appeal**

On appeal, the Purchaser sought challenge the decision of the primary judge and alleged that the Vendor's right of rescission was qualified by the Purchaser's right under cl 37.8 to elect within a reasonable time to step-in and achieve the conditions precedent.

The Vendor on the other hand, sought to uphold the orders on the basis that the Contract was frustrated, principally by reason of the amendment to SEPP 55 which imposed restrictions on the power to grant subdivisions, which was a condition precedent.

**Decision**

The Court allowed the appeal and found the Vendor's right to rescind was qualified by the Purchaser's new right to step-in, and further had to be exercised within a reasonable time after 30 June 2018.

The key factors sustaining this conclusion were:

(1) the improbability and impracticality of the "race" to which the competing construction involves;

(2) the need to give efficacy to the separately negotiated new valuable right enjoyed by the Purchaser; and

(3) the orthodox approach that inconsistent provisions are construed as one qualifying the other.

With respect to issue of frustration, the Court rejected the Vendor's argument and found that the amendment to the SEPP 55 had not altered its obligations to remediate the land to such a degree that they were radically different from when the Contract was entered into. The Court held that it was entirely foreseeable than when a polluter fails to remediate its land, further steps will be put in place to oblige it to perform its obligations.

## *Hanson Construction Materials Pty Ltd v Brolton Group Pty Limited*

## [2019] NSWSC 1641

Coram: Ball J

Court: Supreme Court of New South Wales

Date: 26 November 2019

**BUILDING AND CONSTRUCTION** — adjudication determination under Building and Construction Industry Security of Payment Act 1999 (NSW) — whether determination void — jurisdictional error — whether denial of natural justice — whether failure by adjudicator to provide parties with opportunity to make submissions with respect to choice of reference date relevant to payment claim — whether open to claimant to support determination with reference to different reference date than that relied on by adjudicator — whether open to adjudicator to justify determination on basis that it was a determination of a payment claim by reference to other reference date

**BUILDING AND CONSTRUCTION** — adjudication determination under Building and Construction Industry Security of Payment Act 1999 (NSW) — whether determination void — whether payment claim referrable to work completed after relevant reference date — construction of sections 8 and 13 of the legislation — Southern Han Breakfast Point Pty Ltd (In Liq) v Lewence Construction Pty Ltd and other authorities considered — whether payment claim may only relate to work done before reference date in respect of payment claim was served

**BUILDING AND CONSTRUCTION** — adjudication determination under Building and Construction Industry Security of Payment Act 1999 (NSW) — whether to grant conditional relief — power of court to sever part of determination which is within jurisdiction from that part which is not — recent authority

### Facts

The dispute concerned a contract entered into by the parties whereby Hanson Construction Materials Pty Ltd (**"Principal"**) engaged Brolton Group Pty Limited (**"Contractor"**) to build a quarry processing plant. The parties agreed that the amount payable to the Contract would not exceed the guaranteed maximum price of $85M (**"GMP"**). The Principal terminated the contract on 3 October 2018.

Relevantly, cl.11.4 provided that the Contractor was to submit its payment claims on the last Tuesday of each month. On 28 August 2019, the Contractor served a payment claim for the amount of $6,300,962.64 which included a number of previous claims, subcontractor invoices for work performed between 25 September 2018 to 10 October 2018, and a claim for interest for delayed payment in the amount of $272,768.95.

On 10 September 2019, the Principal served a payment schedule in response specified that it intended to pay "Nil". It provided two reasons for this:

- First, it said that the amount claimed exceeded the GMP.

- Secondly, it claimed that Hanson was entitled to liquidated damages for delay in the amount of $1,625,000.

**Adjudication**

The Contractor lodged an adjudication application for the claimed amount pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**"the SOP Act"**).

While the Principal accepted that 25 September 2018 was an available reference date for the payment claim, it contended that the Adjudicator did not have jurisdiction to adjudicate the claim. This was because the payment claim included numerous subcontractors and supplier invoices dated after 25 September 2018 and also included the claim for interest up until 28 August 2019. The payment claim therefore could not be supported by a reference date of 25 September 2018 because it claimed amounts for work done after that date, nor could the claim be supported by a later reference date because no further reference dates arose under the contract given its termination 3 October 2018.

In his determination, the Adjudicator rejected the Principal's submission that no further reference dates arose following the termination of the contract. Rather, the Adjudicator came to the conclusion that a reference date arose on 23 October 2018 as, in his (erroneous) belief, the contract provided that the Contractor was entitled to make a payment claim after termination.

The Adjudicator therefore found in favour of the Contractor in the sum of $2,877,052.75.

**Supreme Court Proceedings**

The Principal went on to seek a declaration that the adjudication determination was void, together with ancillary relief.

During these proceedings, the Contractor conceded that the reference date of 23 October 2018 was not available to the Adjudicator. As such, both parties agreed that the adjudicator had erred and the proper reference date for the claim was 25 September 2018.

The Contractor sought to defend the Adjudication Determination on the basis that:

(1) The claim for a progress payment served on 29 August 2019 was a valid payment claim because it was supported by a reference date of 25 September 2018;

(2) The Adjudicator had jurisdiction under the SOP Act to determine that claim;

(3) Any errors made by the Adjudicator in determining that claim were errors within jurisdiction and consequently not reviewable by the Court; and

(4) In any event, to the extent that any errors were jurisdictional they did not affect the whole determination and the Court in its discretion should, as a condition of relief, impose a condition that Hanson pay that part of the determination unaffected by jurisdictional error."

Hanson took issue with each of steps (1), (3) and (4) and further argued that the Adjudicator failed to carry out his statutory task under s 22 of the SOP Act which required him to engage in "a process of evaluation, sufficient to warrant the description" in respect of the parties' materials and submissions.

**Decision**

*<u>Were the errors made by the Adjudicator reviewable?</u>*

Given that it was accepted by both parties that the Adjudicator was in error when he determined that the payment claim made on 29 August 2019 was supported by a reference date of 23 October 2018, the key question for determination was whether the errors of the Adjudicator were reviewable.

The Court held that the determination was reviewable for the following reasons:

(1) Given that the parties agreed that the relevant reference date in the case of the payment claim in question was 25 September 2018, it was not open to the Adjudicator to determine the claim as if it were a payment claim by reference to some other date.

(2) Given that neither party contended for a reference date of 23 October 2018, it was not open to the Adjudicator to choose a reference date of 23 October 2018 without giving the parties an opportunity to make submissions in response.

The Court thus found that there was a substantial denial of natural justice.

*<u>Was the payment claim supported by a reference date of 25 September 2018?</u>*

Given the finding that there had been a denial of natural justice, the Court held that it was not necessary to consider this point. However, had it been necessary, the Court noted that it would have been of the view that the progress payment served on 29 August 2019 was capable of being supported by a reference date of 25 September 2018.

The Court further noted there is nothing in the SOP Act or *Southern Han* which requires that, for a payment claim to be valid, it must only relate to work done before the reference date in respect of which the payment claim was served.

*<u>Should conditional relief be granted?</u>*

While the Court accepted that it had power to sever part of the determination which fell within its jurisdiction and to grant conditional relief in respect of it, it chose not to do so here. This was because the Court held that the Adjudicator’s error went to the heart of the payment claim and altered the lens through which the payment claim was assessed. If the Court were to ‘sever’ the Adjudicator’s determination in a way that could provide conditional relief, this would require the Court to make numerous decisions with respect to the merits of the case. As this does not come within the jurisdiction of the Court, conditional relief was not granted.

*<u>Failure to perform the statutory task</u>*

The Court held it was unnecessary to consider this point given the conclusions reached in respect of the above issues. That said, it nonetheless held that it would have rejected the Principal’s submissions that the Adjudicator had not complied with its obligations under the SOP Act.

The Court declared the adjudication determination was void.

## *Icon Co (NSW) Pty Ltd v AMA Glass Facades Pty Ltd*

## [2019] NSWSC 250

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 12 March 2019

**BUILDING AND CONSTRUCTION** — security of payment — where successive adjudicators expressed inconsistent findings as to proper construction of the building contract — subcontractor did not challenge second determination and instead resubmitted payment claim — contractor contended third determination void because construction issue determined by unchallenged second determination — subcontractor belatedly sought to challenge second determination by cross-summons

### Facts

This case concerns a contract entered into by Icon Co (NSW) Pty Ltd (**"Icon"**) and AMA Glass Facades Pty Ltd (**"AMA"**). Under the Contract, AMA was to install a facade and undertake associated works on the Opal Tower at Sydney Olympic Park. During the course of the works, AMA was orally directed by Icon to perform a number of variations. These directions were not confirmed in writing.

The matter was heard by two separate adjudicators in three succeeding determinations. The issue however was that the adjudicators came to different and inconsistent views as to the proper construction of the terms of the contract concerning:

(1) AMA's right to payment for variation works where the direction to carry out those works was not confirmed in writing; and

(2) Icon's right to set off liquidated damages against AMA's payment claims.

*First Adjudication*

In March 2018, Ms Helen Durham made a determination in respect of Variations 2 to 24 (**"the First Durham Determination"**). The adjudicator found that:

- AMA was entitled to have the contract sum adjusted, despite the fact that the directions were not in writing nor confirmed in writing;
- Icon was not entitled to set off an amount of liquidated damages as the works had not reached practical completion; and
- the adjudicated amount was $1.9 million.

*Second Adjudication*

In August 2018, Mr Doron Rivlin made a determination in respect of Variations 26 to 31 (**"the Rivlin Determination"**). The adjudicator found that:

- AMA was not entitled to have the contract sum adjusted as the relevant variation directions were not in writing nor confirmed in writing;
- No issue estoppel or res judicata arose in respect of this claim as the claim itself was not the subject of any previous determination by an adjudicator;
- Icon was entitled to a specified amount of liquidated damages; and
- The adjudicated amount was '$nil'."

*Third Adjudication*

In January 2019, Ms Helen Durham also made a determination in respect of a payment claim that was indistinguishable from the payment claim heard in the Rivlin Determination (**"the Second Durham Determination"**). The adjudicator found that:

- AMA was not barred by reason of the absence of the written confirmation from claiming the variations the subject of the Rivlin Determination;
- Icon was not entitled to set off liquidated damages against AMA's claim for variations; and
- the adjudicated amount was 660,000."

**Key issues**

These adjudication determinations gave rise to the following issues:

(1) Whether AMA should be granted leave pursuant to seek an order in the nature of certiorari quashing the Rivlin Determination despite falling outside the time limit imposed by r 59.10(2) of *the Uniform Civil Procedure Rules 2005* (NSW) (**"UCPR"**); and

(2) Whether adjudicators are required to follow the contractual interpretation adopted by earlier adjudicators in respect of later claims made under the same contract.

**Decision**

The Court refused to grant AMA leave to challenge the Rivlin Determination on the basis that AMA did not provide adequate explanation for why its application to impeach the Rivlin Determination was made outside the three-month time limit in UCPR r 59.10. AMA had been aware of the Rivlin Determination since it was made.

In the absence of any explanation for the delay, the Court inferred that AMA decided not to follow the usual procedure of seeking prerogative relief to quash the Rivlin Determination, and instead served the further payment claim, which was a repetition of the payment claim determined by Mr Rivlin, in the hope of securing a more favourable determination.

While the Court noted its misgivings concerning Mr Rivlin's decision not to adopt Ms Durham's construction of the relevant provisions of the Contract, it did not find it necessary to form any definitive view about that question given its above findings.

The Court thus made an order of certiorari quashing the Second Durham Determination.

## *Icon Co (NSW) Pty Ltd v Australia Avenue Developments*

## [2018] NSWCA 339

Coram: Basten JA, Meagher JA, Leeming JA

Court: 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 subject of the dispute was a contract entered into by Icon Co (NSW) Pty Ltd **(“Contractor”)** and Australia Avenue Developments Pty Ltd (**Developer”**) for the construction of the Opal Tower at Sydney Olympic Park.

On 30 July 2018, the Contractor served a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) in an amount of $3,664,918.40 (with GST). On 13 August 2018, the Developer served a payment schedule in response and proposed to pay (and had in fact paid) $1,161,143.50.

On 27 August 2018, the Contractor lodged an adjudication application seeking to claim the whole of the payment claim. The Adjudicator found in favour of the Contractor in an amount of $2,638,287.58. The unpaid balance was a little over $1.477 million.

On 19 September 2018, the Developer commenced proceedings in the Equity Division seeking an order quashing the adjudication determination. The relief sought by the Developer was granted on the basis of jurisdictional error. Specifically, it was held that the adjudicator erred in awarding amounts in relation to back charges which were not the subject of the payment claim and thus not properly part of the adjudication process (*Australia Avenue Developments Pty Ltd v Icon Co (NSW) Pty Ltd* [2018] NSWSC 1578).

The Contractor sought to appeal this decision on the basis that the Court could not examine the approach adopted by the Adjudicator when forming an opinion as to the meaning of the contract. Further, it was alleged that the Developer identified no error in the reasoning of the adjudicator, except to say that the back charges were not part of the payment claim as served.

**Decision**

The New South Wales Court of Appeal upheld the appeal and set aside the original decision that quashed the determination of the adjudicator.

The Court found that it was not the role of the primary judge to determine whether the approach adopted by the adjudicator in construing the payment claim and contract was erroneous. Even if it were erroneous, it would not constitute a jurisdictional error to act upon such an erroneous view. It therefore could not form a basis upon which the adjudication determination could be quashed.

## *Impero Pacific Group Pty Ltd v Bonheur Holdings Pty Ltd*

## [2019] NSWSC 286

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 21 March 2019

**BUILDING AND CONSTRUCTION** — construction contracts — Building and Construction Industry Security of Payment Act 1999 (NSW) — application for recovery of 'claimed amount' as a debt due — validity of payment claim — available reference date — whether termination gives rise to statutory entitlement to payment — validity of supporting statement — supporting statement substantially compliant with required form — application to recover part of amount claimed — judicial evaluation of 'claimed amount' neither sought nor appropriate

### Facts

This case concerned a contract entered into by Bonheur Holdings Pty Ltd (**"Principal"**) and Impero Pacific Group Pty Ltd (**"Contractor"**) for the design and construction of a residential building in Sydney.

On 29 October 2018, the Principal exercised its option under cl 39A to terminate the contract for convenience.

On 27 November 2018, the Contractor issued a progress claim in the amount of $1,394,484.55 (inclusive of GST) for works performed in the period between 25th September 2018 (the last reference date) to 30th October 2018 (the date of termination). The Principal failed to serve a payment schedule in response within the time stipulated by the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**"the Act"**). Accordingly, the Contractor sought judgment for the claimed amount in the NSW Supreme Court.

The Principal resisted the entry of the judgment under the Act on the following grounds:

(1) The payment claim was invalid because it was not supported by an available reference date for the purposes of the Act; and

(2) The payment claim was invalid (or was not validly served) because the supporting statement which accompanied it did not comply with s 13(7) of the Act

**Decision**

Both defences advanced by the Developer were rejected by the Court. It was held that the Contractor was entitled to judgment.

*Available Reference Date*

With reference to the decisions of Ball J in *Patrick Stevedores Operations No. 2 Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2014] NSWSC 1413 and Darke J in *Omega House Pty Ltd v Khouzame* [2014] NSWSC 1837, the Court acknowledged that the current position at law was that a contract does not, after termination, continue to provide reference dates in respect of construction work carried out under the contract prior to its termination.

The Court distinguished the instant case on the basis that termination of the contract here gave rise to a contractual entitlement to payment under cl 39A which was separate from the contractual entitlement to receive progress payments. Indeed, no such argument was advanced in *Patrick Stevedores* or *Omega House.* As such, the Court concluded that the termination of the Contract gave rise to a fresh reference date for the purposes of the Act.

The payment claim was not invalid on this ground.

*Supporting statement*

Section 13 of the Act relevantly provides:
…
(7) A head contractor must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement that indicates that it relates to that payment claim.

(8) A head contractor must not serve a payment claim on the principal accompanied by a supporting statement knowing that the statement is false or misleading in a material particular in the particular circumstances.

(9) In this section:

supporting statement means a statement that is in the form prescribed by the regulations and (without limitation) that includes a declaration 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."

While the Court accepted that the supporting statement in the present case may or may not have been accurate or complete, the Court found that in form, it complied with the requirements of s13(9) of the Act. As such, s 13(7) was not engaged. Moreover, there was no evidence that if the statement was incomplete or incorrect, it was knowingly incomplete or incorrect in contravention of s 13(8) of the Act.

The payment claim was therefore not invalid on this ground.

## *Iskra v MMIR Pty Limited*

## [2019] NSWCA 126

Coram: Bathurst CJ, Gleeson JA, Payne JA

Court: New South Wales Court of Appeal

Date: 30 May 2019

**BUILDING AND CONSTRUCTION** — adjudication of payment claim — review of adjudicator's decision — whether adjudicator simply allowed claim in full in default of any valid submission against it — whether adjudicator engaged in process of evaluation — no requirement for legally correct language — fine-tooth comb approach not appropriate — Building and Construction Industry Security of Payment Act 1999 (NSW), ss 9, 10, 22(1), 22(2), 22(3)

**ADMINISTRATIVE LAW** — judicial review — whether adjudicator exercised statutory function to determine value of construction work — where adjudication may not be set aside for error of fact or law — jurisdictional error — no requirement for legally correct language — determination not to be examined with fine-tooth comb

**Facts**

This appeal concerns the validity of an adjudication determination made under s 22 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**"SOP Act"**). The Adjudicator found in favour of Iskra (**"the Builder"**) and held that MMIR Pty Limited (**"the Owner"**) owed a sum of $159,829.95 including GST.

*The dispute*

The dispute arose out of a building contract between the Iskra (**"the Builder"**) and MMIR Pty Limited (**"the Owner"**) for the upgrade, refurbishment and fit out of a restaurant and function centre in Wollongong.

On 4 September 2018, the Builder served a payment claim for $165,829.95. The progress claim totalled $615,829.95 for 15 items of work and included a six per cent "project management fee" of $31,689.36. The invoice allowed a credit of $450,000 for amounts already paid, leaving the sum outstanding of $165,829.95.

On 14 September 2018, the Owner served a payment schedule in response certifying $nil as the amount it proposed to pay. This was justified on the grounds that:

(a) the works were not undertaken on the basis claimed by the builder;

(b) payment had already been made for some amounts claimed;

(c) the claim had not been "progressed"; and

(d) the owner was entitled to a set-off in relation to the works.

*Adjudication*

On 27 September 2018, the Builder applied for adjudication of its payment claim. It asserted that the contract was an oral “do and charge” contract. By contrast, the Owner alleged the construction contract arose from its acceptance of a written quote provided by the builder on about 3 August 2016 for a price of $225,000. With respect to the amount of the payment claim, the owner asserted that the amounts claimed were grossly excessive, and that the Builder had issued fraudulent, duplicate or inflated claims.

The Adjudicator rejected the owner's contention that there was a fixed price agreed and determined that the contract was a “do and charge” contract. On this basis, the Adjudicator found in favour of the Builder in the sum of $159,829.95 including GST.

*Current proceedings*

On 29 January 2019, the adjudication determination was quashed by the primary judge on the basis of jurisdictional error: *MMIR Pty Limited v Iskra* [2019] NSWSC 35. Specifically, the primary judge found that the adjudicator had failed to come to a view as to what was properly payable having regard to the true construction of the contract and the true merits of the claim.

On 6 February 2019, the Builder commenced an appeal in the New South Wales Court of Appeal.

**Decision**

The Court disagreed with the primary judge's finding that the adjudicator had failed to consider whether the amount claimed was “proper” having regard to terms of the contract and the “reasonable value” of the works performed.

Rather, the Court found that when read as a whole, the determination makes plain that the adjudicator considered the amount claimed having regard to the terms of contract and the payment claim, and took into account the requirement to value the construction work.

Furthermore, any error by the adjudicator in construing the terms of the contract or in assessing the value of the amount claimed, involve matters within the adjudicator's jurisdiction. It is not the role of the primary judge to determine whether the approach adopted by the adjudicator was erroneous. Even if the adjudicator's construction of the contract was erroneous, it would not constitute jurisdictional error to act upon such an erroneous view.

## *Kai Ling (Australia) Pty Ltd v Rosengreen*

## [2019] NSWCA 3

Coram: Basten JA, Sackville AJA, Barrett AJA

Court: New South Wales Court of Appeal

Date: 5 February 2019

**CONTRACTS** — formation — novation — requirements for effective novation of contract by substitution of party — whether option to purchase land novated in favour of substituted grantee

### Facts

The key question for determination in this case was whether Kai Ling (Australia) Pty Ltd (**"Kai Ling"**) had an interest in land at West Pennant Hills owned by Mr Rosengreen.

Kai Ling's claim to such an interest was based on an option to purchase the land granted by Mr Rosengreen to Saadie Group by a deed of option. Kai Ling maintained that the deed of option was later novated so that contractual rights and obligations originally created between Mr Rosengreen and Saadie Group became rights and obligations between Mr Rosengreen and Kai Ling to the exclusion of Saadie Group.

The key dealings between the parties may be summarised as follows:

- Rosengreen granted an option to purchase land to Saadie Group on 30 April 2015 (**"Option Deed"**)
- On 3 May 2015, Fayez Saadie (the sole director of Saadie Group) requested that Rosengreen execute a single 'signing page.' This page was the same execution page used for the Option Deed, save for the name of the grantee which had been changed to Kai Ling.
- The signing page already bore the signatures of Robert Wang (director) and Zhan Shi (director pursuant to power of attorney) who represented Kai Ling.
- Mr Saadie asked Mr Rosengreen to sign the sheet and said that there was a need to change the name of the Grantee but it did not change anything. On this basis, Mr Rosengreen signed.
- On 4 May 2015, a new option deed was sent by Saadie Group's solicitors to Rosengreen's solicitors (**"New Option Deed"**) which included a number of changes:
    - Kai Ling's name had been substituted for Saadie Group where relevant;
    - the Signing Page appeared in place of the execution page; and

  - a handwritten clause included in the Option did not appear in the New Option.

- On 27 November 2015, a variation deed was entered into by Mr Rosengreen and Saadie Group. The deed recited that those two parties had entered into an option deed in relation to the particular property and provided that the period for exercise of the option was extended in return for a payment of $100,000 to Mr Rosengreen.

At first instance, Lindsay J held that there had been no such novation and that Kai Ling had no interest in Mr Rosengreen's land by virtue of the option granted to Saadie Group. Kai Ling challenged that decision in this appeal.

**Decision**

The Court dismissed the appeal and found that Kai Ling had failed to establish that on 3 May 2015, Mr Rosengreen, Saadie Group and Kai Ling had all agreed that a new contract between Mr Rosengreen and Kai Ling was to be substituted for the old contract between Mr Rosengreen and Saadie Group.

The Court came to this conclusion on the basis of the following reasons:

(1) In the absence of proof that Mr Saadie had acted on 3 May 2015 with the authority of Kai Ling, it was not shown that Mr Rosengreen and Kai Ling had engaged in any conduct of a contractual kind towards one another on that day.

(2) Even if there had been contractual conduct as between Mr Rosengreen and Kai Ling on 3 May 2015, the purpose of the contractual conduct was to deal with an apparently foreseen possible future need to 'change the name' of the grantee of the option, as distinct from immediately substituting a new grantee.

(3) As at 27 November 2015, two of the three relevant parties (Mr Rosengreen and Saadie Group) acted on a clear footing that they alone remained the parties to the option agreement made between them on 30 April 2015.

## *Lainson Holdings Pty Ltd v Duffy Kennedy Pty Ltd*

**[2019] NSWSC 576**

Coram: Hammerschlag J

Court: Supreme Court of New South Wales

Date: 17 May 2019

**ALTERNATIVE DISPUTE RESOLUTION** — expert determination — contract — construction of expert determination provision requiring an expert to make a determination ‘according to law’ — whether expert required to make a determination free of legal error affecting the result — whether expert determination susceptible to review for alleged legal error on its face; HELD: ‘according to law’ did not require the determination to be free of legal error to be binding — expert determination not susceptible to review for legal error on its face — expert determination binding

### Facts

This case concerned a contract entered into by Lainson Holdings Pty Ltd (**“Principal”**) and Duffy Kennedy Pty Ltd (**“Builder”**) for building works to be undertaken on the land owned by the Principal for a contract sum of $21.9 million. The parties contemporaneously entered into a Deed, which recited that they wished to record mutual accommodations made to reduce the risk to each of the Contract and that the Deed was to take priority over the Contract.

The Deed included a dispute resolution provision in clause 9. It stipulated that “if a dispute arises between the parties, the complainant must not commence any court or arbitration proceedings, except where that party seeks urgent interlocutory relief, unless it has first complied with this clause.” The clause provided requirements of notification, expert determination and continued performance of obligations.

The Contract itself contained another dispute resolution provision (cl 42), which, in its original form, provided for disputes to be referred to arbitration. However, a special condition (cl 59) of the Contract provided that the word “arbitration” is deleted and replaced by the words “expert determination”.

The Contract required the Builder to provide and deliver to the Principal, within 14 days of the date of the Contract, two unconditional bank guarantees for $500,000 each, with no expiry dates, as security. While the Builder established these guarantees, they were never delivered to the Principal.

A dispute arose between the parties and their correspondence may be summarised as follows:

- On 28 September 2015, the Principal issued the Builder a notice to show cause for why it should not take the work out of the Builder’s hands or terminate the Contract.

- On 5 October 2015, the Builder responded, through solicitors, giving its own notice to show cause and responding to Lainson's notice.

- On 6 October 2015, the Principal gave the Builder notice that it was terminating the Contract.

- On 9 October 2015, the Builder responded and asserted that the Principal had repudiated the Contract and communicated its acceptance of the repudiation.

- On 5 May 2016, the Builder gave the Principal notice of dispute claiming that it had not been paid for work and loss of profit.

- On 26 May 2016, the Principal issued the Builder with notice of dispute claiming loss and damage by reason of the Builder's failure to perform the work in a competent manner.

*Expert Determination*

On 26 May 2016, an Expert was appointed for resolving the dispute in accordance with cl 9 of the Deed.

The Expert determined that the Principal's purported termination of the Contract on 6 October 2015 was invalid. This was because because its power to issue a Notice to Show Cause and a Notice of Termination was subject to a duty to act reasonably and in good faith, and the Principal had exercised the power to terminate for an extraneous purpose in breach of that duty. With respect to the Builder, the Expert found that its treatment of the Principal's termination as repudiatory conduct to be valid, and thus its termination of the Contract on that basis to be valid.

In the proceedings, the Principal sought a declaration that it was not bound by the Expert Determination on the basis that:

(1) The Expert did not discharge the task entrusted to him by the Contract as he failed to determine the dispute "according to law" in pursuant of Rule 5.1. Specifically, the Expert erred, as a matter of law, in finding that its power to issue a Notice to Show Cause and a Notice of Termination was subject to an implied duty. Namely, the duty to act reasonably and in good faith and not for an extraneous purpose.

(2) Where parties contractually refer to an expert for determination a dispute in the decision of which a question of law becomes material, the Court can interfere where, on the face of the record, the expert has made a mistake of law. It argued that the finding of the implied term is a mistake of law which is obvious on the face of the record.

**Decision**

The Court found in favour of the Builder, rejecting both arguments advanced by the Principal.

*<u>Failure to make Determination according to law</u>*

With respect to the Principal's first argument, the Court noted that parties would be bound by the Expert Determination (irrespective of its result) if the Expert did what the Contract, on its proper construction, required him to do. Conversely, the Expert Determination will not be binding if the Expert went outside the ambit of what the Contract required him to do.

The key question for determination was thus: what did the Contract require the Expert to do in requiring him to determine the dispute "according to law"? In determining this, the Court looked to what a reasonable person would have understood them to mean. It held that the words "according to law" mean in the manner which the law requires a person in the position of the Expert to go about the mandated task, so as to give it contractual efficacy; for example, honestly and without bias or collusion.

*Error of law on the face of the record*

The Court rejected the Principal's argument that there had been an error of law on the face of the record which could be subject to judicial review.

This was because an expert determination is no more than a private contractual mechanism to which parties agree and which does no more than create binding contractual obligations. It has no statutory backing as a process. It is not a process which resolves any dispute by the exercise of judicial, quasi-judicial, administrative, statutory or other power or jurisdiction. As such, the Expert Determination is not a record and it is not susceptible to correction because there is a mistake in it, provided that what the Expert did was in the ambit of the Contract.

## *Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd*

## [2019] NSWCA 161

Coram: Bell P, Macfarlan JA, Payne JA

Court: New South Wales Court of Appeal

Date: 2 July 2019

**CIVIL PROCEDURE** — summary disposal — where claim said to be apportionable — dismissal of third-party cross-claim against named concurrent wrongdoer — whether primary judge erred in dismissing cross-claim based on independent causes of action against cross-defendant — consideration of Dymocks Book Arcade Pty Ltd v Capral Ltd [2010] NSWSC 195

### Facts

Landpower Australia Pty Ltd (**"Landpower"**) was the sole defendant in proceedings brought by Lindsay and Faith Northcott (**"Northcotts"**) in which they have sought damages for breach of contract, negligence, misleading or deceptive conduct and negligent misrepresentation relating to the performance of the harvester.

In Landpower's defence to the proceedings, Landpower alleged that there were a number of concurrent wrongdoers within the meaning of s 87CD(1) of the *Competition and Consumer Act 2010* (Cth) (**"CCA"**) and the *Trade Practices Act 1974* (Cth) (**"TPA"**) and s 35(1) of the *Civil Liability Act 2002* (NSW) (**"CLA"**). Included in these concurrent wrongdoers was Penske Power Systems Pty Ltd (**"Penske"**).

Landpower alleged that the Northcotts' claims were apportionable claims for the purposes of Part 4 of the CLA and section 87CB of the CCA. Landpower thus went on to pursue a cross-claim against Penske in which it:

- Sought to claim relief pursuant to section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) if, as alleged, the Northcotts suffered loss or damage. This claim was ultimately conceded by Landpower as being bound to fail; and

- Alleged other claims in respect of misleading and deceptive conduct, negligent misrepresentation and breach of contract (as between Landpower and Penske).

Penske was successful in seeking orders to summarily dismiss the cross-claim. Landpower appealed that decision.

### Decision

The Court allowed the appeal and held Landpower's cross-claim should not have been dismissed or struck out.

The Court found that s 36 of Part 4 of the CLA did not operate to preclude a cross-claim against an alleged concurrent wrongdoer where the cross-claim is based on an independent cause of action. Indeed, the Court noted that such a claim may, in effect, act as an alternative plea against the possibility that the cross-defendant is *not* found to be a concurrent wrongdoer and/or the plaintiff's claim is not held to be apportionable. This is provided that the cross-claim is brought bona fide and is not demurrable. The fact that it may not ultimately succeed (wholly or in part) does not mean that the cross-claim should be summarily dismissed.

The Court also commented on the purpose of proportionate liability regimes. It noted that such regimes are not intended to undermine independent substantive rights that a defendant may have against alleged concurrent wrongdoers and it would be undesirable and potentially prejudicial to wait for a determination (that a particular entity was a concurrent wrongdoer) to be made in order to bring separate proceedings under an independent cause of action.

## ***Lendlease Engineering Pty Ltd v Timecon Pty Ltd***

## **[2019] NSWSC 685**

Coram: Ball J

Court: Supreme Court of New South Wales

Date: 12 June 2019

**BUILDING AND CONSTRUCTION** — adjudication — whether determination of adjudicator void — jurisdiction of adjudicator — Building and Construction Industry Security of Payment Act 1999 (NSW) — whether there was a construction contract — whether there was a construction contract under which there was an undertaking to carry out construction work or to supply related goods and services

### Facts

Lendlease Engineering Pty Ltd and Bouygues Construction Australia Pty Ltd together formed an unincorporated joint venture (**"the LLBJV"**). The LLBJV purportedly entered into a contract or arrangement with Timecon Pty Ltd (**"Timecon"**) by which Timecon agreed to permit LLBJV to store on a site in Somersby virgin excavated natural material (**"VENM"**) produced by excavation and tunnelling work for the NorthConnex Project. This was for a fee of $4.00 per tonne.

On 7 November 2018, Timecon served a payment claim on the LLBJV claiming $4.00 per tonne for the "generation and recovery of spoil from the NorthConnex project Tunnel" of 201,712 tonnes of VENM for a total price of $887,532.80 including GST. In response, the LLBJV served a payment schedule certifying the scheduled amount as "nil". The dispute went to adjudication where the Adjudicator found in favour of Timecon in the amount of $887,532.80 including GST.

The LLBJV commenced proceedings seeking to have the adjudication determination set aside. Arguing on the basis of jurisdictional error, the LLBJV claimed that there was no "contract or other arrangement" within the meaning of the SOP Act between it and Timecon relating to the disposal of VENM at the Somersby Site.

### Decision

The key issue for determination was whether an arrangement had to be legally binding in order for it to be a "contract or other arrangement" for the purposes of the SOP Act.

In determining this, Ball J looked to a number of cases in which the Court had adopted the view that an arrangement did not need to be legally binding in order to come within the SOP Act. These included:

(1) *Okaroo Pty Ltd v Vos Construction and Joinery Pty Ltd* [2005] NSWSC 45 (Nicholas J);

(2) *Machkevitch v Andrew Building Constructions* [2012] NSWSC 546 (McDougall J); and

(3) *IWD No 2 Pty Ltd v Level Orange Pty Ltd* [2012] NSWSC 1439 (Stevenson J).

His Honour found that the circumstances of each of these cases were such that there was in fact a legally binding arrangement, even if not of a contractual nature.

His Honour also noted that the above cases failed to consider the operation of s 32 of the SOP Act which allows a Court or Tribunal to order the restitution of any amount paid under a SOP Act payment claim where the claimant is found in civil proceedings, to have no underlying right to be paid.

In view of this, his Honour held that the SOP Act could not be interpreted as creating an obligation to pay where one does not otherwise exist. Rather, its purpose is to provide a mechanism by which contractors who do work in the construction industry, and are entitled to be paid for that work are able to make progress claims and to have those claims paid promptly.

Having established that a legally binding arrangement was required, his Honour found that there was no contract or other arrangement between the LLBJV and TImecon for the disposal of tunnel spoil from the NorthConnex Project. Consequently, the adjudication determination was declared void.

***Lords Property Group Pty Ltd v Shire Lind Developments (NSW) Pty Ltd***

**[2019] NSWSC 1818**

Coram: Ball J

Court: Supreme Court of New South Wales

Date: 11 December 2019

**BUILDING AND CONSTRUCTION** — Building and Construction Industry Security of Payment Act 1999 (NSW) — progress payment claims under section 13 of the legislation — recovery of amounts in respect of those payment claims — purported defence based on terms of construction contract — section 16(4)(b) of legislation disentitles defendant to bring defence based on terms of relevant construction contract — no defence to plaintiff's claim — no issue of principle

**CIVIL PROCEDURE** — Appearances — multiple applications for adjournments — failure by defendant to appear at final hearing — ample opportunity for defendant to obtain legal representation and advice — defendant made aware of time and place of final hearing — hearing to proceed in absence of defendant

**Facts**

Lords Property Group Pty Ltd (**"Contractor")** and Shire Lind Developments (NSW) Pty Ltd (**"Developer"**) entered into a contract for the design and construction of two six-storey residential buildings in Sutherland.

The Contractor commenced proceedings seeking to recover seven progress payments said to be due under the contract.

While the Developer filed a technology and construction list response, it did not file any evidence. The Developer had also advised the Court that it did not seek to cross-examine the plaintiff's witnesses, and that it had no defence to the plaintiff's claim.

When the matter came on for hearing on 5 December 2019, the Developer sought an adjournment on the basis that it had just dismissed its general counsel and wanted an opportunity to obtain legal advice and instruct its solicitors. An adjournment was granted and the matter was set down for hearing on 11 December 2019.

On 10 December 2019, the Developer emailed the Court notifying that it had failed to secure legal representation and requested an adjournment be granted. The Developer was informed that an application for a further adjournment would have to be made in open court at the time of the hearing. There was no appearance by the Developer at the hearing.

**Decision**

His Honour found that the Developer had been given sufficient time to obtain legal representation and was on notice of the hearing. As such, his Honour deemed it appropriate to proceed to deal with the matter, notwithstanding the absence of the Developer.

The Court held that the Developer had failed to make full payment of progress claims 5, 6, 7 and 8 and that such sums were owed to the Contractor. With respect to the progress claims which were paid late, the Contractor was to be entitled to interest.

The court made orders accordingly.

### *Loulach Developments Pty Ltd v Roads and Maritime Services*

### [2019] NSWSC 438

Coram: Leeming JA

Court: Supreme Court of New South Wales

Date: 18 April 2019

**LIMITATION PERIODS** — negligence — when causes of action first accrued — developer incurred material wasted expense, but only sued for lost profit — wasted expense incurred more than six years before proceedings commenced, at time when profit was prospective — significance of plaintiff confining claim to lost profits — significance of interest sought to be protected by common law — cause of action on first representation statute barred — defendant failed to establish plaintiff incurred material loss from second representation prior to six years before proceedings commenced — cause of action on second representation not statute-barred

**NEGLIGENCE** — duty — novel duty of care — pure economic loss to developer from negligent misstatement by statutory authority to council — significance of assumption of responsibility, reliance and vulnerability — whether duty inconsistent with or sat ill with statutory obligations applicable to authority — no duty found in relation to second representation

**NEGLIGENCE** — duty — scope of duty — first representation made directly by statutory authority to developer — whether representation went beyond question asked — whether representation outside scope of duty of care — first representation within scope of duty of care

**NEGLIGENCE** — breach — whether at time representations were made there was extant proposal to widen or realign road — significance of historical documents — significance of failure to give testimonial evidence — significance of concession that proposal had at some stage been abandoned — breach made out

**NEGLIGENCE** — causation — whether developer had established it would have acted differently had there been no breach — causation not established

**NEGLIGENCE** — special statutory power — whether statutory authority was exercising special statutory power when responding to council — Civil Liability Act 2002 (NSW) s 43A considered — s 43A inapplicable

**NEGLIGENCE** — damages — plaintiff's case depended on ‘Desired Development’ being built — damages calculated by reference to hypothetical profit calculations of Desired Development and actual development — whether plaintiff established any chance of Desired Development being approved — no fall-back case for wasted expenditure — damages case not made out

### Facts

Loulach Developments Pty Ltd (**"Loulach"**) was the developer of a mixed-use development in Parramatta. The development site was comprised of two lots; Lots 11 and 12.

In August 2008, Loulach sought to obtain development consent to build on Lot 11. To this, the predecessor of the Roads and Maritime Services (**"RMS"**) the Roads and Traffic Authority (**"RTA"**), confirmed in writing that the whole of Lot 12 was required for the widening of Pennant Hills Road (**"First Representation"**).

During the assessment of Loulach's development application, a similar representation was made to Parramatta City Council (**"the Council"**). By a letter dated 30 January 2009, the RTA advised the Council that Lot 12 was affected by a Road Widening Order as notified in the Government Gazette No. 25 dated 17/03/1967 (**"Second Representation"**). However, contrary to the RTA's letter, the 1967 road widening order did not apply to Loulach's land. Nor did any other road widening order

### Loulach's cause of action

Loulach sued RMS in negligence for pure economic loss.

It claimed that in making the First and Second Representations, the RTA assumed a duty to Loulach to take reasonable care in relation to the provision of information and advice. It further alleged that RTA breached its duty by failing to take reasonable steps to confirm the accuracy of each of the First and Second Representations. Moreover, had the duty not been breached, Loulach claimed that it would have sought rezoning and development consent to pursue its desired development on both Lots 11 and 12, which would have been more profitable.

### RMS's defence

RMS denied that it owed any duty of care to Loulach when it wrote to the council. It denied that there was any breach of duty insofar as the substance of both representations was correct, based on its contention that there was an extant proposal involving the widening of Pennant Hills Road in 2008 and 2009.

It denied that any breach of duty had caused loss to Loulach. It denied that Loulach would have sought rezoning, or obtained rezoning, or applied for a different development consent, or been granted consent for a different building, and it denied that Loulach had suffered any of the loss claimed.

Finally, RMS alleged that the whole of Loulach's cause of action was statute barred by reason of s 14(1)(b) of the Limitation Act 1969 (NSW).

### Decision

Leeming JA dismissed Loulach's claim in relation to both the First Representation and the Second Representation.

*First Representation*

His Honour held that, as alleged by Loulach, in making the first representation in the RTA's 19 August 2008 letter, it assumed a duty to Loulach to take reasonable care in relation to the provision of information and advice in that letter, including as to the existence of a road widening proposal.

With respect to breach, this was found to turn on whether or not there was an extant proposal to widen the road using land situated within Lot 12 in 2008. His Honour found that there was no such proposal and thus found that the RTA had breached the duty of care it owed when it made the first representation.

His Honour, however, found Loulach's claim failed on the point of causation. His Honour did accept that it was plausible that had the RTA disclosed that it had no need for Lot 12 for road widening, then Loulach would have considered applying for a rezoning to permit a different development extending to Lot 12. However, his Honour was not convinced that the "Desired Development" was abandoned upon receipt of the first representation.

*Second Representation*

With respect to the Second Representation, his Honour held that no duty was owed to Loulach to take reasonable care when responding to the Council's reference of the development application. While his Honour accepted that it was reasonably foreseeable that the RTA's response would be seen by the applicant, such was held to fall short of being sufficient to impose a duty. This was because there was an absence of any assumption of responsibility on the part of the RTA, no direct reliance had been established and Loulach was not especially vulnerable.

Importantly, his Honour pointed to the statutory function of the RTA and found it difficult to see how the common law would impose a duty upon the RTA to take reasonable care where the statutory regime invited the RTA to employ its expertise to provide advice as to the safety and efficiency of the built structure, and its impact on traffic during the construction phase.

*Limitation Period*

While both actions were found to fail, his Honour went on to consider the effect of the limitation period. Relevantly, s 14(1)(b) of the *Limitation Act* provides:

> "An action on any of the following causes of action is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims:
>
> (b) a cause of action founded on tort, including a cause of action for damages for breach of statutory duty"

It was held that while Loulach's first cause of action was statute-barred, the second was not.

In respect of the first cause of action, it was held that insofar as Loulach spent funds on the actual development, rather than the "Desired Development", such constituted actual loss. Indeed, given that Loulach had spent funds in preparing the development application prior to 22 December 2008, its cause of action had thus accrued.

With regard to the second cause of action, his Honour was not satisfied that RMS had discharged its onus of proving that Loulach had suffered measurable and non-negligible loss in the period between 30 January 2009 and 5 June 2009.

His Honour therefore found for the defendant and dismissed the plaintiff's claim.

## *Maloney v Blue Haven Pools South Pty Ltd*

## [2019] NSWCATCD 17

Coram: Ross Senior Member

Court: NSW Civil and Administrative Tribunal

Date: 25 February 2019

### Facts

This case concerns a contract between the applicant (**"Ms Maloney"**) and Blue Haven Pools South Pty Ltd (**"Blue Haven"**) for the construction of an in-ground swimming pool.

When excavation began on 6 July 2016 water inundated the site and construction ceased. A dispute arose between the parties as to who was contractually liable to pay the additional costs necessary to facilitate the construction of the pool.

Ms Maloney originally filed an application seeking an order that Blue Haven construct the pool in accordance with the contract. However, Ms Maloney later alleged that Blue Haven had repudiated the contract. She purported to accept the repudiation and terminated the contract. She then sought an order that Blue Haven pay her damages of $182,332.23.

Blue Haven rejected Ms Maloney's claims and instead alleged that it had at all times been willing and able to construct the pool provided that Ms Maloney fulfil her obligation to pay the additional costs. It argued that Ms Maloney was not entitled to terminate the contract and that in doing so she repudiated the contract. Blue Haven says that it accepted Ms Maloney's repudiation and itself terminated the contract.

### Decision

The Tribunal Member found in favour of Ms Maloney in the sum of $94,494.23 as damages for repudiation of the contract.

The reasons for this decision may be summarised as follows:

Items 7 and 8 of the agreement are expressed in broad terms and extend to "any work necessary to stabilise the site conditions encountered in excavating." As such, this includes the installation of sheet piling, and the supply and installation of the dewatering system. The costs of such work are expressly included in the fixed price of the contract.

Clause 9(f) entitles Blue Haven to make variations where there is a latent condition in the land. It was held that the risk of collapse of the excavation was not a latent condition and thus no variation could be made in respect of the costs of dewatering. However, given that the actual conditions required steel sheet piling at a much greater expense, such amounted to latent conditions. That said, Blue Haven is not entitled to a variation because the wording of Item 8 does not exclude work required because of a latent condition.

Blue Haven's actions in entering the applicant's home, without her consent, and placing a cheque in the hallway was an unequivocal act of repudiation. There is no doubt that a reasonable person in Ms Maloney's position would conclude that by returning all monies paid under the contract Blue Haven no longer intended to be bound by the contract. Ms Maloney was therefore entitled to terminate, and had validly done so.

### *MMIR Pty Limited v Iskra*

### [2019] NSWSC 35

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 29 January 2019

**BUILDING AND CONSTRUCTION** — construction contracts — Building and Construction Industry Security of Payment Act 1999 (NSW) — requirement that Adjudicator assess the value of construction works in accordance with terms of ‘do and charge’ contract — requirement that Adjudicator assess the reasonableness of builder's margin — failure of Adjudicator to address requirements amounts to jurisdictional error

#### Facts

This case concerns a contract between MMIR Pty Ltd (**“Owner”**) and Iskra (**“Builder”**) for the upgrade and refurbishment of a restaurant and fitness centre in Wollongong. Over the course of the project, the Owner made payments totalling the sum of $456,000 to the Builder. In dispute is the balance which the Builder claimed remained unpaid.

The payment claim in question was dated 4 September 2018, and consisted of 15 work items that totalled $528,156.05 and a “project management fee” of $31,689.36 including GST; the total amount claimed for the project was $615,829.95. The invoice allowed a credit for amounts paid of $450,000, leaving an amount payable of $165,829.95. The Owner responded to the payment claim with a payment schedule indicating a nil payment.

Upon adjudication, the Adjudicator found in favour of the Builder in the sum of $159,829.95.

The Owner accepted that the contract in question was an oral contract for the work to be done on a “do and charge” basis. It also accepted that the work in question had been completed. However, at issue was whether it had been properly valued.

Counsel for the Owner contended that the Adjudicator had failed to make any rational analysis of whether the amount claimed in the payment claim was justified having regard to the terms of the contract and the value of the works undertaken. Counsel submitted that this case rises to a jurisdictional error because the Adjudicator had failed to satisfy an essential requirement of conducting an adjudication in accordance with the Act. Specifically, it relied on a statement of principle by Brereton J in *Pacific General Securities Limited v Soliman & Sons Pty Limited* [2006] NSWSC 13 at [86]:

> “The absence of relevant material from a respondent does not entitle the adjudicator simply to award the amount of the claim without addressing its merits, which as a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value. Adoption of the other approach by an adjudicator - by allowing a claim in full just because a respondent's submissions are rejected, without determining whether the construction work the subject of the claim has been performed and without valuing it - would bespeak a misconception of what is required of an adjudicator”

### Decision

His Honour found in favour of the Owner and held that the Adjudicator had failed to come to a view as to what was properly payable having regard to the true construction of the contact under the Act and the true merits of the claim. His Honour found that it was unclear whether the Adjudicator appreciated that this is what he needed to do.

Moreover, had the Adjudicator considered each of the individual invoices, such would have been insufficient. The Adjudicator was also required to consider the reasonableness of the charge made by the builder for the work done, whether in terms of cost to the builder or on any other basis of charging. The Adjudicator was also required to evaluate the reasonableness of the six per cent charged by way of “project management fee”.

His Honour thus set aside the adjudication determination.

### *MN Builders Pty Ltd v MMM Cement Rendering Pty Ltd*

### [2019] NSWDC 734

Coram: Abadee Judge

Court: District Court of New South Wales

Date: 4 December 2019

**BUILDING AND ENGINEERING CONTRACTS** — application for summary judgment — claim by subcontractor against builder for unpaid tax invoice — whether valid construction contract was entered into — whether payment claim was served — whether claimant's pleading precludes submission that payment claim was served

**Facts**

This case involves a contract between MN Builders Pty Ltd (**"Builder"**) and MMM Cement Rendering Pty Ltd (**"Subcontractor"**) for the supply of rendering services in connection with building works in Liverpool. The rendering works subject to the contract were performed from the middle of 2018 through to late January 2019.

Dispute arose between the parties in respect payment owed under the contract. The Subcontractor issued 7 tax invoices; however, only the 7th tax invoice was paid by the Builder.

*Builder's Claim*

The Builder claimed that it had overpaid the Subcontractor by approximately $280,000. It is alleged that the contract price was calculated per square metre in accordance with a quote from the Subcontractor on the day the contract was formed, being 7 June 2018. Accordingly, the value of the work performed by the Subcontractor was in the sum of $326,635.62 (incl GST).

In its defence, the Subcontractor argued that most of the surfaces rendered were less than 1 $m^2$. As such, the parties had verbally agreed that rendering would be charged on a "lineal" basis, not a "square metre" basis. The Builder denies such an agreement was reached.

*Subcontractor's Cross-claim*

The Subcontractor later filed a cross-claim in reliance of the *Construction Industry (Security of Payment) Act 1999* (NSW) (**"the Act"**). It alleged that its invoice constituted a "Payment Claim" under the Act and that as no "Payment Schedule" had been served within 10 business days, the Builder was thus liable for the sum of $129,827.50 plus interest.

To this, the Builder argued that no valid construction contract was entered into for the purposes of the Act, nor was a valid "Payment claim" ever served pursuant to the Act.

*Application for Summary Judgement*

In the present proceedings, the Subcontractor sought summary judgement on the cross-claim.

The Builder submitted that the application must fail since there are triable issues in relation to: whether there is a "construction contract"; and whether and how the payment claim was served. Specifically, whether a payment claim had been validly served in accordance with the contract, and whether s31 of the Act (which requires the payment claim be provided to “the person” or the person who has authority to receive it) has been complied with.

**Decision**

His Honour found in favour of the Subcontractor and entered a summary judgment for the Subcontractor in the sum of $129,827.50.

*Construction of the contract*

In finding that there was no triable issue as to whether there was a construction contract, his Honour distinguished the present case from *Grave v Blazevic Holdings Pty Ltd t/as Kross Building Services* (2010) 79 NSWLR 132. Unlike *Grave,* the issue here was not directed at the existence of a construction contract, but rather, the proper basis for the applicant charging under the construction contract.

*Payment claim*

His Honour also found there to be no triable issue as to whether the Builder had been validly served with the payment claim in accordance the contract or with s 31 of the Act. This was because once the Builder had confirmed receipt of the payment claim, questions about compliance became redundant.

## *Modog Pty Ltd v ZS Constructions (Queenscliff) Pty Ltd*

**[2019] NSWSC 1743**

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 6 December 2019

**BUILDING AND CONSTRUCTION** — payment claims under the Building and Construction Industry Security of Payment Act 1999 (NSW) — adjudication determination — whether email and attached schedule sent by project manager a payment claim under s 13(1) — whether defendant was person who sent documents it asserts was a payment claim — whether multiple payment claims served in respect of one reference date

### Facts

This case concerns a contract entered into by Wyndora 36 Pty Limited (**"Owner"**) and Modog Pty Limited (**"Head Contractor"**) for the design and construction of apartments in Freshwater, NSW. To assist in the performance of the works, the Head Contractor engaged ZS Constructions (Queenscliff) Pty Ltd (**"Subcontractor"**).

The Head Contractor and Subcontractor adopted a process of submitting progress claims and payments of amounts relating to the project whereby each month, the Subcontractor prepared a payment summary sheet listing invoices and amounts due and payable. These were in respect of construction management and procurement services provided, materials acquired from suppliers and work done by trade contractors.

On 11 September 2019, the Subcontractor emailed the Head Contractor and attached a document referred to as a "Payment Summary Sheet" for the project. Following this initial email, on the same day, six further emails were sent to the Head Contractor attaching invoices that were referred to in the Payment Summary Sheet. On 19 September 2019, the Head Contractor issued five payment schedules in response to five invoices sent via the fifth and sixth emails dated 11 September 2019 ("five management invoices"). The amounts payable were assessed as nil.

Upon adjudication, the Adjudicator found in favour of the Subcontractor and adjudicated the amount owed by the Head Contractor to be the amount of $57,488.66. The only part of payment claim the adjudicator did not allow was one of the five management invoices in the sum of $21,249.00.

In these proceedings, the Head Contractor sought to have the adjudication determination set aside. It argued that the 11 September 2019 email was not a valid payment claim within the meaning of section 13(1) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**"SOP Act"**); and as such, the Adjudicator did not have jurisdiction to consider the claim.

### Decision

While her Honour accepted that service of a payment claim within the meaning of s 13(1) was a necessary pre-condition to the adjudicator having jurisdiction to determine the adjudication application made by the Subcontractor, the Court was not satisfied that the Head Contractor had successfully established jurisdictional error.

This is because when considered in the context of the past dealings between the parties, the 11 September email and attached Payment Summary Sheet can together be read as constituting a payment claim within the meaning of s13(1). When viewed as a matter of substance rather than form, her Honour found that there was only one payment claim made. Indeed, the Head Contractor's decision to respond to the payment claim via multiple payment schedules does not itself alter the objective character of the Subcontractor’s emails.

## ***Parsons v Adams***

## **[2019] NSWCATAP 301**

Coram: Britton Principal Member, Sarginson Senior Member

Court: NSW Civil and Administrative Tribunal

Date: 20 December 2019

**BUILDING AND CONSTRUCTION** — liability of contractor for breach of statutory warranty under s 18B of the Home Building Act 1989 (NSW) — scope of s 18F defence to a contravention of a statutory warranty under s 18B of the Home Building Act

**CONTRACT** — ascertaining parties to contract

### Facts

In 2017, Ms Sarah Adams (**"Owner"**) had engaged Mr Dennis Parsons (**"Contractor"**) to construct a concrete slab on which to erect an outdoor "alfresco room". Two months after the slab was poured, the Owner noticed that parts of the slab had begun to lift.

In November 2018, an inspector appointed by the Department of Finance, Services and Innovation issued the Contractor a "rectification order" under s 48E of the *Home Building Act 1989* (NSW) (**"the Act"**). The Contractor did not comply with that order.

The Owner then made an application to the NSW Civil and Administrative Tribunal seeking an order for compensation in the sum of $22,000. The Tribunal ordered the Contractor pay $18,726 for the cost of rectifying the defective concrete slab.

The Contractor now seeks to appeal that decision on the following grounds:

(1) The Contractor argued that he was not a party to the contract. The parties were the Owner and D & J Parsons Pty Ltd (**"the Company"**).

(2) The Contractor further argued that he had relied on plans provided by the Owner and the site classification provided by the Owner's certifier. The Owner's certifier instructed the Contractor of the required piers, the certifier inspected the piers and approved them before they were poured.

### Decision

The Tribunal noted that on the face of the quotation, the identity of the party contracted to perform the work was ambiguous. This was because while the letterhead identified the Company, the quotation referenced the Contractor's licence number.

Given this, the Tribunal turned to consider the surrounding circumstances and subject matter of the contract. The Tribunal highlighted the verbal assurance given to the Owner by the Contractor that he was licensed to undertake the work. As such, the Tribunal found that a reasonable observer would conclude that the parties intended that the contract would be with whomever was the holder of the contractor licence; that being the Contractor and not the Company.

The Tribunal found that the Contractor was in breach of a statutory warranty that the work "will be done with due care and skill" and "will be reasonably fit for the particular purpose for which the work is required."

Furthermore, no defence under s18F of the Act was available to the Contractor. Specifically, s18F provides a defence where the deficiencies complained of can be proved to arise from either the instructions given by the person for whom the work was contracted to be done, or reasonable reliance by the defendant on written instructions given by a person who is a relevant professional acting for the person for whom the work was contracted to be done.

In the present case, the Tribunal found that the Owners did not provide any instructions. Moreover, even if it is accepted that the certifier was "a relevant professional" who had inspected the work and given him "verbal approval" for the work, there is no evidence to suggest that the certifier gave the Contractor written instructions to that effect.

Thus, the Tribunal dismissed the appeal.

***Pollak v Yapp***

**[2019] NSWCA 150**

Coram: Bell P, Payne JA, White JA

Court: New South Wales Court of Appeal

Date: 20 June 2019

**CONTRACTS** — Construction — Interpretation — Contract for sale of land — Special condition in contract required vendor to ensure all development conditions complied with prior to completion — Whether warranty had effect of requiring all works subject of development approval to be completed — Special condition contained disclosure that some works were carried out in conformity with development consent but lower staircase requires replacement — Whether disclosure amounts to warranty that all works subject of development approval have been completed — Where some but not all works the subject of development approval in fact completed — Whether provision of interim occupation certificate capable of satisfying vendors' obligation to provide an occupation certificate

**BUILDING AND CONSTRUCTION** — Occupation certificates — Whether interim occupation certificate that certifies some but not all of works the subject of development approval means that whole premises cannot be lawfully occupied — Whether occupation certificate relates to entire property or merely part of property on which certified works situated — Meaning of 'altered portion' of existing building

**Facts**

Yapp (**"Vendor"**) and Pollak (**"Purchaser"**) entered into a contract for the sale of land in Woolloomooloo on 30 June 2018. While the stipulated date for completion was 11 October 2018, the Purchaser did not complete the contract on the basis that the Vendor failed to adhere to obligations contained in Special Condition 49.

Special Condition 49 provided that:

> "Notwithstanding clause 35, the vendor discloses works have been carried out in accordance with the Development Approval annexed to the contract, however, the lower staircase requires replacement. The vendor agrees to ensure the replacement of the lower staircase is carried out in accordance with the Development Approval prior to settlement. The vendor warrants that all Development Consent Conditions will be satisfied on or before completion and will provide an occupation certificate to the purchaser prior to settlement. The purchase cannot make a claim or requisition or rescind or terminate in respect of this work."

Some but not all of the works authorised by the Development Approval had been carried out. On 24 August 2018, the accredited certifier issued an interim occupation certificate in respect of the property, noting that the building was suitable for occupation or use in accordance with its classification under the Building Code of Australia BCA class 1a. The IOC was then forwarded onto the Purchaser and purported to be "in satisfaction of Special Condition 49."

At first instance, the primary judge dismissed the cross-claim brought by the Purchaser seeking orders that the Vendors specifically perform and carry into effect Special Condition 49 of the contract by satisfying all of the development consent conditions of the Development Approval referred to in the contract and providing an occupation certificate in accordance with that Special Condition.

The primary judge held that:

- The warranty contained in Special Condition 49 did not require the Vendor to complete the balance of the works permitted by the Development Approval. Rather, it was only a warranty in respect of works which had already been carried out in accordance with the Development Approval as set out in the first sentence.

- Special Condition 49 could be satisfied by the provision of an interim occupation certification as opposed to a final occupation certificate.

The primary judge thus found that the Vendor had complied with Special Condition 49 and subsequently made an order for specific performance in favour of the Vendor.

The Purchaser appealed the primary judge's order for specific performance of the contract on the basis that Special Condition 49 required the vendors to complete all of the works under the Development Approval and obtain a final occupation certificate in respect of those works.

**Decision**

The Court upheld the primary's judge's decision and was satisfied that the Vendor's actions in undertaking alteration works to the staircase and providing an interim occupation certificate in respect of those works satisfied its obligations under Special Condition 49.

In interpreting the first sentence of the Special Condition, which stated *"the vendor discloses works have been carried out in accordance with the Development Approval,"* the Court characterised this as a disclosure by the Vendor that any works that had been carried out were carried out in accordance with the development approval. It was not a disclosure that all work permitted by the approval had been carried out.

With respect to the requirement that an "occupation certificate" be provided prior to settlement, the Court held that it would be incorrect to assume that a final occupation certificate could only be issued once all of the work the subject of the development approval was completed. Rather, an interim certificate may validly satisfy this obligation.

## *Poonindie Pty Ltd trading as Ted Wilson and Sons (TWS) v Eurobodalla Shire Council*

## [2019] NSWSC 1485

Coram: Rein J

Court: Supreme Court of New South Wales

Date: 28 August 2019

**BUILDING AND CONSTRUCTION** — Expert determination — Where, on the defendant's case, four issues were referred to the expert for determination, but on the plaintiff's case only one of those issues was validly referred, such that the expert's determination ought to be void for want of a mandate — Where the contractual provisions governing expert determination allowed the parties to raise before the expert 'any' cross claim, set-off or defence once an initial issue had been referred

**CIVIL PROCEDURE** — Separate determination of questions

### Facts

Poonindie Pty Ltd trading as Ted Wilson and Sons (**"TWS"**) and Eurobodalla Shire Council (**"Council"**) entered into a contract by which TWS was to undertake construction works at the Bodalla Sewage Treatment Plant.

The contract contains a mechanism for the resolution of disputes via expert determination. Mr Neil Turner (**"the Expert"**) was appointed for the determination of a dispute in respect of the internal plant road (**the 'Road Issue'**). The Expert was also appointed to determine three other issues which were raised by the Council as cross-claims. These were in respect of clay liners (**the 'Liners Issue'**); uni-flanges joints (**the 'Flanges Issue'**); and decant pump capacity (**the 'Pump Issue'**).

The Expert found in favour of to the Council in respect of the Road Issue and Liners Issue, and in favour of TWS in respect of the Flanges Issue and Pump Issue (**"Expert Determination"**).

TWS brought proceedings seeking declarations as to the validity of the Expert Determination. Specifically, TWS argued that the Expert did not have jurisdiction to consider the cross-claims relating to the Liners, Flanges and Pump for they were not connected with the subject matter of the Roads Issue advanced. Moreover, they had not been through commercial negotiations as required by cl 69 of the contract.

In response, the Council argued that the Expert Determination was valid as it was within the scope of the dispute resolution provisions of the contract. Relevantly, the Council pointed to cl 71.6 of the contract which provided: "in response to any issue referred to the Expert by a party, the other party may raise any defence, set-off or cross-claim". The Council contended that the word "any" is broad and thus, cl 71.6 should not be read as imposing any limitations on cross-claims that may be brought.

### Decision

The Court upheld the validity of the Expert Determination in relation to all four issues, finding there to be no reason to restrict the words in cl 71.6.

Specifically, the Court observed that it was well-accepted that a cross claim does not have to bear any relationship to the primary claim put forward by the plaintiff or applicant. Accordingly, there is no reason not to treat the parties as importing into their agreement the usual technical (legal) meaning of "cross claim".

***Porges v Adcock Private Equity Pty Ltd***

**[2019] NSWCA 79**

Coram: Payne JA, White JA, Sackville AJA

Court: New South Wales Court of Appeal

Date: 17 April 2019

**CONTRACTS** — Misleading conduct under statute — Misleading or deceptive conduct — Silence — Sale of shares in company — Vendor represented to purchaser that company was good and profitable investment — Vendor disillusioned with management of company — Vendor aware of risk of litigation against company — Whether primary judge erred in finding vendor's failure to disclose was misleading or deceptive conduct

**Facts**

Mr Stephen Porges was the executive chairman of Adcock Private Equity Pty Ltd (**"APE"**). Before APE could make any investment, approval had to be given by Mr Proges. One of APE's investments was in a company called DirectMoney Finance Pty Ltd (**"DirectMoney"**) which was proposed to be listed on the Australian Stock Exchange.

In late 2014, the shareholders of DirectMoney sought to appoint Mr Porges as the non-executive chairman. Mr Porges agreed to take up the position provided that APE buy his shares in a company called SecureOne Corporation, Inc (**"SecureOne"**). This was because if he were to take on the role, he would be earning less money than he would normally earn and would thus need to liquidate some of his assets. APE subsequently acquired in total 1,100 shares held by Mr Porges in SecureOne.

Mr Porges failed to disclose to APE that he was involved in a disagreement with the management of SecureOne. He also failed to disclose that there was a signification claim (in excess of USD10million) against SecureOne for breaching a share purchase agreement and that the costs to defend this claim would likely cripple SecureOne. While this claim was ultimately dismissed, the costs incurred by SecureOne resulted in SecureOne's collapse and the devaluation of its share price to zero.

APE commenced proceedings against Mr Porges on the basis that it had been induced to purchase Mr Porges' shares in SecureOne on the basis of misleading and deceptive conduct on the part of Mr Porges. Specifically, APE alleged that it was induced to purchase Mr Porges' shares based on "Profit Representations" that:

- Mr Proges was involved in the day-to-day business of SecureOne and thus had reliable information about its performance;
- SecureOne was trading profitably;
- SecureOne had a viable business plan that was being effectively executed;
- SecureOne was likely to be attractive to a potential purchaser of its shares;

- APE was likely to make a net profit if it purchased shares in SecureOne and would be a good and profitable investment for APE; and

- Mr Porges was a reluctant seller of the shares.

**NSW Supreme Court Decision**

At first instance, McDougall J found that Mr Porges hadd engaged in misleading or deceptive conduct by not disclosing information relating to the suit against SecureOne. Specifically, his Honour found that Mr Porges had been aware of information that was inconsistent with the picture he painted of SecureOne's prospects, and that the most basic considerations of commercial honesty would have dictated that he disclose those circumstances to APE.

McDougall J further observed that it would be “impossible to accept that an intelligent and experienced business man” could have thought that the omitted information was of no importance. Rather, it was common sense that the suit against SecureOne was the type of information that any purchaser considering an investment in SecureOne shares would have thought material to its decision to proceed.

**Appeal**

Mr Porges sought to appeal the decision of the primary judge on the basis that:

(1) Mr Porges did not make some of the alleged representations to APE;

(2) Mr Porges had reasonable grounds for making the some of the alleged representations;

(3) Some of the alleged representations did not amount to misleading or deceptive conduct;

(4) APE did not rely on some of the alleged representations

**Decision**

The appeal was unanimously dismissed by the NSW Court of Appeal.

The Court found that Mr Porges' grounds of appeal “failed to grapple with the way in which the primary judge decided the case.” Specifically, the primary judge’s decision turned on the finding that Mr Porges’ failure to disclose material information amounted to misleading or deceptive conduct. It was not, as assumed by Mr Porges, that each positive representation was misleading or deceptive.

## *Rhomberg Rail Australia Pty Ltd v Concrete Evidence Pty Limited*

## [2019] NSWSC 755

Coram: Ball J

Court: Supreme Court of New South Wales

Date: 21 June 2019

**BUILDING AND CONSTRUCTION** — adjudication determination under section 22 of Building and Construction Industry Security of Payment Act 1999 (NSW) — whether determination void — jurisdictional error — whether adjudicator failed to afford natural justice and procedural fairness in reaching determination — whether denial of procedural fairness was substantial — whether entitled to recover in respect of unaffected part of claim

### Facts

Rhomberg Rail Australia Pty Ltd (**"Contractor"**) and Concrete Evidence Pty Limited (**"Subcontractor"**) were parties to a contract for works in connection with the light rail project. A dispute arose between the parties in respect of a final payment claim dated 31 October 2018 served by the Subcontractor on the Contractor. The claim was for the sum of $1,206,754.12 (excluding GST), being the amount owed under the contract together with a claim for 119 variations.

Relevantly, in its adjudication application, the Subcontractor stated that it had created a "further Variations Register for the purposes of this adjudication which records the variation claims that remain outstanding and in respect of which CE wishes to pursue. The variations register is at Tab 7." However, the Variations Register at Tab 7 was incomplete, with only every other page of the register being included. Tab 8 of the Subcontractor's application did contain the supporting documents for all variations claimed. Notwithstanding the incompleteness of Tab 7, the Adjudicator found in favour of the Subcontractor in the amount of $1,061,800.61 excluding GST.

The Contractor sought a declaration that the determination was void on the ground that the Adjudicator failed to afford it natural justice in reaching his determination. Specifically, the Contractor alleges that the Adjudicator had denied it procedural fairness by proceeding to deal with the excluded variations in Tab 7 without giving it an opportunity to make submissions in relation to them.

### Decision

While the Court accepted that the Contractor did not in fact appreciate that Tab 7 was incomplete, it found that anyone reading Tab 7 reasonably carefully would have appreciated that the document was incomplete. Furthermore, the Court found that a person acting reasonably would at least have appreciated that there was an inconsistency between Tab 7 and Tab 8 and therefore appreciated that there was at least a risk that the Adjudicator would proceed with his adjudication by reference to Tab 8 rather than Tab 7.

Thus, the Court found that the Contractor was not denied procedural fairness and dismissed the proceedings.

### *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In liquidation)*

### [2019] NSWCA 11

Coram: Leeming JA, Payne JA, White JA, Sackville AJA, Emmett AJA

Court: New South Wales Court of Appeal

Date: 12 February 2019

**EQUITY** — rectification of building contract — whether adjudication application under the Building and Construction Industry Security of Payment Act 1999 (NSW) (Security of Payment Act) made within time — answer depends on the date under the contract for the making of a progress payment — whether the primary Judge was correct to order rectification of the contract by changing the due date for payment — whether the evidence supported the finding that the parties had a common intention, at the time the contract was executed, that the date for payment should be otherwise than as recorded in the contract

**BUILDING AND CONSTRUCTION** — adjudication application invalid because made out of time — whether the contractor entitled to institute summary proceedings under s 16(2)(a)(i) of the Security of Payment Act to recover unpaid portion of the scheduled amount as a debt — whether adjudication application, although a nullity, had a factual existence that had legal consequences — whether the invalid adjudication constituted an election between inconsistent statutory remedies so as to preclude summary proceedings to recover the debt

**BUILDING AND CONSTRUCTION** — contractor in liquidation — whether the Security of Payment Act, as a matter of construction, is capable of operating for the benefit of a contractor which has gone into liquidation in insolvency — where Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd [2016] VSCA 247; (2016) 337 ALR 452 decides that equivalent Victorian legislation is not available to a contractor in liquidation — whether Victorian Court of Appeal decision is clearly wrong and should not be followed

#### Facts

This case concerns a contract between Seymour Whyte Constructions Pty Ltd (**"Contractor"**) and Ostwald Bros Pty Ltd (**"Subcontractor"**) for certain road works on the Pacific Highway near Grafton. A dispute arose between the parties in respect of a progress claim served by the Subcontractor for $6,351,066.08 pursuant to s 13(1) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**"SOP Act"**). The Contractor responded with a payment schedule proposing to pay $2,505,237.58 (**"Scheduled Amount"**).

Upon adjudication, the Adjudicator determined that the amount due by the Contractor to the Subcontractor was $5,074,218.27 (**"Adjudicated Amount"**). The Contractor has paid neither the Scheduled Amount nor the Adjudicated Amount.

**Supreme Court Proceedings**

The Contractor then went on to commence proceedings seeking to have the Adjudication Determination declared invalid on the ground that the Subcontractor made its Adjudication Application outside the time limit specified in the SOP Act, being 20 business from the due date of payment.

The Subcontractor contended that the application was not made out of time due to a contractual error. It thus filed a cross-claim seeking rectification of the Contract to alter the dates on which the Contractor had to make progress payments. In the alternative, the Subcontractor sought recovery of the payment schedule amount as a statutory debt under section 16(2)(a)(i) of the SOP Act.

After the proceedings commenced the creditors of the Subcontractor resolved that it should be wound up.

At first instance, the primary judge (Stevenson J) held that this was a clear case where rectification of the Contract should be ordered. His Honour thus found that the adjudication application was made within time and that the Adjudication Determination was valid.

His Honour went onto find that even if the Adjudication Determination was invalid, the Subcontractor was nonetheless entitled to seek recovery of the unpaid Scheduled Amount as a debt due to it pursuant to s 16(2)(a)(i) of the SOP Act. His Honour further held that the SOP Act, on its proper construction, continued to apply notwithstanding that the winding up of Ostwald had commenced.

**Appeal**

The Contractor went on to appeal the decision of the primary judge.

The key issues for determination were:

(1) Whether the primary judge erred in rectifying the Contract so as to alter the due date for payment.

(2) If yes, was the Subcontractor precluded from suing to recover the unpaid amount as a statutory debt pursuant to s 16(2)(a)(i)?

(3) If no, was the SOP Act as a matter of construction incapable of applying to a builder or subcontractor which had gone into liquidation in insolvency?

**Decision**

*Rectification*

The Court held that the primary Judge had erred in finding that the evidence established that the common intention of the parties on the date of execution of the Contract was that the Contractor should have 30 days from the end of the month in which the payment claim was served to pay the Subcontractor.

Specifically, the Court noted that there was no evidence explaining how Special Condition 9.1, which provided for a payment period of fifteen business days from receipt of a claim, came to be inserted into the Contract as executed. Accordingly, the Court found that the Subcontractor did not make the adjudication application within the period specified by s 17(3)(d) of the SOP Act.

*Statutory Debt*

The Court held that while the Subcontractor could institute proceedings to recover the unpaid portion of the Scheduled Amount from Seymour as a debt due (s 16(2)(a)(i)), or make an adjudication application (s 16(2)(a)(ii)), it could not pursue both (whether at the same time or consecutively).

Specifically, the Court found that legislation contemplates that the remedies are alternative and not cumulative. This is because where a claimant has lodged an adjudication application and proceeded to an adjudication which upholds the respondent's defences, it could not be said that such a claimant could then then seek to enforce the unpaid portion of the scheduled amount by way of statutory debt pursuant to s 16(2)(a)(i).

However, given that the Subcontractor's adjudication application was invalid, it thus remained entitled to recover the scheduled amount as statutory debt under section 16(2)(a)(i).

*Liquidation*

Relying on the case of *Southern Han,* the Court noted that the language of s 8(1) of the SOP Act creates an entitlement to a progress payment in an amount to be quantified in accordance with Pt 3 of the SOP Act, provided that:

- the person has undertaken to carry out construction work under a construction contract; and
- A reference date under the construction contract has arisen.

The Court held that there is nothing in the language of s 8(1) to support an implication that the entitlement to a progress payment cannot arise unless the builder or subcontractor continues to carry out construction work under the contract.

As such, the Subcontractor's entitlement to a progress payment was held to be unaffected by its liquidation.

***Simmonds v Rust; Rust v Simmonds***

**[2018] NSWCATCD 75**

Coram: Goldstein Senior Member

Court: NSW Civil and Administrative Tribunal

Date: 29 November 2019

**BUILDING AND CONSTRUCTION** — Home building — Contracts — Standard form HIA NSW Residential Building Contract for New Dwellings — Payment of progress claims — Suspension of work, — Notices of breach — Termination — Cost to complete — Defective work

### Facts

Benjamin Frank Hind Simmonds and Jessica Marion Simmonds (**"the Owners"**) entered into a NSW Residential Building Contract with Christopher John Rust (**"the Builder"**).

*The Owner's Claim*

The Owners admit that they had not paid the Builder $54,516.42 of the contract price. However, they alleged that they issued breach notices to the builder and that they terminated the contract on 29 November 2017. As a result, they claimed damages of $122,357.95. In response, the Builder argued that the notices were not served in accordance the contract and were therefore invalid. The Builder further alleged that the Owners wrongfully terminated the contract. As a result, he claimed damages as a consequence of the wrongful termination.

*The Builder's Claim*

The Builder sought damages on the basis of repudiatory conduct on the part of the Owners. Specifically, he sought damages in the sum of $54,516.42, being the unpaid balance of the contract price. The owners denied that they repudiated the contract and state that claiming the unpaid balance of the contract price is the wrong method of calculating loss.

### Decision

The Tribunal found that the Owners were obliged to pay the Builder's 6$^{th}$ progress claim which amounted to $30,035.66 inclusive of GST as works were substantially complete. It further held that the Builder's suspension of works on the basis of non-payment was valid.

Of the four notices of breach issued by the Owners to the Builder, only one was found to be have been validly served. This is because the remaining notices failed to provide adequate details of the breach alleged. The notice which was validly served alleged that the Builder was in breach of the contract by reason of delay of works. The Tribunal found that this amounted to a substantial breach of the contract and thus, the Owners were found to have validly terminated the contract.

## *Sought After Investments Pty Ltd v Unicus Homes Pty Ltd*

## [2019] NSWSC 600

Coram: Ball J

Court: Supreme Court of New South Wales

Date: 23 May 2019

**BUILDING AND CONSTRUCTION** — payment claims under the Building and Construction Industry Security of Payment Act 1999 (NSW) — adjudication determination — whether multiple payment claims served in respect of one reference date — whether multiple supporting statements issued in respect of one payment claim — whether more than one supporting statement could be provided in respect of a single payment claim

### Facts

Unicus Homes Pty Ltd (**"Unicus"**) issued Sought After Investments Pty Ltd (**"Sought After Investments"**) four payment claims totalling $234,267.20. The payment claims were made under a contract for the construction of a child care centre in Horsley. At adjudication, the Adjudicator found in favour of Unicus in the amount of $213,277.60.

Sought After Investments sought a declaration that the adjudication determination is void on the basis that:

(1) Unicus served four payment claims in respect of one reference date, contrary to s 13(5) of the SOP Act;

(2) If Unicus did serve one payment claim, it did not comply with s 13(7) because it issued multiple supporting statements in respect of that claim;

(3) If the documents served by Unicus did constitute four separate payment claims, but were nonetheless valid, the first claim did not comply with s 13(7) of the SOP Act because the supporting statement in respect of that claim was not a valid supporting statement

### Decision

Ball J dismissed the proceedings, finding in favour of Unicus.

*Single Payment Claim*

In characterising the four payment claims, his Honour pointed to Unicus' letter dated 14 February 2019 which enclosed the four invoices. Although expressed in the plural ("claims"), his Honour noted that the letter identified that the due date for payment was to be calculated from the date of the letter. Consequently, his Honour found that Unicus had made a single demand for payment of the amounts stated in the enclosed invoices.

Ball J further noted that objectively, a recipient of the letter must have understood that a single claim was being made for payment of the full amount of the four invoices, all of which were presented at the same time.

*Compliance with s13(7) SOP Act*

His Honour found that the supporting statements issued by Unicus were valid under the SOP Act. The supporting statement clearly indicated which payment claim it was in relation to; was in the form prescribed; and was supported by a certificate asserting its accuracy.

***Stepanoski v Aslan (No 3)***

**[2019] NSWSC 1445**

Coram: Emmett AJA

Court: Supreme Court of New South Wales

Date: 28 October 2019

**CONTRACTS** – extent to which defendant has been overpaid for work that had been completed before the Lump Sum Contract was terminated – whether the Lump Sum Contract was wrongly terminated by the plaintiffs or whether it was repudiated by the defendant.

**DAMAGES** – quantification of damages to which the plaintiffs or defendant would be entitled – differences in opinion evidence of expert witnesses – resolving differences without detailed cross-examination.

**Facts**

The plaintiffs, Tony and Sonja Stepanoski (**the Owners**) entered into a building contract with Jamal Aslan (**the Builder**) for the construction of two residences on land in Chatswood. In the first decision of Stepanoski v Aslan [2018] NSWSC 1160, the Court was saddled with the task of determining a battle of the forms type case.

It was common ground that on 14 October 2014, the parties entered into a Costs Plus contract. However, after the Costs Plus contract was entered into, the parties subsequently entered into a Lump Sum contract for the same works.

Relying upon the contemporaneous material, the Court held that the contract that bound the parties was a Lump Sum contract. The questions that remained for determination in this case, were, in view of the Court's finding that the relevant contract that bound the parties was a lump sum contract, was the contract repudiated by the Owners who terminated the contract. What if any damages accrued to the Owners and/or the Builder.

By clause 9 of the Lump Sum Contract, Mr Aslan warranted that the work would be performed in a proper and workmanlike manner, and in accordance with the plans and specifications set out, and that all materials supplied by him would be good and suitable for the purpose for which they were used.

Clause 11 of the Lump Sum Contract contained a list of prime cost items totalling $167,000.

Clause 12 contained a schedule of progress payments.

Clause 27 provided that, even if a dispute were to arise, the parties were required, unless acting in accordance with an express provision of the Lump Sum Contract, to continue to perform their obligations under the contract so that the Works were completed satisfactorily within the agreed time.

The Builder sent two notices ceasing building works in relatively close succession. The Builder relied upon the Owners' failure to pay progress claims that the Builder had issued. After issuing the second notice, no further work was undertaken on the site. The Builder submitted an additional progress claim that included various Building contract Variations. The total contract variations were said to total $481,176.00.

It was common ground that the Owners had paid the sum of $1,067,094.28 to the Builder and that the value of the work completed by the Builder under the Lum Sum contract was $564,426.48 plus an allowance of $50,000 for variations that was agreed by the Owners.

The Builder, in his cross claim, pursued the Owners for an additional amount of $564,426.48 above the contract work. This included allowances for;

- latent site conditions - $41,360;
- variations approved by the Council - $145,753;
- adjustments for excess prime cost amounts and provisional sum amounts - $18,147;
- delay costs - $141,139.59; and
- other variations - $40,000.

***Latent Site Conditions***

The Court found that there was no evidence to support the proposition that these additional expenses had been incurred. Further, the Builder failed to follow the express contractual provisions that contemplated what was to occur should latent site conditions be discovered. The claim was rejected.

***Variations approved by the Council***

The Owners conceded, through their expert, that the value of the variations that were claimable by the Builder were $50,000.00 and that such an amount ought to be allowed for the Builder.

***Provisional Sum and Prime Cost Items***

The Builder's expert estimated the cost of works done that fell within the provisional sum and prime cost items and compared his estimates with those in the Lump Sum Contract.

Significantly, the Builder did not tender any documentary evidence in support of the claim in respect of provisional sum and prime cost items. If there were costs for provisional sum and prime cost items that exceeded the figure provided in the Lump Sum Contract, the Builder was simply required to produce the invoice or statement evidencing the amount actually paid. No attempt was made to do so. There was no evidence in support of this claim, there was no evidence that the Builder attempted to comply with the express provisions that would enable him to have made a claim for these amounts. The claim was rejected.

***Delay Costs***

The Builder's expert estimated delay costs. There was no verification of the actual delay costs incurred. Further, there was no provision that allowed the recovery of delay costs under the Lump Sum contract. In those circumstances, the Court held that the claim must fail.

The additional variations claims were not made out and therefore rejected. This meant that the Owner's had substantially overpaid for the works that were completed.

The Court noted that where a party to a contract acts on a genuine but erroneous view of its obligations under the contract, the party will not, for that reason alone, have repudiated the contract if the party shown that it is still willing to perform the contract according to its tenor. However, persistence in an untenable construction will ordinarily be regarded as repudiatory conduct.

The Court held that the Builder claimed payments to which he was not entitled and suspended work on the basis that the Owners had not made payments to which he was not entitled. It followed that the Owners were entitled to treat this conduct, accept the repudiation and terminate the contract. The Owners were therefore entitled to the losses that they suffered as a result of the repudiation by the Builder.

**Loss of Rent**

The Owners claimed loss of rent for 111 weeks at the rate of between $1,275 and $1,350 per week. The Builder argued that the calculation does not include an allowance for failure to mitigate loss or an allowance for what would have been received "net of loan repayments and payments to income tax."

The Court held that the Builder failed to establish that the Owners failed to mitigate their loss. To the extent that the Owners obtained judgment in respect of the loss of rental income, that part of judgment would be in assessable form.

**Escalation Costs**

The Court held that, as the Owners had not completed the construction but sold the property in its incomplete state, an appropriate measure of damages would have been the difference between the sale price, on the one hand, and the price that might have been realised had the Works being completed, on the other. There would need to be an allowance for the balance of the contract Price plus the cost of variations.

No attempt was made to establish loss on this basis.

**Judgment**

The Court found in favour of the Owners as against the Builder.

**Post Script**

An order was sought by the Owners to re-open their case to put on evidence in support of its claim for escalation costs. That application was successful and contained in the decision of *Stepanoski v Aslan (No 5)* [2020] NSWSC 139

## *Strike Australia Pty Ltd v Data Base Corporate Pty Ltd*

## [2019] NSWCA 205

Coram: Bell P, Basten JA, Ward JA

Court: New South Wales Court of Appeal,

Date: 21 August 2019

**CONTRACTS** — Construction — Interpretation — determination of market rent by an expert valuer — construction of provision of sub-lease requiring the valuer to 'have regard to' certain matters in determining the market rent for a sub-lease of premises located at King Street Wharf, Sydney — interpretation of requirement to 'have regard to''comparable premises in the vicinity of the Premises' — whether matters listed exhaustive — meaning of 'have regard to'

**VALUATION** — expert determination — whether the trial judge erred in finding that the valuer did not have regard to market rents in the manner prescribed by the sub-lease — whether the trial judge erred in finding that the determination of market rent by the valuer was not binding on the appellant and the respondent as parties to the sub-lease — whether the valuer erroneously had regard to the physical configuration of the premises or tenant's property — appeal dismissed with costs

**VALUATION** — nature of valuation — meaning of 'acting as an expert and not as an arbitrator'

### Facts

Strike Australia Pty Ltd (**"Lessee"**) and Data Base Corporate Pty Ltd **("Lessor"**) entered into a sublease of the premises at King Street Wharf, Sydney (**"the Premises"**). The sublease was entered into on 20 March 2007 and ran for 10 years, commencing on 24 August 2007, with two five-year options to renew.

On 9 February 2017 the Lessee exercised its first option to renew. A rent review was to occur at the commencement of the further term which, in the absence of agreement, was to be determined by an independent valuer. With there being no agreement, a valuer was nominated and the valuation was completed on 24 August 2017.

Relevantly, cl 4.5(c)(ii) of the sublease provided that the valuer must "have regard to … market rents … for comparable premises in the vicinity of the Premises …". Following this, the valuer had regard to rents in the King Street Wharf complex, retail rents for basements in the Sydney CBD and identified four properties which he said provided "the best guide" to the market rent for the premises. Of these four properties, two were remote from King Street Wharf, one being at Macquarie Park and the other being at Bondi Beach.

Dispute arose between the parties as to whether the valuation had been undertaken in accordance with the requirements of the sublease. The Lessor contended that the Macquarie Park and Bondi properties did not qualify for consideration because they were not "in the vicinity of" the Premises, and thus, the valuer had not undertaken the valuation task in accordance with cl 4.5(c)(ii) of the sublease.

### Appeal

At first instance, the Supreme Court found in favour of the Lessor and made the declaration sought. The Lessee then appealed this decision on the grounds that:

(1) The primary Judge erred in finding that the valuer did not carry out his determination of the Market Rent in accordance with paragraph 4.5 of the First Schedule to the sublease.

(2) The primary judge erred in finding that the valuer:

(a) Did not have regard to market rents in the manner prescribed by paragraph 4.5(c)(ii) of the sublease; and

(b) Erroneously included market rents for premises 'not in the vicinity of the Premises' within the meaning of paragraph 4.5(c)(ii) of the sublease.

**Decision**

The Court dismissed the appeal.

*In the vicinity of the Premises*

At issue was whether the question of determining if a property was "in the vicinity of" the Premises was for the valuer, or whether it was a question which could be addressed as a matter of fact by the Court.

Here, the Court held that the parties did intend that a valuer would determine whether comparable premises were in fact in the vicinity of the leased premises, allowing a reasonable margin for differing views. That said, the Court noted that the valuer does not exercise an unfettered discretion in making that choice. Rather, if on a proper construction of the contract, it was not open for any valuer acting reasonably to conclude that properties at Macquarie Park or Bondi Beach were "in the vicinity of the Premises" then one may infer a misconstruction of the contract.

On this basis, the Court found that the primary judge was correct to conclude as a matter of fact that the properties at Macquarie Park and Bondi Beach could not properly be considered as being in the vicinity of the Premises at King Street Wharf. Such a conclusion was not reasonably open under the terms of the sublease.

*Exhaustive list of considerations*

Given that two of the four properties considered as the best guide to market rent were not in the vicinity of King Street Wharf, the Court turned to consider whether the mandatory factors listed in cl 4.5(c) constituted an exhaustive or non-exhaustive list.

The Court affirmed the reasoning of the primary judge and held that cl 4.5(c) should be read as an instruction to the appointed valuer, and one which identifies the permissible boundaries of the types of rents to which the valuer is to have regard. As noted by the primary judge, if the clause were to be interpreted as a non-exhaustive list, the evident intention to place limits upon the types of rents to which the valuer must have regard would be undermined.

## ***Style Timber Floor Pty Ltd v Krivosudsky***

**[2019] NSWCA 171**

Coram: Bell P, Leeming JA, Simpson AJA

Court: New South Wales Court of Appeal,

Date: 16 July 2019

**BUILDING AND CONSTRUCTION** — payment claim under Building and Construction Industry Security of Payment Act 1999 (NSW) — payment schedule — claim related to seven invoices and five sites — email in response proposed a meeting and referred to many emails, photos, back charges and complaints — email said claimant would understand why he couldn't be paid and that the damages done were more than had been claimed — whether email in response was a payment schedule — whether email indicated reasons for withholding payment within meaning of s 14(3) — no particular site indicated — scope of dispute unable to be determined — court at first instance correct to conclude email not a payment schedule — appeal dismissed

### Facts

This case concerns a dispute over a payment claim served by Mr Krivosudsky (trading as RK Grinding) on Style Timber Floor Pty Ltd (**"Style Timber"**) relating to seven invoices from five separate sites for a total amount of $106,166.50.

In response to the payment claim, the Director of Style Timber, Mr Wang, emailed Mr Krivosudsky stating that '…I will show you the working agreement between Style Timber and RK Grinding, many emails, photos, videos, back charges from builders and other trades, complaints from my clients. You will understand why I can't pay you. The damages you have done is more than what you claimed. Then it's up to you what you want to do next.'

### District Court Decision

The case was first heard by Judicial Registrar Howard in the NSW District Court wherein Mr Krivosudsky sought the claimed amount and filed a motion seeking summary judgment.

It was held that Mr Wang's email was not a valid payment schedule under the Building and Construction Industry Security of Payment Act 1999 (NSW) (**"SOP Act"**). Specifically, it was found that the email did not adequately set out the essence of 'the reason' for withholding the payment and was thus in contravention of s 14(3) of the SOP Act.

Judicial Registrar Howard granted summary judgment in favour of Mr Krivosudsky in the amount sought.

Style Timber sought and was granted leave to appeal directly to the NSW Court of Appeal.

### Decision

The Court of Appeal dismissed the appeal.

Relevantly, the Court referenced the judgement of Palmer J in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 wherein he stated that "Section 14(3) requires that reasons for withholding payment of a claim be indicated in the payment schedule with sufficient particularity to enable the claimant to understand, at least in broad outline, what is the issue between it and the respondent. This understanding is necessary so that the claimant may decide whether to pursue the claim and may know what is the nature of the respondent's case which it will have to meet if it decides to pursue the claim by referring it to adjudication."

In view of this, the Court found that there was nothing in Mr Wang's response which was directed to any particular invoice or to any particular project. Specifically, the Court held that it was unclear from the email as to the number of sites which were said to contribute to the damages Mr Wang's company had suffered and was further opaque as to whether any of the actual entries in the invoices were disputed. Thus, the Court found that Mr Wang's email was not a valid payment schedule under s 14 of the SOP Act.

## *The Owners — Strata Plan 83572 v Jackson Teece Chesterman Willis Pty Ltd*

## [2019] NSWSC 942

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 25 July 2019

**BUILDING AND CONSTRUCTION** — residential building work — statutory warranties — remedial work to leaking façade — scope of work to be undertaken by the remedial builder — whether work done without due care and skill — whether any loss shown to have resulted from builder's work

### Facts

The plaintiff is the Owners Corporation in respect of a development in Hunter Street, Newcastle known as “Bellevue on Bellevue”.

The Owners Corporation had settled with the first and second defendants, Jackson Teece Chesterman Willis Pty Ltd and Michael Fitzgerald Consulting Engineers Pty Ltd. The third defendant, Momentum Mortgages Limited (Receivers and Managers appointed), had been deregistered. The only remaining defendants were Mr Mark and Mrs Naomi Neumann; the fourth and fifth defendants.

In August 2010, Mr and Mrs Neumann operated a partnership trading as “Mark Neumann Building” and were engaged by project manager Cyre Group Pty Ltd (**“Cyre Group”**) to carry out remedial works in respect of the façade.

The issue raised in this dispute was whether the Owners Corporation has established that the remedial work done by Mr Neumann was in breach of the warranty implied by s18B of the Home Building Act that the work would be done with due care and skill.

### Decision

The Court dismissed the proceedings and held that the Owners Corporation had failed to establish that the work done by Mr Neumann was done without due care and skill.

The Court found that Mr Neumann held a defence under s 18F of the Home Building Act as Cyre Group instructed Mr Neumann to carry out the work in a manner contrary to the advice Mr Neumann gave.

Furthermore, the Court found that the Owners Corporation had failed to provide evidence of what damage, if any, it had suffered as a result of any want of due care and diligence in Mr Neumann's work.

## ***The Owners — Strata Plan 89041 v Gaylan Pty Ltd***

## **[2019] NSWSC 619**

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 28 May 2019

**COSTS** — party/party — general rule that costs follow the event — building dispute — allegedly defective building work — whole dispute referred to referee — referee's report adopted — agreement that defendants pay plaintiff's costs unless defendants can show it was unreasonable for plaintiff not to allow defendants to effect repairs

**BUILDING AND CONSTRUCTION** — costs — whether it was unreasonable for plaintiff not to allow defendant back in to effect repairs

### Facts

The plaintiff is the Owners Corporation in respect of a property comprising 14 residential units at Ettalong. The first defendant, Galyan Pty Ltd, was the owner and developer of the property. The second defendant, ACH Clifford Pty Ltd, was the builder. Galyan and ACH Clifford are referred together as “the Builder.”

The dispute between the parties was initially settled on the basis of the parties agreeing to appoint Ms Janet Grey as referee. Ms Grey published her report on 18 February 2019. Ms Grey awarded the Owners Corporation $1,282,486.59.

The matter that then divided the parties was what orders should be made as to the costs of the proceedings. Relevantly, the parties agreed the only matter to be determined as to costs was that as stated by his Honour Justice Hammerschlag in Court on 12 September 2017. Namely, the question that remained was whether the Owners Corporation's refusal to allow the Builder back in to the site to remedy the defects, prior to the date of Hammerschlag J's order, was unreasonable.

### Decision

Stevenson J found that the Builder had failed to show that the Owners Corporation acted unreasonably in not allowing the Builder to return to the site.

Specifically, his Honour found that between the time of the Builder's exclusion from the site in August 2015 and September 2017 the Builder did not propose a workable scope of works. Furthermore, the rectification work ultimately proposed on the Builder's behalf fell far short of that which Ms Grey has now determined was needed. This, his Honour held, pointed strongly to the conclusion that it was reasonable for the Owners Corporation not to permit the Builder to rectify the work on the basis proposed.

## *The Owners — Strata Plan No 91322 v Trustees of the Roman Catholic Church for the Archdiocese of Sydney*

**[2019] NSWCA 89**

Coram: Gleeson JA, Leeming JA, McCallum JA

Court: New South Wales Court of Appeal

Date: 24 May 2019

**LAND LAW** — strata title — leasehold strata scheme — enforcement of statutory warranties — whether holder of a 99-year lease a 'successor in title' under the Home Building Act 1989 (NSW)

### Facts

This case concerns a property development involving the construction of 16 luxury townhouses and apartments at Spring Cove, Manly. The land subject to the development is owned by the Trustees of the Roman Catholic Church for the Archdiocese of Sydney (**"Trustees"**). The Trustees granted development rights to Spring Cove Developments Pty Ltd (**"Developer"**) that entered into a construction contract with SX Projects Pty Ltd (now in liquidation).

The lots were sold "off the plan" according to a tripartite agreement between the Trustees, the Developer and the purchaser. Relevantly, the agreement contemplated that, upon completion of the development and registration of the strata plan, the Trustees would sell the leasehold interest in the relevant lot to the purchaser.

The strata plan was registered on 25 August 2015. Prior to registration of the plan, the Trustees agreed to create a leasehold interest in each lot by leasing it to themselves with effect from 25 August 2015. There were 16 such leases and it was common ground that each was effective. The Trustees also agreed to lease the common property directly to the Owners Corporation with effect from 25 August 2015. All 17 leases had a term of 82 years commencing on 25 August 2015 with an option to renew for a further 17 years.

A dispute arose between the parties with the Owners Corporation alleging that the apartments and areas of the common property possess a number of defects. It brought proceedings in the District Court claiming damages for breach of the statutory warranties implied into the construction contract pursuant to s 18B of the Home Building Act.

The pleading alleged that the residential building work was undertaken by the Trustees and further alleged that the Owners Corporation was "the immediate successor in title to the [trustees]" and was "entitled to the benefit of the statutory warranties."

The Trustees and Developer sought to have the statement of claim struck out pursuant to r14.28 of the UCPR on the grounds that no reasonable cause of action was disclosed. Specifically, it was alleged that the Owners Corporation was had no entitlement to enforce the warranties.

**District Court Decision**

The primary judge found that whether the Owners Corporation had standing to enforce the warranties could be determined as a separate question which was formulated as follows:

(1) Is the plaintiff a successor in title and immediate successor in title to the first defendant (the trustees) for the purposes of ss 18B, 18C and 18D of the Home Building Act 1989?

(2) Are the individual leaseholders successors in title to the trustees for the purposes of ss 18B and 18D of the Home Building Act 1989?

(3) If yes to question (2), does the plaintiff have standing to bring the claim as pleaded in the amended claim at paras 22A to 22I on behalf of each lot holder in regard to the common property by virtue of s 254 of the Strata Schemes Management Act 2015?

The primary judge held that the first two questions must be answered in the negative and that question (3), in that circumstance, did not arise for determination. Accordingly, the primary judge concluded that, because the Trustees retained the right of reversion in respect of the leases of each lot and in respect of the common property leased to the Owners Corporation, none of the holders of those leaseholds was a successor in title to the Trustees.

The Owners Corporation sought to appeal this decision, alleging that the primary judge erred in holding that the holder of a 99-year lease was not a successor in title under legislation which provides the benefit of statutory warranties.

**Decision**

The Court upheld the decision of the primary judge and dismissed the appeal. It held that the term "successor in title" in the Home Building Act is to be given its general meaning; that is, a person who holds title after another.

*Vesting Point*

The Court rejected the Owners Corporation's argument that the proper construction of the phrase "successor in title" in the Home Building Act is to be informed by the operation of s 24 of the *Strata Schemes Development Act 2015* (NSW) which provides that common property "vests" in the owners corporation of the strata scheme upon registration of the strata plan.

Rather, the Court found that the nature of the title held by the Owners Corporation must be determined according to the legislation in force as at the date on which the strata plan was registered (25 August 2015). As at that date, strata schemes were governed by two statutes which, relevantly, did distinguish between freehold and leasehold title: the *Strata Schemes (Freehold Development) Act* 1973 (NSW) and the *Strata Schemes (Leasehold Development) Act 1986* (NSW).

*Mount Bruce Point*

The Court also rejected the submission that *Mount Bruce Mining v Wright Prospecting* (2015) 256 CLR 104 provides a basis upon which the Owners Corporation can be said to have become the successor in title to the trustees and that no instrument was necessary for that purpose.

The Court distinguished the *Mount Bruce* case on the basis that it was concerned with the construction of a mining royalty agreement, not a statute. And so, while the High Court considered the relevance of events, circumstances and things external to the contract in *Mount Bruce,* such did not apply to the construction of statute.

*<u>Justice Fry Submission</u>*

Finally, the Court rejected the Owners Corporation's third argument which sought to draw analogy between the current case and the reasoning of Fry J in the English decision of *Taite v Gosling* (1879) 11 Ch D 273. Specifically, the Owner's Corporation sought to argue that the long-term lease of property by the holder of the fee simple having the benefit of statutory warranties in its favour should be recognised as a form of assignment carrying the benefit of those warranties.

However, given that *Taite v Gosling* was concerned with the operation of a negative covenant, such was found by the Court to be unhelpful when construing the words of the Home Building Act.

## *The Owners SP No 8075 v Esh Group Pty Ltd*

## [2019] NSWDC 93

Coram: Abadee Judge

Court: District Court of New South Wales

Date: 29 March 2019

**BUILDING AND CONSTRUCTION** — s 177 of the Conveyancing Act 1919 (NSW) — duty of care 'not to do anything that removes the support to any other land' — whether encompasses omissions — where owner holds non-delegable duty of care

**NEGLIGENCE** — breach of duty — reasonable-precautions — whether failed causation established — whether recurrent costs reasonable

**PRACTICE AND PROCEDURE** — defendants' failing to adduce evidence

**JONES V DUNKEL DEFENCE**

**BLATCH V ARCHER MAXIM** — pleading — whether plaintiff precluded from relying on s177 of Conveyancing Act

**Facts**

The plaintiff in this case is the Owners Corporation of a block of units located at 17 Frazer Street Collaroy (**"the Property"**). In early August 2014 excavation and construction works commenced on land adjacent to the Property at 19A Frazer Street.

In the course of those early works, the plaintiff raised a concern about the stability of its land. On 17 August 2014, the plaintiff's driveway was undermined by excavation which eventually collapsed on 19 August 2014. Between August 2014 and December 2017 repair works were undertaken to the driveway and a retaining wall.

The plaintiff brought actions in negligence against multiple defendants allegedly involved in the works which caused the damage to its driveway. The plaintiff sought damages, being the cost of repairs, which were quantified in the sum of $412,453.40.

The defendants in this matter were as follows:

(1) The principal contractor or builder which carried out the construction.

(2) The contractor undertaking the excavation work.

(3) The registered proprietor of the land.

(4) The first developer of the land.

(5) The second developer of the land.

(6) An additional contractor who undertook some of the excavation work.

**Decision**

The Court found in favour of the plaintiff as against each of the defendants. Judgement was handed down for the sum of $494,665.78 being the costs of rectification and interest.

*Duty of care*

The Court held that each of the defendants owed the plaintiff a statutory duty of care pursuant to s 177 of the *Conveyancing Act 1919* (NSW). Indeed, the Court found that the duty in s 177(2) renders it irrelevant what capacity a defendant may engage in construction work.

With respect to the third defendant, being the owner of the land, the Court further held that following the view of Young AJA in *John Llavero v Brett Anthony Shearer* [2014] NSWSC 1336 that the owner of premises upon which construction works are undertaken and which cause support to be removed to supporting land owes a non-delegable duty of care.

*Breach*

The Court was satisfied that the first, second, fourth, fifth and six defendants had breached their duty of care to the plaintiff on the basis that they had failed to devise and implement an adequate shoring system, and further commenced works without any adequate planning.

While the Court was unable to ascribe specific failure on the part of the third defendant, it nonetheless held that it was unnecessary for the plaintiff to establish that the third defendant itself acted negligently as it owed a non-delegable duty to the plaintiff.

*Loss and Damage*

The plaintiff alleged that the loss and damage suffered include:

(1) total destruction to the section of the driveway;

(2) significant cracking of the concrete driveway and curbs adjacent to the destroyed areas;

(3) destruction of the southern and south eastern portions of the sandstone block retaining wall, to the south-east of the garage structure adjacent to block C.

The Court accepted these submissions for they were not challenged by the defendants.

*Causation*

The Court was satisfied that the identified breaches of the duty of care by the defendants, singularly, and/or in combination, materially contributed to the collapse of the support to the plaintiff's property.

## *Vannella Pty Limited atf Capitalist Family Trust v TFM Epping Land Pty Ltd; Decon Australia Pty Limited v TFM Epping Land Pty Ltd; Vannella Pty Limited v TFM Epping Land Pty Ltd*

**[2019] NSWSC 1379**

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 11 October 2019

**BUILDING AND CONSTRUCTION** — payment claims under the Building and Construction Industry Security of Payment Act 1999 (NSW) — application for summary judgment — whether validity of payment claim is a triable issue — whether email constitutes payment schedule — where email fails to specify the claims to which it objects and the grounds for objection

**COSTS** — security for costs — relevance of personal undertaking by director — discretion to order — no issue of principle

### Facts

Decon Australia Pty Limited (**"Decon"**) and TFM Epping Land Pty Ltd **("TFM"**) entered into a building contract for the design and construction of a residential apartment building in Epping known as the Juniper Development. Vannella Pty Limited as trustee for the Capitalist Family Trust (**"Vannella"**) and TFM were parties to a joint venture arrangement relating to the development

On 3 June 2019, Decon served a Progress Claim on TFM by hand and by email. On 14 June 2019, the solicitor for TFM sent an email to the solicitor for Decon (in a section headed 'Your clients' claims') that the variations claimed were not agreed.

*Decon Proceedings*

Decon sought summary judgment pursuant to r 13.1 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR) for the total of the claimed debt, being $6,355,352.46. Specifically, Decon contended that the 14 June email did not constitute a valid payment schedule as it did not meet the requirements of section 14(2) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**"SOP Act"**). As a result, it is alleged that TFM failed to provide a payment schedule within the time required under section 14(4) of the SOP Act and had therefore become liable to pay the full claimed amount.

TFM sought to oppose the application and contended that Progress Claim 10 was not a valid payment claim in accordance with the SOP Act. This was based on a number of arguments which, TFM argued, raised serious questions to be tried; they were:

(1) Decon's claim for interest (of $1,193,617.67) did not relate to construction work within the meaning of ss 9 or 10 of the SOP Act

(2) Progress Claim 10 failed to identify the construction work to which the claim relates, as required by s 13(2)(a) of the SOP Act.

(3) The variations claimed did not form part of the works under the Building Contract as they were not the subject of directions and were not valued in accordance with clause 36 of the Building Contract.

(4) Progress Claim 10 wrongly included a claim for the release of retention monies.

*Security for costs motion*

TFM filed notices of motion seeking security for their costs in each of the three proceedings pursuant to r 42.21 of the UCPR and s 1335 of the Corporations Act 2001 (Cth). While TFM agreed not press its motions seeking security for costs from Decon if summary judgement was entered, it continued to press for security from Vannella in relation to the Vannella proceedings and the Equity proceedings.

TFM argued that Decon and Vannella did not have the financial ability to meet any adverse costs orders. Specifically, TFM pointed to evidence that Decon and Vannella are limited liability companies, have nominal paid up capital, own no real property and are subject to various personal property security register charges.

Decon and Vannella opposed the application for security for costs. They submitted that TFM's evidence did not meet the threshold required to satisfy the Court that there were reasons to believe they would be unable to satisfy any costs orders if ordered to do so.

**Decon Decision**

Henry J was satisfied that TFM had no substantive defence in respect of the validity of Progress Claim 10 and that TFM failed to serve a payment schedule on Decon. As such, summary judgement was entered in favour of Decon for the amount claimed.

*Triable issues*

While Henry J accepted that an invalid payment claim can be raised as a defence on an application for summary judgment, her Honour held that the issues raised by TFM in respect of the validity of Progress Claim 10 lacked substance.

*Interest claim*

In determining this point, Henry J referred to the decision of the NSW Court of Appeal in *Coordinated Constructions Co Pty Ltd v JM Hargraves (NSW) Pty Ltd* (2005) 63 NSWLR 385. In that case, it was held that any amount that a construction contract required to be paid as part of the total price is an amount due for that construction work, even if labelled "interest." The Court further held that even if s 13 of the SOP Act was limited to claims for payment of construction work or related goods and services supplied, it is a matter for an adjudicator to determine whether interest could be claimed and not for the Court.

In view of this, her Honour rejected TFM's argument that the inclusion of interest in Progress Claim 10 necessarily rendered it invalid.

*Failure to identify construction work*

The Court noted that the threshold for satisfying the requirement of s 13(2)(a) of the SOP Act is relatively low. Specifically, what is required is that sufficient detail be provided as to the construction work to which the progress payment relates so as to enable the recipient to understand the basis of the claim, to determine whether to make payment or to dispute it by providing a payment schedule in response with reasons as to why it is disputed. Indeed, a payment claim does not fail the requirement under s 13(2)(a) merely because it can be seen, after a full investigation of all the facts and circumstances, not to successfully identify all of the construction work for which payment is claimed.

In view of these observations, her Honour rejected TFM's submission that the Progress Claim was unclear. When read as a whole document, Henry J held that it was clear that Progress Claim 10 was a claim for a progress payment made under the SOP Act for the amount of $6,355,352.46. Her Honour further found no ambiguity as the amount claimed plainly comprised of three elements relating to construction work or related goods and services; namely:

- a claim for interest,
- a claim for the unpaid portions of the lump sum contract, and
- a claim for the value of variations in the construction works.

*Variations*

Her Honour observed that in a challenge to a valid payment claim, it is not a defence that the claimant failed to comply with the contractual requirements for what is claimed: s 15(4)(b)(ii) of the SOP Act. Accordingly, her Honour rejected TFM's argument that the inclusion of variations which were not valued in accordance with clause 36 of the Building Contract rendered Progress Claim 10 invalid.

*Retention monies*

Her Honour again rejected TFM's argument that Progress Claim 10 was invalid on the basis that it failed to state that it included a claim for the release of retention monies.

In so determining, her Honour looked to the legislative provisions of the SOP Act. Notably, her Honour observed that s 13(3)(b) of the SOP Act is permissive, allowing for the claimed amount (being the amount of the progress payment that a claimant claims to be due) to include retention monies. It does not mandate the inclusion of retention monies or that any claim for their release has to be identified in a payment claim.

Moreover, the requirements for a payment claim are set out in s 13(2) of the SOP Act. Relevantly, a claim must indicate the amount of the progress payment which is claimed to be due. It is only the amount of the progress payment that must be indicated, not that release of retention monies are claimed, or the amount of those monies as a separate item.

*Is the 14 June email a payment schedule?*

Her Honour concluded that that the 14 June email was not a valid payment schedule. It failed to comply with s 14 of the SOP Act. Specifically, her Honour pointed to three issues with the 14 June email:

(1) It failed to identify the payment claim to which it related, being Progress Claim 10;

(2) It did not indicate the amount that the defendants proposed to pay instead of the claimed amount; and

(3) It did not specify particular reasons for withholding payment other than some general observations regarding variations, loss and damage.

### Security for Costs Decision

*Security from Decon*

While it was not necessary for her Honour to consider the applications against Decon given that summary judgment had been granted, Henry J stated that security for costs would not have been ordered in any event.

While Decon's liquid assets had reduced substantially over the previous two years; her Honour was not satisfied that this meant there was a real risk that Decon would be unable to pay. This was particularly so given its trading history and current involvement in active construction projects of which it was the builder that were valued at $45 million.

*Security from Vanella*

Unlike Decon, Vannella did not provide copies of any relevant financial records. In the absence this information, and in view of the evidence adduced by the defendants, her Honour found TFM to have successfully established the threshold requirement for an order for security against Vannella.

That said, the Court went on to consider whether it should exercise the discretion and withhold ordering security in view of the proffer of a personal undertaking from Mr Saab, the sole shareholder and director of Vannella and controller of the Capitalist Family Trust (and its assets). The undertaking was to be jointly and severally liable for any costs order made in respect of Vannella in the Equity and Vannella proceedings.

While Henry J did not have a detailed picture of Mr Saab's financial position, her Honour was satisfied with the undertaking from Mr Saab and therefore declined to order that Vannella provide security for costs for the following reasons:

- Mr Saab was the sole shareholder and director of Decon which her Honour had already found to possess significant equity;

- Mr Saab had an interest in fulfilling his undertaking given the threat of bankruptcy in the event of non-compliance; and

- The value of security sought was not sufficiently high.

***Vella v Mir***

**[2019] NSWCATAP 28**

Coram: Rosser Principal Registrar, Kearney Senior Member

Court: NSW Civil and Administrative Tribunal

Date: 31 January 2019

**APPEAL** — Home Building — Definition of major defect — Limitation defence or jurisdictional issue — s 18F defence

**Facts**

Mr and Mrs Vella (**"the Vellas"**) entered into a "costs plus" building contract with Cathayne dated 1 August 2011 under which Cathayne was to undertake residential building works (**"the 2011 contract"**). On 1 January 2013, Cathayne and Mrs Vella signed a second contract under which Cathayne was to undertake supervision and carpentry works. The Vellas terminated the second contract on 6 February 2013. The final occupation certificate was issued on 22 July 2013.

Mr and Mrs Mir ("**the Mirs"**) purchased a house from the Vellas on 27 October 2015. They claimed that the house suffered major water ingress during heavy rain. According to various building reports obtained by the Mirs, the property contained numerous building defects relating to the installation of balcony doors and balcony waterproofing.

In June 2016, the Mirs commenced proceedings against the Vellas and Cathayne, who each claimed that the other was responsible for the allegedly defective works that were the subject of the Mirs' claim. Specifically, the Mirs made an application to the Tribunal seeking damages for breach of statutory warranty under s 18B of the *Home Building Act 1989* (NSW) (**"the HB Act"**).

The Tribunal ordered that the Vellas pay the applicants $143,161.15, and Cathayne pay the applicants $3,091.55. The Vellas appealed the decision. In so doing, the Vellas advanced 14 grounds of appeal. The important ground that was considered by the Appeal Panel was whether section 18E constituted a limitation defence or was a jurisdictional threshold issue.

**Decision**

The Appeal Panel allowed the appeal in part.

In relation to the question of whether the Tribunal had jurisdiction to hear and determine a statutory warranty claim, the Appeal Panel held that the Tribunal must:

(1) Decide when the statutory warranty period starts;

(2) If a statutory warranty has previously been enforced, decide whether s 18E(2) applies;

(3) Decide whether each of the claimed defects is in a major element of a building as defined in the note to s 18E (4);

(4) Decide whether each of the claimed defects in a major element is a major defect as defined in s 18E (4); and

(5) Decide whether the application has been made in time

The Appeal Panel concluded that the Tribunal fell into error by characterising s 18E as a limitation defence not properly pleaded by the Vellas rather than as a threshold issue, central to the Tribunal's jurisdiction to deal with the application under s 48K(7).

## Visual Building Construction Pty Ltd v Armistead (No 2)

## [2019] NSWCA 280

Coram: Bell Acting Chief Judge, Macfarlan JA, White JA

Court: New South Wales Court of Appeal

Date: 21 November 2019

**CONTRACTS** — termination — whether building contract validly terminated — whether in the circumstances, 10 business days' notice giving opportunity to remedy default needed to be given prior to termination — alternative bases for termination — Shepherd v Felt & Textiles of Australia Ltd

### Facts

Armistead (**"Owner"**) entered into a building contract with Visual Building Construction Pty Ltd (**"Builder"**) for ) for the construction of two duplex buildings on a block of land in Caddens, NSW.

On 13 July 2015, the Owner issued a formal Notice of Termination of the Contract. It alleged that the Builder had defaulted under the terms of the Contract in that:

(1) The Builder had failed to complete the works by 2 July 2015 being the date for completion under Clause 3 of the Contract;

(2) The Builder had failed to obtain the necessary approvals from Penrith City Council for a Construction Certificate;

(3) The Builder had failed to rectify the defective works as defined by the Contract;

(4) The Builder had failed to proceed with due diligence;

(5) The Builder had breached the Statutory Warranty Provisions of the Home Building Act in that the work was not done in accordance with and or complied with the Home Building Act

On 23 March 2017, the Owner commenced proceedings in the District Court of New South Wales claiming damages. The primary judge entered judgment in the sum of $651,536 for the Owner and held that the Owner had validly terminated his Contract with the Builder.

The Builder appealed the decision on the ground that the primary judge erred in finding that the Contract had been validly terminated. Specifically, the Builder alleged that the termination was not valid because 10 business days' notice had not been given to remedy the defaults detailed in the Notice of Termination.

### Decision

The Court dismissed the appeal.

It held that to the extent that cl 15 of the Contract imposed any requirement to give 10 business days' notice prior to termination, such a requirement only applied if the default was capable of being remedied within 10 business days. As the Builder's default was incapable of being cured within a 10 business day period the Owner had validly terminated the Contract.

The Court further observed that even if the Contract had not been validly terminated, it remained the case that the Contract had plainly been breached as the Builder had failed to obtain a Construction Certificate prior to commencement of the work. Importantly, the Court noted that the Owner's entitlement to damages does not depend upon whether termination of the Contract was valid.

## ***White Construction Pty Ltd v PBS Holdings Pty Ltd***

## **[2019] NSWSC 1166**

Coram: Hammerschlag J

Court: Supreme Court of New South Wales

Date: 6 September 2019

**BUILDING AND CONSTRUCTION LAW** — contract — damages — Contract to design a sewerage system for a subdivision and submit it for approval — alleged breach consisting of failure to create and submit a design acceptable to the approval authority allegedly having the effect of delaying completion of the subdivision — whether breach established — whether damages established — programming experts called on question of delay — appropriate method of delay analysis — requirement to have regard to evidence — requirement for the plaintiff to establish damages

**HELD** — no breach established — damages not established

### Facts

White Constructions Pty Ltd (**"White"**) was developing a 100 lot subdivision known as Cedar Grove in Kiama NSW. White had contracted Illawarra Water & Sewer Design Pty Ltd (**"IWS"**), a sewer designer, and PBS Holdings Pty Ltd (**"PBS"**), a water servicing coordinator, to prepare and submit a satisfactory sewer design for approval by Sydney Water.

White commenced proceedings alleging breach of contract against both IWS and PBS. Specifically, White alleged that IWS failed to prepare a satisfactory sewer design within a reasonable time and that PBS failed to ensure that IWS discharged its obligations to do so. As a result, White alleged that the completion of the Cedar Grove development was delayed from 15 July 2016 to 1 March 2017, which in turn caused White to suffer loss and damage.

The substance of White's complaint was that IWS proposed to Sydney Water an installation involving pumping stations rather than a gravity-based solution involving a deep under bore. It was the latter solution which was eventually approved by Sydney Water.

In response to this claim, IWS and PWS argued that the delay did not constitute a breach as White had them to pursue the unsuccessful pump solution. Further, it was argued that the delay in obtaining approval for the sewer design did not delay or disrupt the project.

### Decision

Hammerschlag J found in favour of IWS and PBS and dismissed the proceedings accordingly.

His Honour concluded that IWS and PBS were not in breach of the Contract given that White had instructed IWS not to propound the under-bore solution, but to instead propound the pumping stations solution.

Interestingly, in the case Hammerschlag J invoked rule 31.54(1) of the UCPR that provides:

> "In any proceedings, the court may obtain the assistance of any person specially qualified to advise on any matter arising in the proceedings and may act on the adviser's opinion."

His Honour noted that the rule enables the Court to have the benefit of confidential, unbiased and competent scientific or other advice: *Adhesives Pty Ltd v Aktieselskabet Dansk Gaerings-Industri* (1935) 55 CLR 523 at 580.

The Court obtained the assistance of Mr Ian McIntyre who was a fellow of the Institution of Engineers Australia and had many years of programming and delay analysis experience on major projects. His expertise was used by the Court to divine how to deal with the expert advice on delay and programming that had been advanced by both sides.

His Honour further found that White was unable to show that the project was delayed because of the delay attributable to the sewer works.