CONSTRUCTION

LAW UPDATE

April 2018

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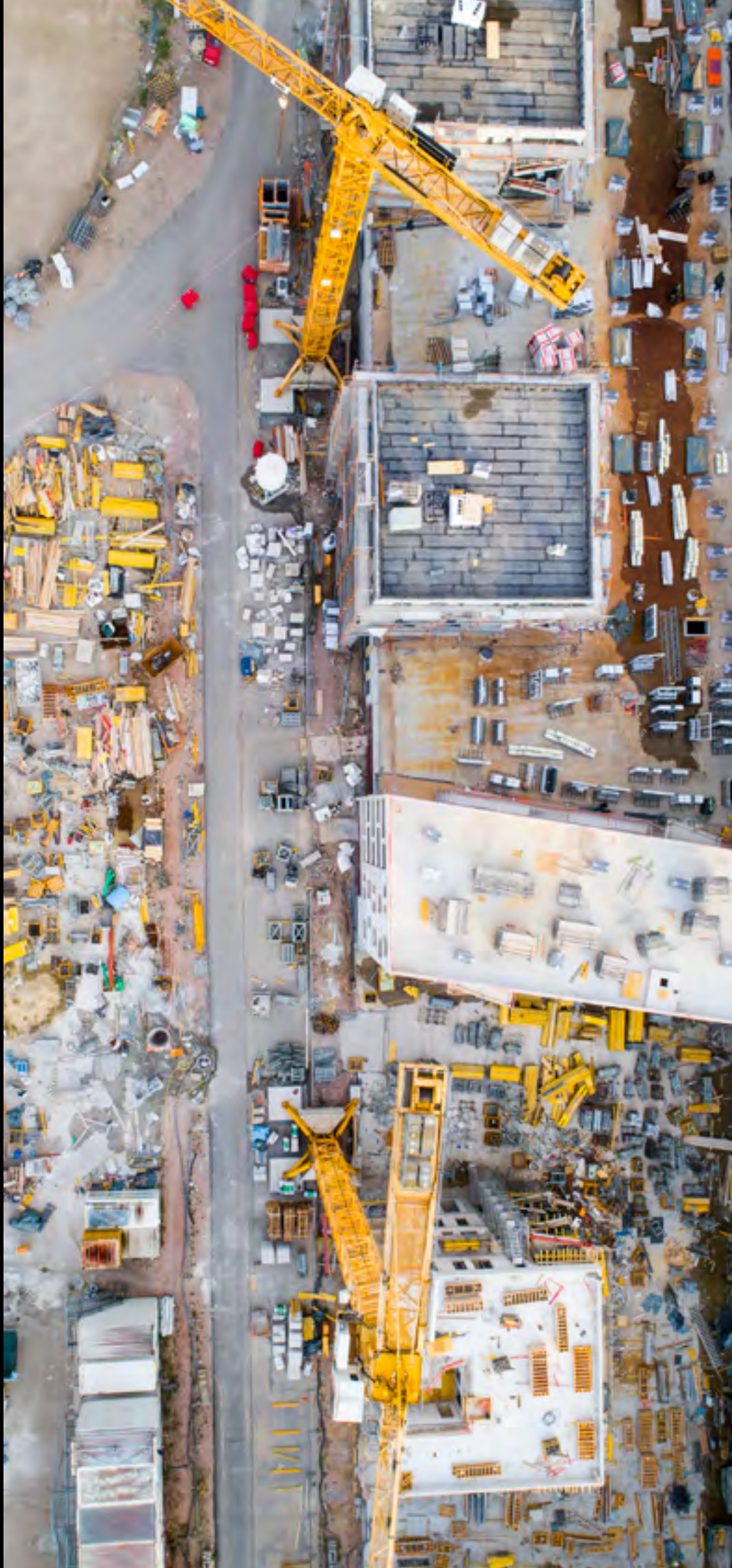

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Welcome to the latest edition of Corrs Construction Law Update April 2018

CONSTRUCTION LAW UPDATE

This publication provides a concise review of, and commentary on, the major judicial and legislative developments affecting the construction and infrastructure industry in recent months.

We hope that you find it interesting and stimulating.

Our thinking

Corrs regularly publishes thinking pieces which consider issues affecting various sectors of the domestic and global economies. We have included at the end of this Construction Law Update links to some of our recent thinking on issues affecting the construction industry.

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Important Security of Payment Update

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Narrow scope of appeal

Security of payment legislation is intended as a quick but imperfect way to resolve building payment disputes. This allows participants to get on with the main job of finishing construction as soon as possible.

But in its aim to achieve a quick resolution, some of the traditional hallmarks of the court system are replaced by quick procedures and adjudicators who do not necessarily have legal training. This inevitably leads to errors.

Should such errors be tolerated as the cost of doing justice quickly and expeditiously? And does it depend on how bad the error is? We now have High Court guidance.

In two decisions, the Court ultimately found:

- only the most serious of errors are reviewable (jurisdictional errors, or a fundamental defect in the way the decision was made); and
- the structure and purpose of the New South Wales security of payment legislation otherwise did not permit review of more minor errors.

Jurisdictional error

Jurisdictional error occurs when a decision maker (like an adjudicator) not just makes a mistake, but actually exceeds their power. Courts have a supervisory role in Australia in ensuring that all decision makers (from government ministers, to tribunals, smaller courts and adjudicators) do not exceed the power that has been granted to them by parliament. This is an important foundation of the separation of powers in Australia and ensures that a decision maker at all times acts within the powers that have specifically been granted to them.

In practical terms, the Court has confirmed the standard position in Australia that an adjudicator who acts beyond the power granted to them (for instance, by purporting to issue a decision on a non-building dispute, or reaching a decision so illogical it reveals they have not properly turned their mind to the dispute at hand) will find their decision susceptible of being reviewed and nullified.

This is important to maintain public confidence in the system, but was never fundamentally in issue in these cases.

Key takeaways

The High Court recently handed down two important security of payment decisions.[1] Here's what you need to know:

- the very narrow scope to appeal an adjudicator's finding was confirmed; and
- clauses which make payment contingent on something outside a claimant's control may be void, including commonly utilised clauses.

Keywords:

Security of payment; High Court; jurisdictional error; non-jurisdictional error

More minor errors

It wasn't alleged in either of the High Court cases that the adjudicator had committed a jurisdictional error. Instead, it was alleged they made more minor (and common) errors.

- In *Probuild* it was alleged the adjudicator made an error in calculating the liquidated damages owed.
- In *Maxcon*, it was alleged the adjudicator made an error in applying the "pay when paid" prohibition in the South Australian legislation.

Technically, these are known as "*non-jurisdictional errors on the face of the record*". But the name is less important that what they represent — more minor, run of the mill errors which might reasonably be expected to arise frequently due to the speed under which the adjudication is conducted, and the relative legal inexperience of some adjudicators.

There had been some debate as to whether these sorts of errors were able to be reviewed. The High Court has now put the debate to an end — such decisions are not reviewable. Having a pool of decisions that is immune from review by the courts is unusual in our legal ecosystem. However, the Court felt it was necessary so as not to "*frustrate the operation and evident purposes of the statutory scheme*",[2] as appeals would impermissibly elongate the determination of a payment claim.

Of course, there is a risk that even though the error of the adjudicator may be relatively minor, and even to be expected given the rapid adjudication process, the consequences of the error are severe. A respondent forced to pay an exceptionally large adjudication amount may feel the removal of the right to have the erroneous decision reviewed facilitates a substantial injustice.

However, the High Court answered this concern by noting an adjudication was only interim, and payment on account only, and without prejudice to a respondent's right to have the matter finally reviewed before a court. In the Court's view, the exclusion of review does not irrevocably entrench the consequences of an erroneous determination.[3]

Again, practically, the effect is that for many errors, a respondent's best recourse will be to initiate full court proceedings at the end of the project to recover any amounts it claims were paid because of an adjudicator error. In the meantime, this decision will encourage focus to return to finalising construction, in keeping with the "*pay now, argue later*" intent of the legislation.

What about Queensland and Victoria?

The Queensland security of payment regime is substantially similar in form and intent to the New South Wales legislation. Therefore, the High Court's decision will have almost overwhelming persuasive value in Queensland.

But not so in Victoria. Victoria has a unique constitutional framework which requires Parliament to expressly state it wants to exclude errors (that is, the minor errors described above) from review by the courts. As the Victorian Parliament has not done so, minor errors will probably in general remain reviewable.

A very limited right to have a second adjudicator review a determination also exists in Victoria. This is only available on the limited grounds that an "*excluded amount*" was wrongly included in the adjudication determination, and this is not affected by the High Court's decision.

1 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 and *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5
2 At [48] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ)
3 At [51] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ)

Pay when paid

In the *Maxcon* decision, the High Court made some comments one judge dismissed as being of "*no public importance*", but may have repercussions about how retention amounts are withheld.

The "*pay when paid*" part of the legislation renders inoperative contractual provisions which make payment contingent on the operation of another contract. The High Court held that the retention arrangement in *Maxcon* breached the "*pay when paid*" provisions of the South Australian legislation, by making return of the retention to a subcontractor contingent on the head contractor obtaining:

- a certificate of occupancy; and
- other approvals necessary for the building to be legally used for its intended purpose.

This meant due dates of the retention amounts were dependant on something unrelated to the builder's performance.[4]

The High Court said the approvals were an intrinsic part of the head contract, and linking payment to their fulfilment thus made subcontract payment contingent on the operation of another contract — the head contract. This is impermissible.

This leaves principals in a difficult situation. It is understandable to link payment to the operation of an event in an upstream contract to ensure the timing of cash cascading through the contractual chain is co-ordinated.

However, in practice, in light of the Court's findings, such interconnected payment regimes may now be difficult to achieve.

Common scenarios now at risk

Several common contractual mechanisms may be at risk, such as:

- retaining retention monies until the end of the defect liability period, where the defect liability period is calculated by reference to the defect liability period in an upstream contract; or
- retaining retention monies from subcontractors until a head contractor has obtained a type of approval under the head contract.

The High Court issued its decision in relation to the South Australian security of payment legislation. But given Victoria, New South Wales and Queensland have materially similar "*pay when paid*" provisions, the High Court's findings will be applicable across those States as well.

Conclusion

These cases have produced two clear outcomes — one predictable and one a little surprising.

The decision in relation to the narrow scope of appeal was not wholly unexpected. By excluding a right to review minor errors, the High Court has ensured the security of payment system will not become a quagmire of technical and pedantic appeals, while maintaining sufficient court supervision over the process to correct more major errors.

Of course, the battlefield could now simply shift to whether a specific error is "*major*" (that is, a jurisdictional error), but one would expect such arguments will not be made in every case.

The slightly surprising aspect of the High Court's decision is the interpretation of the "*pay when paid*" provisions as they operate in South Australia (and by implication the eastern states). The High Court's decision will give this issue prominence.

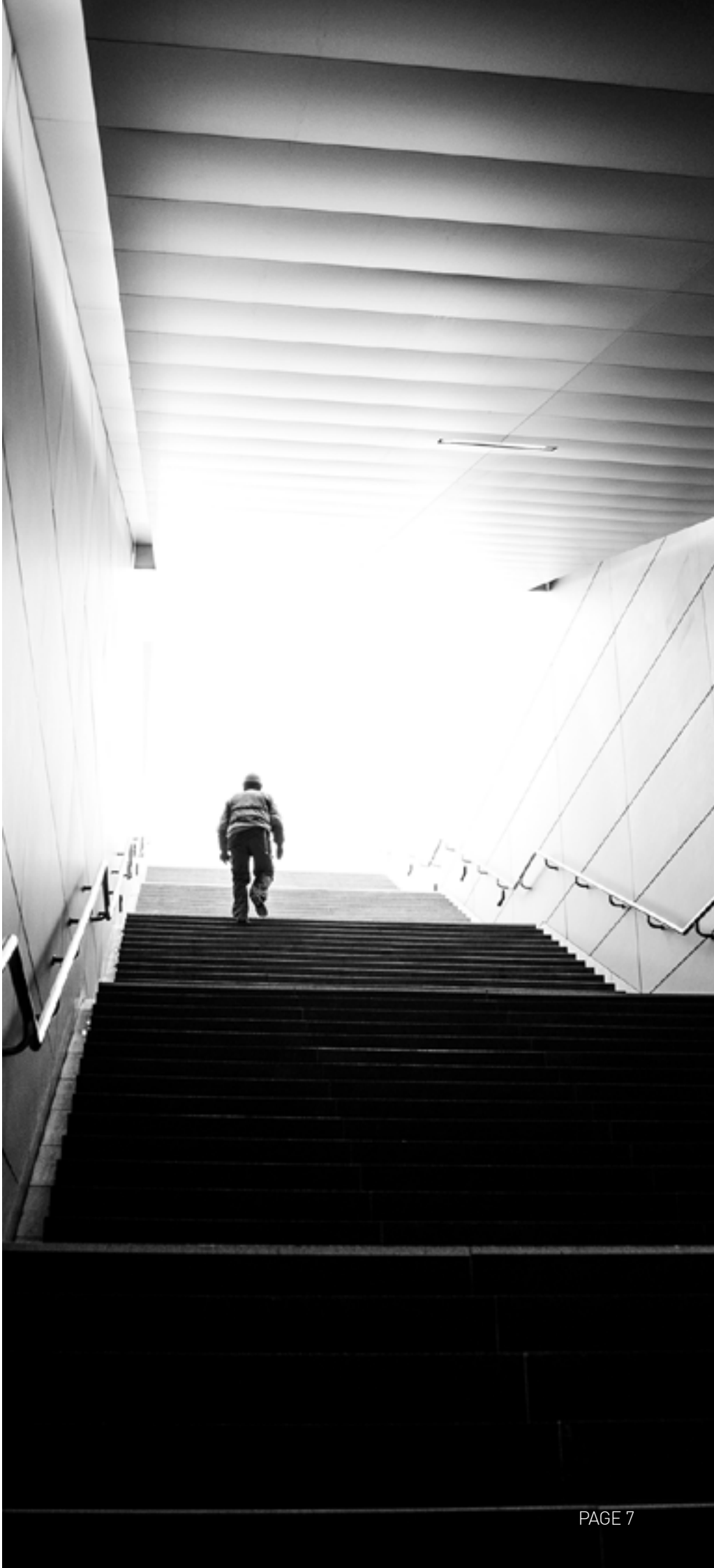
Interlocking payment clauses under which payment is contingent on events upstream should be reviewed to ensure they do not fall foul of the High Court's reasoning.

This has the potential to be the enduring legacy of the decision, as contracts and contractual chains are rewritten to accommodate the decision.

http://eresources.hcourt.gov.au/showCase/2018/HCA/4 (*Probuild*)

http://eresources.hcourt.gov.au/showCase/2018/HCA/5 (*Maxcon*)

Interlocking payment clauses under which payment is contingent on events upstream should be reviewed to ensure they do not fall foul of the High Court's reasoning



Thorne v Kennedy [2017] HCA 49

CONSTRUCTION LAW UPDATE

Facts

In *Thorne v Kennedy*, the High Court considered whether prenuptial and postnuptial agreements entered into between Ms Thorne and Mr Kennedy were voidable for duress, undue influence or unconscionable conduct.

The parties met through an online dating site. Mr Kennedy was an Australian property developer with considerable assets. Ms Thorne was an overseas resident in a position of relative disadvantage (with poor English skills, limited financial independence and delicate immigration status). After meeting in person and deciding to get married, Ms Thorne came to Australia on a tourist visa, with her family following shortly after.

About a week before the wedding, Mr Kennedy insisted on a prenuptial agreement, as a condition of their marriage. Ms Thorne obtained independent legal advice to the effect that the agreement was entirely inappropriate and she should not sign it. Nonetheless, Ms Thorne signed the agreement. Under the prenuptial agreement, Ms Thorne was required to sign a postnuptial agreement in the same terms (with the independent solicitor again advising Ms Thorne as to her limited rights under that agreement). The parties divorced four years later and Ms Thorne sought to have the agreements set aside.

Decision

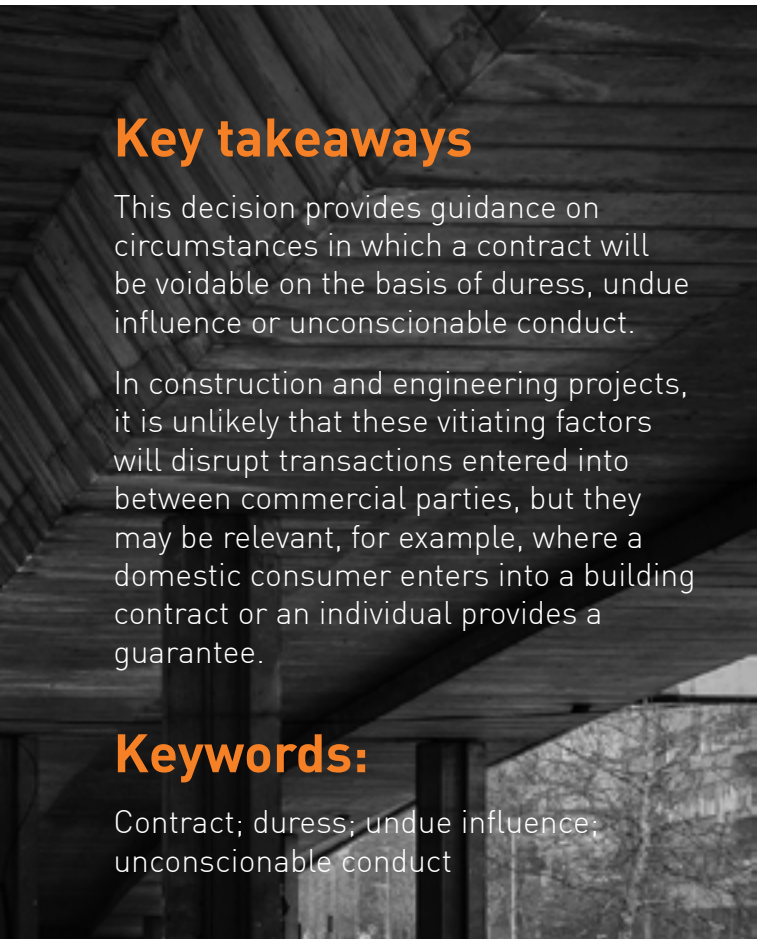
The High Court unanimously allowed the appeal from the Full Court of the Family Court (Full Court). The plurality (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) concluded that the prenuptial and postnuptial agreements were both voidable due to undue influence and unconscionable conduct.[1]

The High Court considered three vitiating factors: duress, undue influence and unconscionable conduct.

Duress

The plurality did not address this factor in detail or consider the comments made by the New South Wales Court of Appeal in respect of duress.[2] The joint judges instead focussed on the other two vitiating factors considered by the trial judge and Full Court.

In a separate judgment, Nettle J (agreeing with the plurality's proposed orders) provided brief comments on *Australia and New Zealand Banking Group v Karam*,[3] which restricted the concept of duress to pressure by "threatened or actual unlawful conduct".[4] Justice Nettle noted that it was not immediately obvious why the concept of duress should be confined to unlawful pressure only but, as it was accepted in oral argument that illegitimate pressure by lawful means was properly subsumed in the rubric of unconscionable conduct, the issue did not warrant further consideration.[5]



Key takeaways

This decision provides guidance on circumstances in which a contract will be voidable on the basis of duress, undue influence or unconscionable conduct.

In construction and engineering projects, it is unlikely that these vitiating factors will disrupt transactions entered into between commercial parties, but they may be relevant, for example, where a domestic consumer enters into a building contract or an individual provides a guarantee.

Keywords:

Contract; duress; undue influence; unconscionable conduct

Undue influence

The plurality first identified a difficulty in defining undue influence by reason of its overlap with duress. However, the plurality then reiterated that the pressure exerted over the plaintiff need only render their judgmental capacity "*markedly sub-standard*".[6] After identifying the circumstances in which a presumption of undue influence might arise and the different ways to prove this vitiating factor, the plurality acknowledged that the legal principles of undue influence were not contested (accordingly, those legal principles are not repeated here).

In reviewing the reasons of the trial judge and the Full Court, the plurality concluded that:

1. the trial judge's decision should not have been disturbed as Ms Thorne's lack of free choice in the decision to sign the agreements constituted undue influence;
2. the Full Court mischaracterised the situation as duress;[7] and
3. in the context of the agreements, a finding of undue influence was open to the trial judge on the evidence where the extent to which the plaintiff was unable to make rational decisions was so great that "she could not aptly be described as a free agent".[8]

Accordingly, the plurality held that the agreements were voidable due to undue influence.

Unconscionable conduct

Next, the plurality noted that there was no controversy between the parties in respect of the principles of unconscionable conduct in equity. Further, and unlike in respect of duress, the issues concerning unconscionable conduct were fully ventilated by the parties in argument.

The plurality concluded that findings that Ms Thorne was the subject of undue influence "point inevitably to the conclusion that she was subject to a special disadvantage in her entry in the agreements".[9] On the facts, the pressure exerted by Mr Kennedy, including the imposed haste for signing agreements, the heavy anticipation of the impending wedding and the fact that the ultimatum was not accompanied by any offer of alternative arrangements (for example, assisting Ms Thorne's family to travel home) all contributed to the substantial subordination of the plaintiff's free will, of which Mr Kennedy took advantage.[10] The plurality accordingly concluded that the agreements were voidable due to unconscionable conduct.

In his separate judgment, Nettle J also reiterated that unconscionable conduct is not restricted to pressure exerted by unlawful means. It also countenances that pressure which goes "*beyond what is reasonably necessary for the protection of legitimate interests*" and the court will intervene to provide relief where the defendant unconscionably takes advantage of the plaintiff's position of special disadvantage (regardless of whether the conduct is otherwise lawful).[11]

Justice Gordon, also in a separate judgment, agreed with the plurality's orders but held that the subject agreements were procured by unconscionable conduct only (and not undue influence). Her Honour considered that "Ms Thorne's capacity to make an independent judgment was not affected"[12] but, rather, she was unable to make a rational judgment to protect her own interests and, on this basis, it was unconscionable to procure or accept Ms Thorne's assent to the agreements.[13] Accordingly, the central consideration for her Honour was the relationship between each vitiating factor and the judgment of the affected plaintiff.[14] In this case, her Honour held that "the fact that Ms Thorne's options were narrow, even eliminated, is not to the point" as it does not consider her will, and the facts do not support the proposition that any actual influence over Ms Thorne's mind was not a free act.[15]

http://eresources.hcourt.gov.au/showCase/2017/HCA/49

1 At [2]
2 [2005] NSWCA 344
3 [2005] NSWCA 344
4 At [70]
5 At [73]
6 At [32]–[33]
7 At [57]
8 At [59]
9 At [64]
10 At [65]
11 At [71] and [74]
12 At [80]
13 At [81]
14 At [80]
15 At [107]

Hancock Prospecting Ltd v Rinehart [2017] FCAFC 170

CONSTRUCTION LAW UPDATE

Key issues

Hancock Prospecting Pty Ltd v Rinehart was an appeal from an interlocutory application under section 8(1) of the Commercial Arbitration Act 2010 (NSW) (**CAA**) seeking a stay of the underlying proceeding in which the respondents allege that the applicants/appellants breached certain fiduciary duties or were complicit in those breaches.

The applicants/appellants dispute those allegations and also rely upon several deeds whereby the respondents provided releases in relation to such claims. The respondents argue that those deeds are invalid and that the arbitration agreements contained in two of those deeds are not applicable to this dispute.

Section 8(1) of the CAA states a court must stay an action "which is the subject of an arbitration agreement" unless the arbitration agreement is "null and void, inoperative or incapable of being performed". A critical issue was therefore whether the parties' disputes regarding the validity of the two deeds were the subject of the arbitration agreements in those deeds. The arbitration agreements in the deeds were identical, providing that "any dispute under this deed" must be referred to arbitration.

The primary judge's decision

Justice Gleeson[2] held that the disputes concerning the validity of the deeds were not disputes "under" the deeds and were therefore not the subject of an arbitration agreement.

In reaching this conclusion, her Honour relied upon the judgment of Bathurst CJ (with whom Young JA agreed) in the NSW Court of Appeal in *Welker*[3], which concerned the interpretation of the arbitration agreement in the same deeds.[4]

In *Welker*, Bathurst CJ rejected modern authority[5] which his Honour considered introduced a new rule of interpretation requiring an arbitration agreement to be interpreted without regard to its plain meaning in order to confer an arbitral panel with jurisdiction over all of the parties' disputes. According to the Chief Justice, this was inconsistent with orthodox principles of contractual interpretation.[6] His Honour then examined the particular wording of the arbitration agreement and found that "any dispute under this deed" referred to a narrow range of disputes, being disputes where the deed governed or controlled the dispute's outcome.[7]

Applied to the present case, Gleeson J found that the deeds could not govern or control the outcome of the disputes concerning their validity and therefore those disputes were not "under" the respective deeds.[8] Accordingly, Gleeson J dismissed the application under section 8(1) of the CAA.

The applicants/appellants appealed Gleeson J's decision.

The Full Federal Court's decision

The Full Federal Court, in the joint judgment of Allsop CJ, Besanko and O'Callaghan JJ, reversed Gleeson J's decision. The Full Court considered that both Gleeson J and Bathurst CJ incorrectly undertook

Key takeaways

The Full Federal Court of Australia's decision in *Hancock Prospecting Pty Ltd v Rinehart* confirms that arbitration agreements are to be interpreted liberally on the presumption that parties choosing arbitration intend for all of their disputes to be dealt with in this way.

Relevantly, the Court held that an arbitration agreement applying to "any dispute under this deed" included disputes regarding the validity of the deed itself. Prior to this decision, there was uncertainty in Australia as to the correct approach to interpreting arbitration agreements, with the New South Wales Court of Appeal in *Rinehart v Welker (Welker)*[1], having found that this same clause applied narrowly to only those disputes which were governed by the deed or where the deed governed or controlled the dispute's outcome.

With the approach in *Welker* expressly rejected, the Full Federal Court's decision is likely to raise Australia's profile as offering a facilitative environment for commercial arbitration.

Keywords:

Commercial arbitration

a semantic analysis of the word "under" in concluding that the arbitration agreement covered a narrow range of disputes.[9] In line with the presumption of "one-stop adjudication", the correct approach is to liberally interpret the arbitration agreement where its language permits.[10]

Contrary to the findings of both Bathurst CJ and Gleeson J, the Full Court considered that the phrase "any dispute under this deed" was capable of being interpreted liberally to encompass a much broader range of disputes than only those where the deed controlled or governed the dispute's outcome.[11] It followed that the disputes concerning the validity of the deeds were disputes "under" the respective deeds and therefore the subject of an arbitration agreement. The Full Court stayed the proceedings in their entirety.[12]

Why is this decision significant?

This decision adopts the modern line of English and Australian authority originating in the 1990s which supports a liberal approach to the interpretation of arbitration agreements and confirms that *Welker* is to be viewed as an anomaly.[13] In light of the Full Federal Court's decision, judges, arbitrators and practitioners are no longer required to focus on difficult distinctions between commonly used figurative phrases in arbitration agreements such as whether a dispute "arose out of", was "in connection with" or was "under" the relevant contract. The liberal approach not only reflects common sense but also gives effect to the objective intention of parties to arbitration agreements, who likely consider such phrases interchangeable.

This decision means that it is very unlikely that an arbitration agreement will be construed narrowly, resulting in the bifurcation of a contractual dispute into court and arbitral proceedings. This will likely assist in promoting Australia as a desirable venue for commercial arbitration.

http://classic.austlii.edu.au/au/cases/cth/FCAFC/2017/170.html

Note: this article by Andrew Stephenson, Alison Teh and Dominic Fawcett first appeared online at http://www.corrs.com.au/thinking/insights/full-federal-court-decision-likely-to-facilitate-arbitration-in-australia/

1 [2012] NSWCA 95 (20 April 2012)
2 *Rinehart v Rinehart (No 3)* [2016] FCA 539 (26 May 2016)
3 [2012] NSWCA 95 (20 April 2012)
4 [2016] FCA 539 (26 May 2016)
5 *Fiona Trust v Privalov Holdings* [2010] UKHL 40 (17 October 2013) [13] (Lord Hoffmann, Lord Walker, Lord Hope, Lord Scott and Lord Brown agreeing); followed in *Paharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2008] WASCA 110 (13 May 2008)
6 [2012] NSWCA 95 (20 April 2012) [115], [121] citing *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165
7 [2012] NSWCA 95 (20 April 2012) [123]–[125] citing *Samick Lines Co Ltd v Owners of the Antonis P Lemos* [1985] AC 711, 727 (Lord Brandon); *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd* (1993) 43 FCR 439, 448 (French J); *BTR Engineering (Australia) Ltd v Dana Corporation* [2000] VSC 246 (14 June 2000) [27] (Warren J); *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2009] VSC 553 (8 December 2009) [34] (Hargraves J)
8 [2016] FCA 539 (26 May 2016) [645]-[646], [650]
9 [2017] FCAFC 170 (27 October 2017) [161], [193]–[205]
10 [2017] FCAFC 170 (27 October 2017) [173]-[186]
11 [2017] FCAFC 170 (27 October 2017) [193], [196], [201]-[202], [204]
12 [2017] FCAFC 170 (27 October 2017) [415]
13 See Andrew Stephenson and Lindsay Hogan, 'Construction Arbitration in Australia' in *Global Arbitration Review: The Guide to Construction Arbitration* (Law Business Research, 2017) 250, 209

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

CONSTRUCTION LAW UPDATE

Background

The parties entered into a subcontract based on AS4903–2000. Clause 37.1 (read with Item 37) provided that progress claims should be submitted progressively on the 20th day of each month, and that an early progress claim would be deemed to have been made on the date for making that claim.

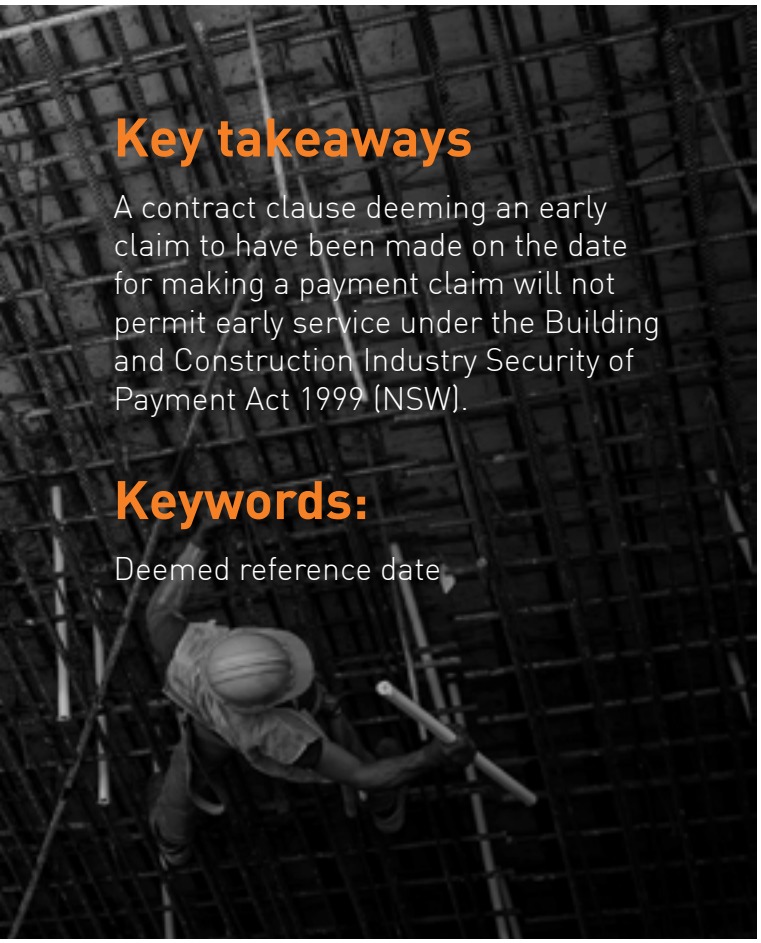
All Seasons Air Pty Ltd (**All Seasons**) made a progress claim on 20 June 2016, and then rendered a further progress claim on 12 July 2016. Regal Consulting Services Pty Ltd (**Regal**) supplied a payment schedule stating that it had no obligation to pay on the claim dated 12 July 2016 as it was the second payment claim for the 20 June 2016 reference date. Regal argued it contravened section 13(5) and so was invalid as a progress claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) (**Act**).

All Seasons then applied for adjudication. The adjudicator accepted, on the basis of the deeming provision in clause 37.1, that the date for the 12 July 2016 claim was deemed to be 20 July 2016, and thus determined that the payment claim was valid. The adjudication certificate was then filed as a judgment for the debt claimed.

The judgment at first instance

McDougall J held that:

- clause 37 of the subcontract operated to start All Seasons' *contractual* rights to recover payment on the 20th day of each month, including for a payment claim served earlier, but had no effect on its *statutory* entitlement to a progress payment, which only arises on a reference date;
- it is not possible to assert that an early progress claim served in accordance with the contractual mechanism is served "*on and from the reference date*" under the statutory mechanism as that permits All Seasons to make a progress claim on any date earlier than the reference date;
- the 12 July 2016 progress claim could thus not be a statutory payment claim as All Seasons was not a person entitled to a progress payment under the Act; and
- accordingly, the adjudicator lacked jurisdiction to hear and determine the adjudication application based on the 12 July 2016 payment claim.



Key takeaways

A contract clause deeming an early claim to have been made on the date for making a payment claim will not permit early service under the Building and Construction Industry Security of Payment Act 1999 (NSW).

Keywords:

Deemed reference date

Appeal

All Seasons sought to appeal the decision substantially on the basis that, by virtue of clause 37.1 of the subcontract, its 12 July 2016 progress claim did not treat the reference date as any date earlier than the reference date. Rather, it argued, the progress claim should be deemed to become a payment claim under the Act only on 20 July 2016. As that date is a reference date, All Seasons would be entitled to a progress payment under the Act in respect of that claim.

Leeming and Payne JJA dismissed the appeal with costs. In a brief separate judgment, White JA agreed with their Honours' reasoning and orders.

Reasoning

The main question before the Court was whether, on 20 July 2016, the 12 July 2016 progress claim engaged the statutory regime under the Act.

Section 13(5) of the Act prohibits the service of more than one payment claim for any reference date. All Seasons had already served a payment claim in respect of the 20 June 2016 reference date. As a result, it had no entitlement to serve a further payment claim in respect of the 20 June 2016 reference date.

The Court accepted that, as between the parties, All Seasons' 12 July 2016 payment claim was contractually deemed to be made on 20 July 2016. However, that did not mean that the 12 July 2016 payment claim was served on 20 July 2016 for the purposes of the Act.

In *Southern Han Breakfast Point Pty Ltd (in liquidation) v Lewence Constructions Pty Ltd* (**Southern Han**),[1] it was established that the entitlement to a progress payment only arises "*on and from each reference date*", as set out in section 8(1) of the Act. It was also established that the service of a payment claim under section 13(1) of the Act is an essential precondition to taking subsequent steps in the procedure for recovering progress payments under the Act.

The entire legislative regime for recovery of progress payments turns on an entitlement to a progress payment (which only arises where a payment claim is served on or from the reference date), and service on or from that reference date of a payment claim.

As All Seasons was not entitled to a progress payment on 12 July 2016, it was also not entitled to serve a payment claim on that date. As a result, the progress payment regime under the Act was not activated.

Conclusion

This decision reaffirms the view that the effect of the Act is to create two parallel mechanisms for the recovery of payments under construction contracts, one contractual and the other statutory. It also clarifies that a contractual term which allows the making of a contractual progress claim earlier than the reference date under the Act will not entitle the applicant to serve a progress claim under the Act.

However, while agreeing with Leeming and Payne JJA and while the point was not argued, White JA was of the view it may be arguable that the phrase "*on and from each reference date*" in section 8(1) of the Act should be interpreted as "*on and with effect from each reference date*", rather than "*on and after each reference date*". White JA considered that such a construction would not appear to be inconsistent with Southern Han. This may open the door for such an argument in a future case with similar facts.

http://classic.austlii.edu.au/au/cases/nsw/NSWCA/2017/289.html

1 [2016] HCA 52

Kawasaki Heavy Industries Ltd v Laing O'Rourke Australia Construction Pty Ltd

[2017] NSWCA 291

CONSTRUCTION LAW UPDATE

Facts

Kawasaki Heavy Industries Ltd (**Kawasaki**) and Laing O'Rourke Australia Construction (**Laing**) entered into a consortium agreement. JKC Australia LNG Pty Ltd (**JKC**) engaged the consortium as head contractor on a cryogenic tank project near Darwin, to provide project management and engineering services.

Their obligations were governed by a subcontract. The subcontract required the consortium to provide performance bonds. Under the consortium agreement, Kawasaki alone would provide these bonds on behalf of the consortium (**Kawasaki bonds**). In return for this, Laing would provide performance bonds in Kawasaki's favour under clause 14(e) of the consortium agreement.

The consortium failed to perform its obligations under the subcontract. JKC asserted an entitlement to damages but did not call on the performance bonds under the subcontract. Laing and Kawasaki had a falling out and asserted claims against each other for non-performance. Kawasaki sought to call on the performance bonds under the consortium agreement. Laing argued that it was not entitled to do so.

At first instance, the Court upheld the continuation of an interlocutory injunction.

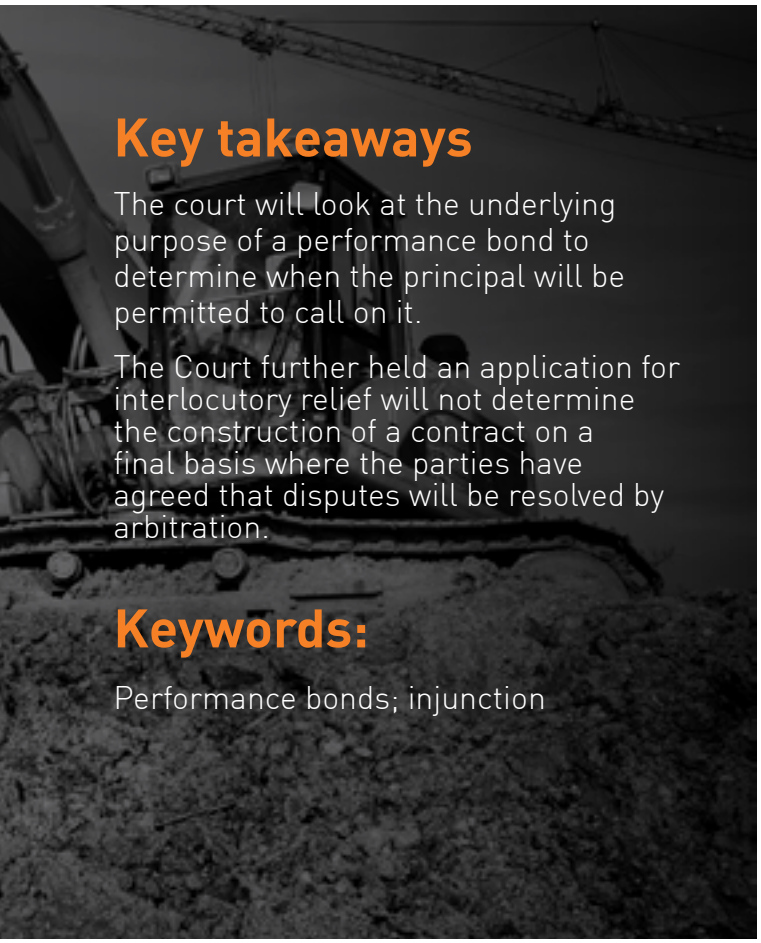
Decision

Meagher, Payne and White JJA found that the crucial issue in this case was whether, on the proper construction of the subcontract, the performance bonds could be called on before JKC had made any demand on the bonds under the JKC subcontract. That is, whether it was the parties' objective intention that Kawasaki be permitted to call on the bonds in circumstances where JKC had not made a call.

The Court held that the performance bonds were intended to secure Laing's obligation to reimburse Kawasaki in the event JKC called on the bonds under the subcontract. They were not intended as security for Laing's general obligation to perform its work under the agreement.

The Court based its decision on several other clauses of the consortium agreement. For example:

- Clause 14(g) provided that Kawasaki had to release the Laing bonds at the same time JKC released the Kawasaki bonds irrespective of whether any obligation of Laing to JKC remained unperformed.
- Clause 14(b) provided that if JKC called on the bonds under the subcontract, Laing and Kawasaki must contribute in proportion to their liability.



Key takeaways

The court will look at the underlying purpose of a performance bond to determine when the principal will be permitted to call on it.

The Court further held an application for interlocutory relief will not determine the construction of a contract on a final basis where the parties have agreed that disputes will be resolved by arbitration.

Keywords:

Performance bonds; injunction

The Court held that the performance bonds were intended to secure Laing's obligation to reimburse Kawasaki in the event JKC called on the bonds under the subcontract. They were not intended as security for Laing's general obligation to perform its work under the agreement.

- Clause 14(f) stated that the bonds provided to Kawasaki must be provided at the same time that Kawasaki was obliged to provide JKC the Kawasaki bonds.

The Court held that it was not required to construe the consortium agreement on a "final basis". Rather, all that was established was that there was a "serious question to be tried" that Kawasaki was not entitled to call on the bonds on the proper construction of the consortium agreement. Since the consortium agreement referred all disputes to arbitration, the final determination of the proper construction of the consortium agreement was left to the arbitral tribunal.

http://classic.austlii.edu.au/au/cases/nsw/NSWCA/2017/291.html

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

CONSTRUCTION LAW UPDATE

Background

Quickway Construction (**Quickway**) engaged Electrical Energy (**Electrical**) to undertake cable hauling works at electrical substations in Canterbury and Leichhardt. Electrical subcontracted works to Scottish Pacific (BFS) Pty Ltd (**Scottish**).

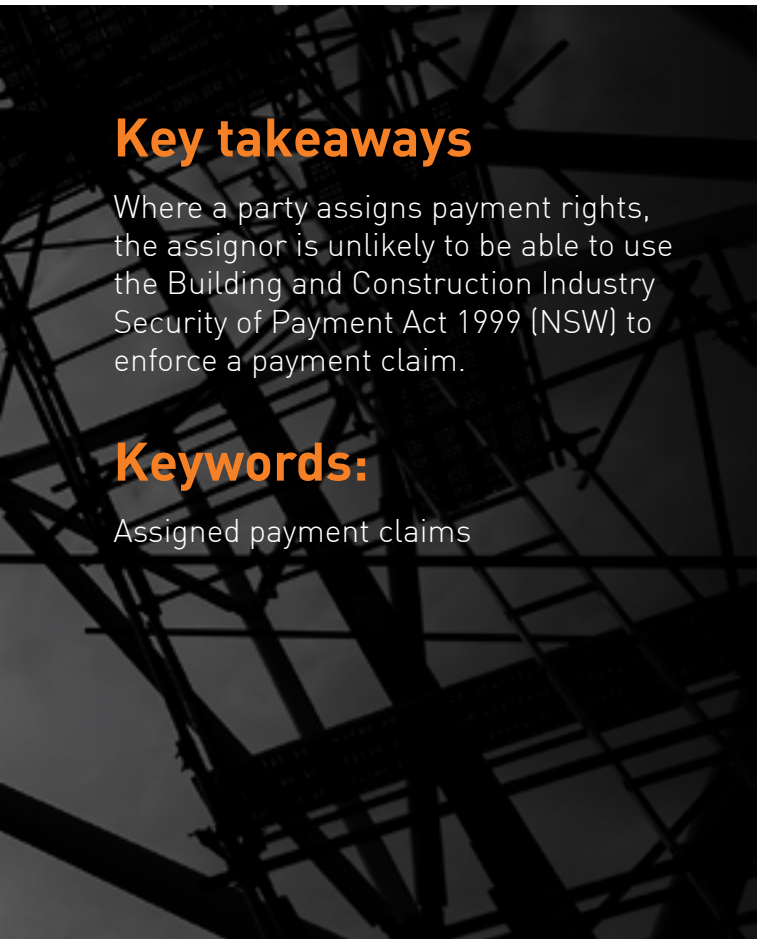
On 22 April 2017, Electrical sent Quickway invoices for $24,725 and $41,250 for work done at the substations. Electrical submitted invoices to Quickway as payment claim pursuant to section 13 of the Building and Construction Industry Security of Payment Act 1999 (NSW) (**Act**). In response, Quickway lodged payment schedules disputing Electrical's claims. The two invoices were the subject of two determinations under section 17 of the Act.

Procedural History

The adjudicator held that the payment claims were valid and the payments were owing. In response to Electrical's demands for payment, Quickway commenced proceedings in the Supreme Court seeking a declaration that the adjudication determinations were not valid. Quickway argued that the payment claims were invalid because the underlying rights to recover payment had been assigned to Scottish.

At first instance, whilst upholding Quickway's challenge to the Leichhardt works determinations for lack of procedural fairness, Parker J rejected Quickway's arguments in the determinations relating to Canterbury.

Quickway then sought leave to appeal to the Court of Appeal. Quickway argued that it had been denied procedural fairness as the debt had been assigned.



Key takeaways

Where a party assigns payment rights, the assignor is unlikely to be able to use the Building and Construction Industry Security of Payment Act 1999 (NSW) to enforce a payment claim.

Keywords:

Assigned payment claims

Issue in dispute

In submitting these payment claims, Electrical advised Quickway that payment should be made to Scottish, stating:

> "*This invoice has been assigned to Scottish Pacific (BFS) Pty Ltd. All payments must be made payable and sent to Scottish Pacific (BFS) Pty Ltd.*"[1]

The issue was whether Electrical could claim under the Act. Under section 13(1), a claimant is a person "*who is or who claims to be entitled to a progress payment*".

Decision

Gleeson and Leeming JJA

Gleeson and Leeming JJA granted leave for the appeal in regards to the Canterbury determination and quashed the adjudication. Their Honours held that section 13(1) of the Act was an essential pre-condition to allowing a party to use the Act. This pre-condition required an assessment as to whether Electrical was a person who "claims to be entitled to a progress payment".

Their Honours held that Electrical could not be a claimant, for Electrical itself had asserted unequivocally on the very document that purported to be a payment claim that there had been an assignment. At the moment of receipt of the invoices intended to constitute a payment claim, Electrical had ceased to be a creditor of Quickway; the rights in the debt had been assigned to Scottish in equity and at law.

In addressing the statutory liability created by section 14(4) (where "the respondent becomes liable to pay the claimed amount **to the claimant**") and the factual situation of the assignment at law, their Honours concluded that extending rights under the Act to Electrical would separate the legal ownership of the underlying debt from that statutory liability. Their Honours did not consider the Act intended to go that far.

Macfarlan JA (dissenting)

Macfarlan JA also held that leave should be granted, but held that the appeal should be dismissed. His Honour concluded that Electrical met the requirements established for a "claimant". Electrical had undertaken the construction work as required by section 8(1) of the Act. It claimed to be entitled to a progress payment, satisfying the second limb of section 13(1) of the Act.

Macfarlan JA concluded that the claims clearly consisted of tax invoices issued by Electrical and section 13 does not contain an express requirement that a payment claim must demand payment to the claimant. In this sense, appointing a third party to receive the correspondent amounts would not deprive the payment claim of its character.

Conclusion

The appeal was allowed and the adjudication determinations relating to the works in Canterbury were quashed. The amounts previously paid to Electrical by reason of the primary judgment were ordered to be repaid with interest. Electrical was also ordered to pay Quickway's costs at first instance and on appeal.

http://classic.austlii.edu.au/au/cases/nsw/NSWCA/2017/337.html

1 At [2]

D.R. Design (NSW) Pty Limited v Grand City International Development Pty Ltd

[2017] NSWSC 1778

CONSTRUCTION LAW UPDATE

Facts

In October 2014, Grand City International (**GCI**) engaged D.R. Design (**DR**) to provide project management and architectural planning services for a mixed use development.

In February 2016, GCI notified DR it was terminating the agreement, exercising a right it claimed to have under the contract. DR claimed that the notice constituted wrongful repudiation and, accepting the repudiation, it terminated the contract.

The contract provided:

> ***Termination by the Client***
>
> *The Client may terminate the Project prior to completion, by doing the following:*
>
> 1. *Provide 48 hours' notice in writing of termination of the Project to DR; and*
> 2. *Pay DR the value of the work completed to date, including any outstanding invoices, and the value of all work undertaken or disbursements incurred since the last invoice was issued, calculated at the hourly rates current at the time the work was undertaken.*
>
> ***Termination by DR***
>
> *DR reserves the right to terminate work on the Project, in which case the Client is required to pay DR the value of the complete work at the hourly rates current at the time the work was undertaken.*

Issue

In its letter on 24 February 2016, GCI told DR it was terminating the agreement. GCI attempted to give immediate effect to the termination by alleging that DR had failed to meet critical deadlines and had caused significant delay and financial loss to the project.

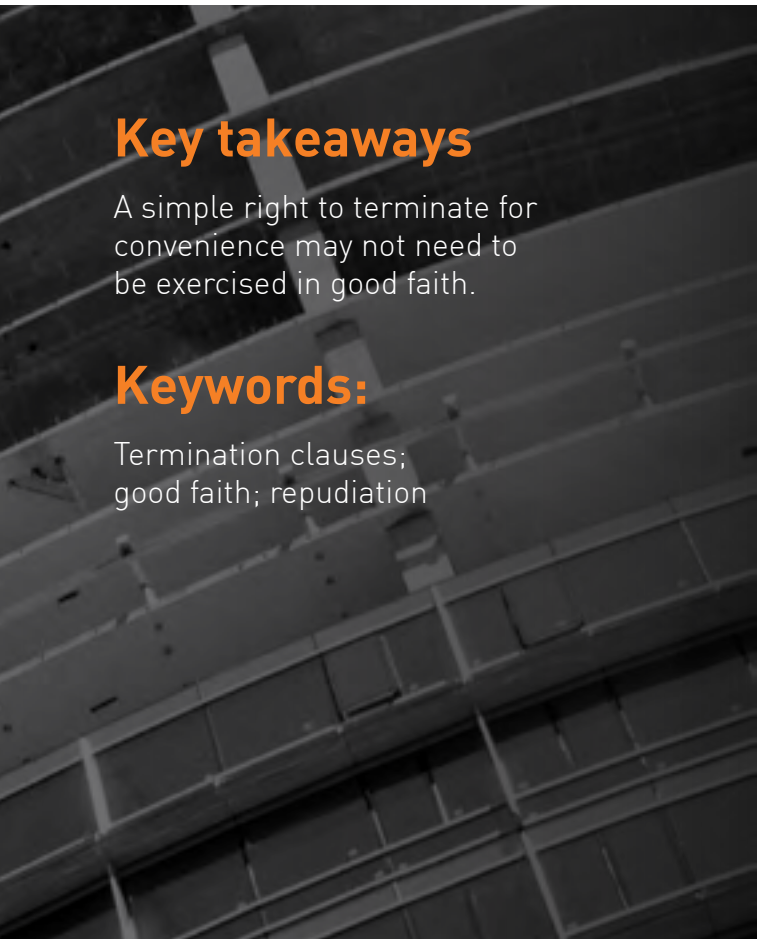
DR raised three objections to the letter:

(a) the letter did not give 48 hours' notice of termination;

(b) GCI was not entitled to exercise a right of termination in bad faith; and

(c) GCI had failed to pay the amounts required by the second part of the termination clause.

For these reasons, DR argued the notice of termination was ineffective, and so amounted to repudiation.



Key takeaways

A simple right to terminate for convenience may not need to be exercised in good faith.

Keywords:

Termination clauses; good faith; repudiation

Decision

Ball J decided that the notice was effective to terminate the contract.

Giving the termination clause a sensible commercial or businesslike interpretation

In giving the clause a businesslike interpretation, Ball J decided that the clause should be interpreted as requiring the notice be given in writing and that it would be effective after 48 hours. To require further that the notice expressly state it would be effective after 48 hours was not a sensible interpretation.

Indeed, what was essential was that the notice transmit the plain intention to terminate the contract and that it be in writing. If the notice met those essential requirements, it would have force after 48 hours, regardless of an attempt to give it immediate effect.

Whether there was an implied term of good faith in the contract

Ball J relied on *Renard Constructions (ME) Pty Ltd v Minister for Public Works*[1] and *Carr v JA Berriman Pty Ltd*[2] to explain that the courts will often take the view that the contract requires reasonableness or good faith when the very effect of the contract will depend on the exercise of a discretion given to one of the parties. In those cases, the requirement to exercise the discretion in good faith is considered to be implicit in the relevant clause.

However, the present case was distinguished from those authorities. This specific context consisted of a simple right of termination, which may be exercised by either party. Regardless of which party elects to terminate, the result is that the service provider must be paid for the works performed until termination. In addition, the language of the contract was clear in this respect.

Ball J continued that any attempt to establish a standard to qualify the right of termination would be a difficult task. For instance, should reasonableness be applied to require a breach to give rise to the right to terminate, the clause would be redundant and at odds with what the parties must have intended.

Finally, Ball J reasoned that it would be natural to consider that payment of the outstanding invoices and amounts due, such as for variations (to the extent that DR was entitled to payment for the variations), would be a consequence of the termination, rather than a condition precedent to it.

Wrongful repudiation

Since Ball J held that the notice of termination was effective, the question of repudiation did not arise.

Conclusion

In concluding the right to termination was rightfully exercised, Ball J decided the amount due for payment with reference to the material facts and awarded DR the right to recover certain unpaid invoices and some of the claimed variations, plus interest.

http://classic.austlii.edu.au/au/cases/nsw/NSWSC/2017/1778.html

1 (1992) 26 NSWLR 234
2 (1953) 89 CLR 327

Building Industry Fairness (Security of Payment) Act 2017

CONSTRUCTION LAW UPDATE

Key amendments

A copy of our detailed guide to the key changes enshrined in the BIF Act is available online.

In summary, the key amendments effected by the BIF Act are the:

1. introduction of project bank accounts (**PBAs**) for certain building contracts;
2. amendment and consolidation of the BCIP Act and the Subcontractors' Charges Act (reproduced in Chapters 3 and 4 of the BIF Act respectively);
3. amendments to the QBCC Act; and
4. introduction of a number of penalty provisions to enforce compliance with the BIF Act.

This article discusses the proclamation and commencement of important provisions of the BIF Act, particularly those provisions establishing a PBA regime for some building contracts. It also outlines important guidance provided by the Building Industry Fairness (Security of Payment) Regulation 2018 (Qld) (Regulations) and the Building Industry Fairness (Security of Payment) (Transitional) Regulation 2018 (Qld) (**Transitional Regulations**), which also commenced on 1 March 2018.

Proclamation of the Act

The provisions establishing the PBA regime (under Chapter 2 of the BIF Act) received proclamation on 22 February 2018 and commenced on 1 March 2018. From 1 March 2018, the PBA regime under the BIF Act applies to government building contracts between $1 million and $10 million, where the tender for contract was issued or advertised on or after 1 March 2018.

In addition to the PBA regime, the other provisions which commenced on 1 March 2018 are set out in the following Commencement Table.

Those provisions not yet in force largely relate to security of payment and subcontractors' charges (including consolidation of the amended Building and Construction Industry Payments Act and the Subcontractors' Charges Act). It has not yet been indicated when these provisions will commence.

Key takeaways

The Building Industry Fairness (Security of Payment) Act 2017 (Qld) (**BIF Act**), which received Royal Assent on 10 November 2017, legislates major changes to the construction industry in Queensland, overhauling the operation of the following Acts:

1. Building and Construction Industry Payments Act 2004 (Qld) (**BCIP Act**);
2. Subcontractors' Charges Act 1974 (Qld) (**Subcontractors' Charges Act**); and
3. Queensland Building and Construction Commission Act 1991 (Qld) (**QBCC Act**).

The provisions of the BIF Act establishing the project bank account (**PBA**) regime (under Chapter 2 of the BIF Act) received proclamation on 22 February 2018 and commenced on 1 March 2018.

Principals, contractors and subcontractors must familiarise themselves with the PBA regime. In particular, head contractors should be aware that government building contracts between $1 million and $10 million will require the establishment of a PBA where the tender for contract was issued or advertised on or after 1 March 2018.

Further, parties should be aware that, while the BIF Act's security of payment provisions have not yet commenced, payments made because of an adjudication, or payment disputes under the BCIP Act regime, may be subject to the BIF Act's PBA provisions.

Keywords:

Queensland security of payment; project bank accounts

Commencement Table – The BIF Act's Key Chapters	
Chapter 1 (Preliminary)	Proclaimed — commenced 1 March 2018
Chapter 2 (Project bank accounts)	Proclaimed — commenced 1 March 2018
Chapter 3 (Progress payments)	Not yet in force
Chapter 4 (Subcontractors' charges)	Not yet in force
Chapter 5 (Administration)	Not yet in force
Chapter 6 (Legal proceedings)	Proclaimed — commenced 1 March 2018
Chapter 7 (Miscellaneous) Other than section 201(2)(b) to (g)	Proclaimed — commenced 1 March 2018
Chapter 8 (Transitional) Including repeal of the BCIP Act and Subcontractors' Charges Act	Not yet in force (**NB**: BCIP Act and Subcontractor's Charges Act not yet repealed)
Chapter 9 (Amendment of this and other Acts)	Not yet in force
Section 211 (Transitional regulation-making power) Other than section 211(1)(a)(ii) and (5)	Proclaimed — commenced 1 March 2018
Section 307(1) (Amendment of Dictionary) Other than to the extent it omits the definition *demerit matter*	Proclaimed — commenced 1 March 2018
Schedule 1 (Consequential Amendments) Includes amendments to Judicial Review Act 1991 and Queensland Building and Construction Commission Act 1991	Not yet in force
Schedule 2 (Dictionary)	Proclaimed — commenced 1 March 2018

The Regulations

The Regulations and the Transitional Regulations also commenced on 1 March 2018.

The Regulations provide guidance on the operation of the PBA regime, including:

- the meaning of "building work";[1]
- "prescribed information" required to be provided by head contractors under sections 50 and 51 of the Act;[2]
- "prescribed payments" into PBAs;[3] and
- withdrawals from PBAs.[4]

For a detailed explanation of the guidance provided by the Regulations, read our previous publication here.

PBA payments and withdrawals

Under the BIF Act, the head contractor must not cause funds to be transferred to,[5] or withdrawn from,[6] a PBA unless it is for an authorised purpose (which may be prescribed by regulation).

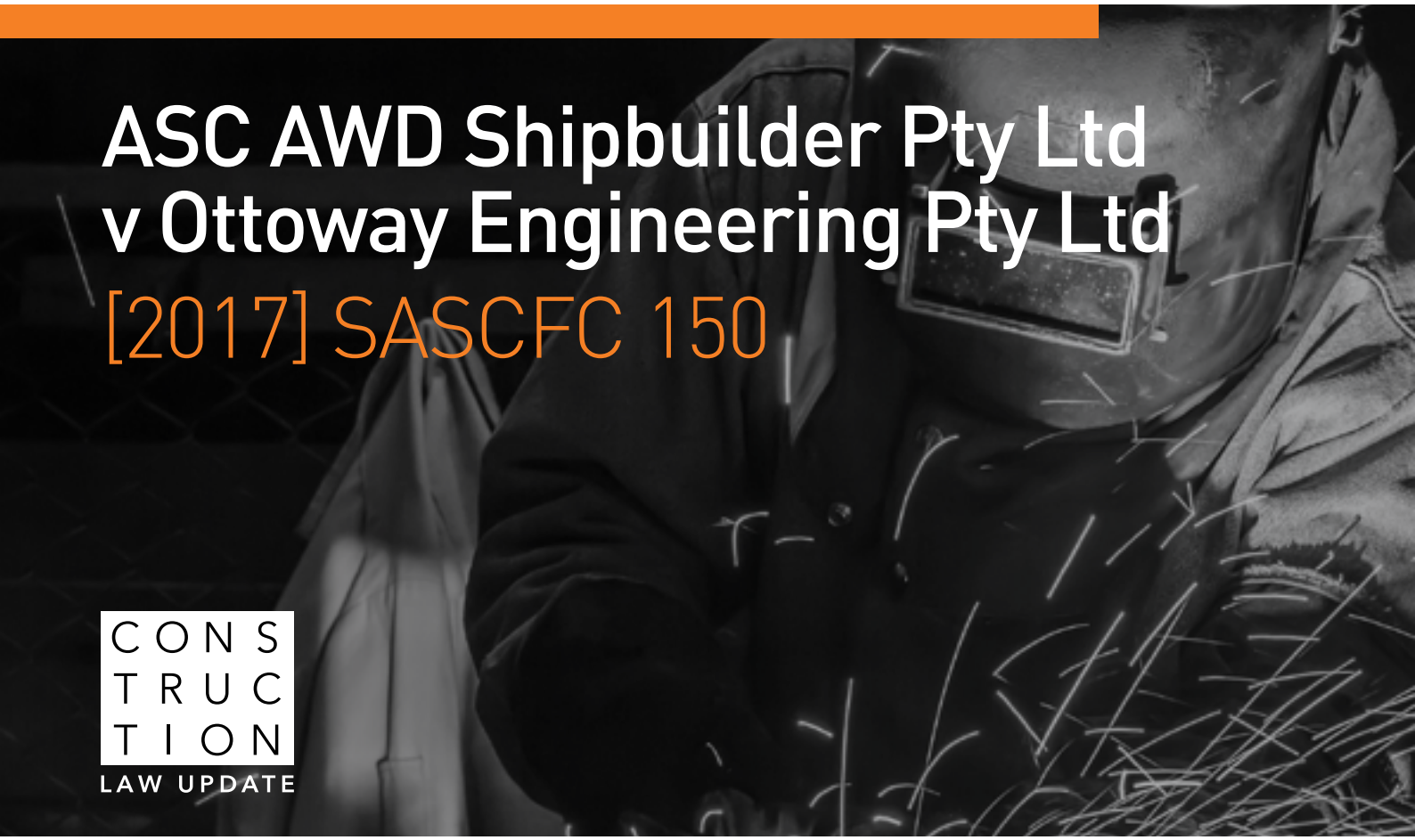
Pursuant to the Regulations, a payment made because of an adjudication of a "payment claim" under the BCIP Act, by either a head contractor under a building contract where a PBA is required or a subcontractor (not suppliers) under a first-tier subcontract, may be made to, or withdrawn from, a PBA.[7]

Transitional provisions and the BCIP Act

As noted in the Commencement Table above, the BCIP Act's new security of payment provisions are not yet in force. Despite this, principals, contractors and subcontractors should be aware that payments made under the BCIP Act regime will still be subject to the PBA provisions if they relate to a current building contract for which a PBA is required.

For example, payments made because of an adjudication of a payment claim under the BCIP Act may be required to be paid into a PBA. Additionally, the Transitional Regulations make it clear that a "payment dispute" may include disputed amounts regarding payment claims under the BCIP Act regime[8], which must also be held in a PBA.[9]

1 Regulation 4
2 Regulations 9 and 10
3 Regulation 6
4 Regulation 6
5 Section 28(e) of the BIF Act
6 Section 31 of the BIF Act
7 Regulations 6 and 7
8 For example, see regulation 5 of the Transitional Regulations: a payment dispute occurs where the amount to be paid (via payment instruction) is less than stated in a payment schedule, or where a payment claim is not served within the time required under the BCIP Act
9 See section 23(c) and 36 of the BIF Act: disputed payments are to be held in the disputed funds account



ASC AWD Shipbuilder Pty Ltd v Ottoway Engineering Pty Ltd [2017] SASCFC 150

CONSTRUCTION LAW UPDATE

Facts

ASC engaged Ottoway Engineering to fabricate, assemble and supply pipework.

Clause 25 of their fabrication contract provided that disputes that were not resolved at a mandatory settlement conference were to be referred to arbitration.

A dispute regarding reimbursement for a contribution arose and was referred to arbitration. The arbitrator made an award in favour of ASC and dismissed Ottoway Engineering's cross-claim.

Consequently, Ottoway Engineering sought leave to appeal against the award on the ground that the arbitrator erred in law by not providing reasons or sufficient reasons for key findings.

In 2017, a Judge of the Supreme Court granted Ottoway Engineering leave to appeal. The Judge held that it was an implied term of the contract that there was to be a statutory right of appeal against the arbitral award on a question of law, as provided for by section 34A(1)(a) of the 2011 Act.

Questions to be tried:

ASC appealed the Judge's order granting leave to appeal against the arbitral award. In doing so, two questions were raised:

1. whether the Judge erred in finding that it was an implied term of the contract that there was to be a statutory right to seek leave to appeal from an arbitral award; and
2. whether the Judge erred in finding that the leave requirements in section 34A(3) of the 2011 Act had been meet.

Decision

The Full Court of the Supreme Court of South Australia held that the Judge had erred in finding that it was an implied term of the parties' contract that there was to be a statutory right to seek leave to appeal from the arbitral award.

The primary Judge's order granting leave to appeal against the arbitration award was vacated, and ASC's application was dismissed.

In reaching this conclusion, the Court held that:

1. the term was not so obvious as to go without saying;
2. it cannot be said that the implied term was necessary to give business efficacy to either the contract or the arbitration agreement.

Key takeaways

Where parties entered into an arbitration agreement under an "old" state Arbitration Act, but subsequently have an arbitration under the "new" 2011 Arbitration Act, it is unlikely a court will recognise an implied term that the parties have opted in to rights of appeal under the 2011 legislation.

Keywords:

Arbitration; right of appeal; implied term

Ground 1: Whether the parties agreed that an appeal may be made against an arbitral award

In considering the possibility of an implied term, Nicholson J (Kourakis CJ essentially agreeing and Stanley J agreeing) stated that if the legislature had intended to protect existing appeal rights of parties, the transitional provisions in the 2011 Act would have been enacted in different terms.

The Court then proceeded to consider the trial Judge's assessment of the case law applicable to implied terms in Australia, citing the five conditions found in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*.[1] For a term to be implied:

1. It must be reasonable and equitable;
2. It must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
3. It must be so obvious that "it goes without saying";
4. It must be capable of clear expression; and
5. It must not contradict any express term of the contract.

The Court considered that an implied term to the effect that the parties, in 2009, agreed that they were to have a statutory right (to be) conferred by the 2011 Act did not readily lend itself to satisfying the *BP Refinery* requirements. Further, such a conclusion would deny the effect and authority of the 2011 Act.

In making their determinations, the second and third requirements were critical.

"Business efficacy"

The Court found that the statutory right conferred by the 1986 Act was already available to the parties as at 2009 and, as such, the implication of such a term could not be seen (in 2009) as being necessary to give business efficacy to the contract. Furthermore, such a term was regarded as unenforceable or of no effect, as once the 2011 Act came into force, it could be seen as covering the field with respect to appeal avenues.

Nicholson J also took the view that an implied term, securing a right of appeal to the parties, however formulated, is not necessary to give business efficacy to the contract, as if a contract is commercially effective without the putative implied term, it will not be implied.

However, while both Acts contemplated that very significant contractual disputes might proceed to arbitration, the Court stated that it cannot be said that an implied term to the effect of giving rise to such a right of appeal was necessary to give business efficacy to either the fabrication contract or the arbitration agreement — both had and continue to have business efficacy.

Furthermore, the existence of the opt-out regime at the time the parties entered into the arbitration agreement and the fact that the parties did not, then or at any time before the repeal of the 1986 Act, agree to opt out, taken together, may lead to the conclusion that there was to be a right of appeal. However, the fact that the parties either did not or could not reach agreement to opt out does not necessarily imply the converse — that they had reached agreement to have a right to appeal.

"So obvious"

The Court stated that the parties should be taken to have recognised that the 1986 Act would operate according to its terms, with no capacity to unilaterally vary or opt out of its requirements.

However, mere entry into the arbitration agreement cannot necessarily indicate an objective presumed intention that there was to be a right of appeal, as opposed to a common understanding or acceptance that, whilst section 38 of the 1986 Act remained in force, a right to appeal in accordance with its terms would lie.

1 (1977) 180 CLR 266

Upon clarification it cannot necessarily be inferred that either or both parties wanted such a right of appeal. In applying the officious bystander test, when assessing the inclusion of an arbitration agreement in 2009, the Court stated that the answer would not be so obvious. On this basis, it was determined that it could not have been the objective presumed intention of the parties that there was to be a right of appeal in accordance with the terms of section 34A of the 2011 Act.

Thus, the Court found that the third requirement could not be made out.

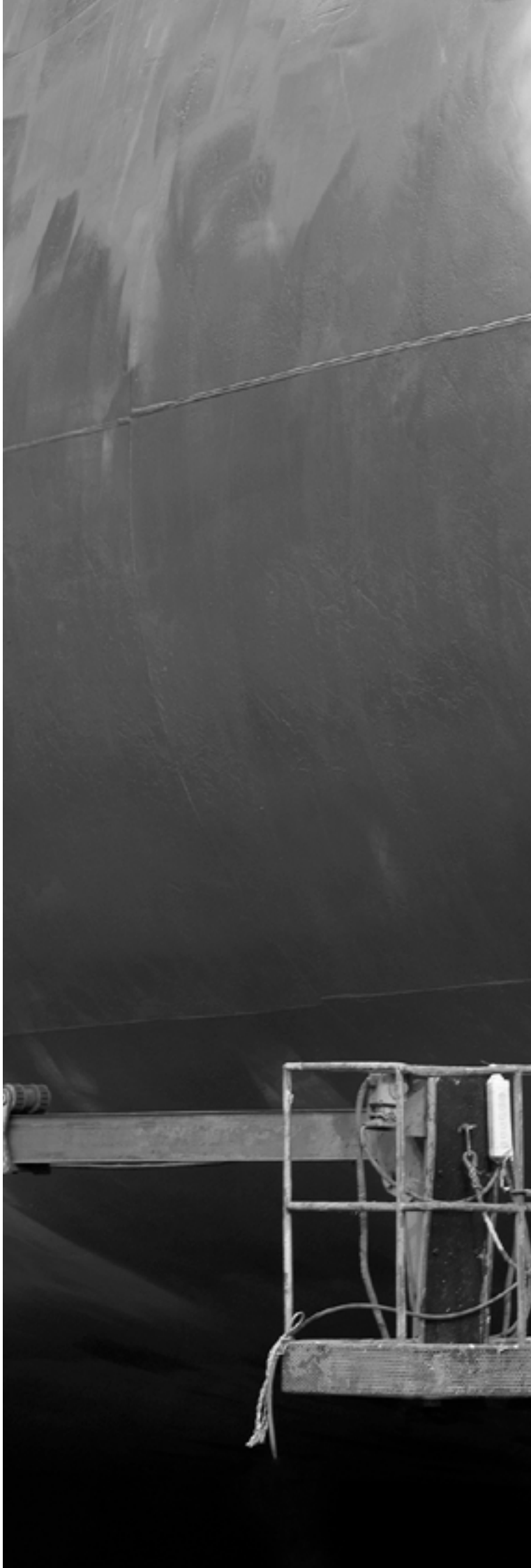
Ground 2: Whether the leave requirements in section 34A(3) had been met

Nicholson J preferred not to express a final view with respect to appeal Ground 2.

However, his Honour was in some doubt as to whether the issue of an arbitration providing sufficient reasons is of a nature that readily lends itself to the criteria for leave prescribed by subsection 34A(3).

The leave criteria in subsection 34A(3) of the 2011 Act are expressed in quite different and arguably more restrictive terms than the 1986 Act. In consideration of this, the Court considered a challenge to sufficiency of reasons would not readily fall within the current leave regime.

http://classic.austlii.edu.au/au/cases/sa/SASCFC/2017/150.html



Adventure Golf Systems Australia Pty Ltd v Belgravia Health & Leisure Group Pty Ltd [2017] VSCA 326

CONSTRUCTION LAW UPDATE

Facts

Adventure Golf Systems Australia Pty Ltd (**AGS**) agreed to build an adventure golf course at the Spring Park Golf Course in Dingley (**Dingley Facility**) for Belgravia Health & Leisure Group Pty Ltd (**Belgravia**). Belgravia managed the Dingley site under a management agreement with Parks Victoria (**Management Agreement**). In 2000, AGS and Belgravia entered into an agreement governing the construction and operation of the Dingley Facility, which included sharing revenue after expenses (**Agreement**).

Clause 6 of the Agreement aligned its term with the Management Agreement, such that it was to continue to have effect for so long as Belgravia occupied the Dingley site "in accordance with" the Management Agreement. Over time, the Management Agreement was extended twice: once by variation and again by the grant of an option.

The Management Agreement expired on 17 November 2015, as did the Agreement. Belgravia, however, continued to occupy the Dingley site under a short-term arrangement with Parks Victoria. It had not shared any revenue with AGS since the expiry of the Agreement.

AGS issued proceedings against Belgravia alleging that the parties owed each other fiduciary obligations and that Belgravia had breached those obligations by negotiating for its own benefit an arrangement with Parks Victoria to the exclusion of AGS.

The trial judge dismissed the claim, finding that Belgravia did not owe fiduciary obligations to AGS at the time of its negotiations with Park Victoria about the future of their relationship concerning the Dingley site, for reasons including that:

- although the recitals to the Agreement appeared to foreshadow the possibility of a "superseding agreement" or a "further renewal" of the Management Agreement, this was not reflected in clause 6, or any other provision of the Agreement;
- the Agreement expressly stated that the relationship between the parties was not that of "partnership, employment or agency" (relationships which ordinarily involve fiduciary obligations); and
- the Agreement had few of the critical features or indicia of a partnership or other arrangement by which fiduciary relationships are created (in particular, clause 21 expressly provided that nothing in the Agreement shall be construed to give either party any right to enter into any commitments or incur liabilities on behalf of the other).

Key takeaways

A trial is not a dress rehearsal for a rehearing in an appellate court. Exceptional circumstances will be required for a party to introduce an issue for the first time on appeal.

There is no single test for determining whether a fiduciary relationship exists in any given case. Equity will not lightly impose fiduciary duties on parties to a well-defined contractual relationship, in which the parties have prescribed in detail their rights and obligations.

Keywords:

Facilities management; renewal of agreement; fiduciary duties

By November 2015, the Agreement had run its course, and both AGS and Belgravia were entitled to pursue their own interests without obligation to the interests of the other.

Decision

The Court (Santamaria JA, with whom Kaye and Ashley JJA agreed) dismissed both grounds of appeal as set out below.

Ground 1 — Construction of the term of the Agreement

AGS argued that the trial judge erred in construing the Agreement as not extending to any renewal or holding over of the Management Agreement after 17 November 2015. AGS submitted that the correct interpretation of the Agreement was that it contemplated that the Management Agreement might be further renewed at the end of the term and that the parties intended for the Dingley Agreement to continue under any such renewal.

Belgravia argued that the issue of duration of the Agreement was not raised as a discrete issue during the course of the trial. It also contended that, in any event, clause 6 of the Agreement aligned its duration with that of the Management Agreement, which expired on 17 November 2015.

The Court affirmed the rule that exceptional circumstances will be required for a party to introduce an issue for the first time on appeal.[1] The rationale for this rule is that it would be inimical to the administration of justice if, on appeal, a party could raise a point that was not taken at trial unless it could not possibly have been met by further evidence at trial.[2]

The Court considered the key documents adduced at trial, which included the pleadings, a list of issues for determination and the parties' closing submissions, and found that these documents only referred to the construction of clause 6 in an ancillary way — in the context of AGS's fiduciary duty claim.

As a result, the Court found that AGS did not raise as a discrete issue the question of the proper construction of clause 6 at trial, and should not be permitted to argue it on appeal. In any event, the Court would have found that the proper construction of clause 6 did not extend to any renewal or holding over of the Agreement on orthodox principles of interpretation such as reading the agreement as a whole, identifying the plain meaning of the text and closely analysing the critical words in clause 6.

Ground 2 — Existence of a fiduciary relationship

AGS argued that the trial judge also erred in construing the relationship between AGS and Belgravia as one that did not impose any obligations of a fiduciary nature on them in the conduct of the adventure golf course business under the Agreement. It submitted that elements of the Agreement evidenced the necessary mutual trust and confidence to give rise to fiduciary obligations, including that:

- AGS entrusted Belgravia with its property for Belgravia to use to generate fees for both parties' mutual benefit;
- AGS had ongoing obligations in relation to the infrastructure and in relation to providing its expertise to Belgravia to perform its obligations; and
- Belgravia was conducting the business of the Dingley Facility and had assumed responsibility for collecting and distributing money for the mutual benefit of both parties.

1 At [92], quoting Kyrou JA (with whom Tate and McLeish JJA agreed) in *Vlahos Pty Ltd v Vlahos* [2017] VSCA 166

2 At [93]

AGS argued Belgravia had breached its fiduciary duty by actively seeking to avoid an extension of the term of the Agreement. Belgravia relied on the trial judge's reasoning in concluding that AGS and Belgravia did not owe each other fiduciary obligations.

The Court stated that there is no single test for determining whether a fiduciary relationship exists in any case,[3] but noted that the judgment of Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, in particular the following passage, is a frequent starting point:

> *"The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position."*[4]

Typically, commercial transactions negotiated at arm's length between self-interested and sophisticated parties on an equal footing do not give rise to fiduciary duties.[5] However, this does not mean that a commercial relationship can never be fiduciary in nature.[6] Fiduciary relationships "*are rarely fiduciary for all purposes*", particularly in commercial relationships.[7]

Where the commercial relationship is governed by a contract, the ordinary rules of construction apply in determining the existence of a fiduciary duty.[8]

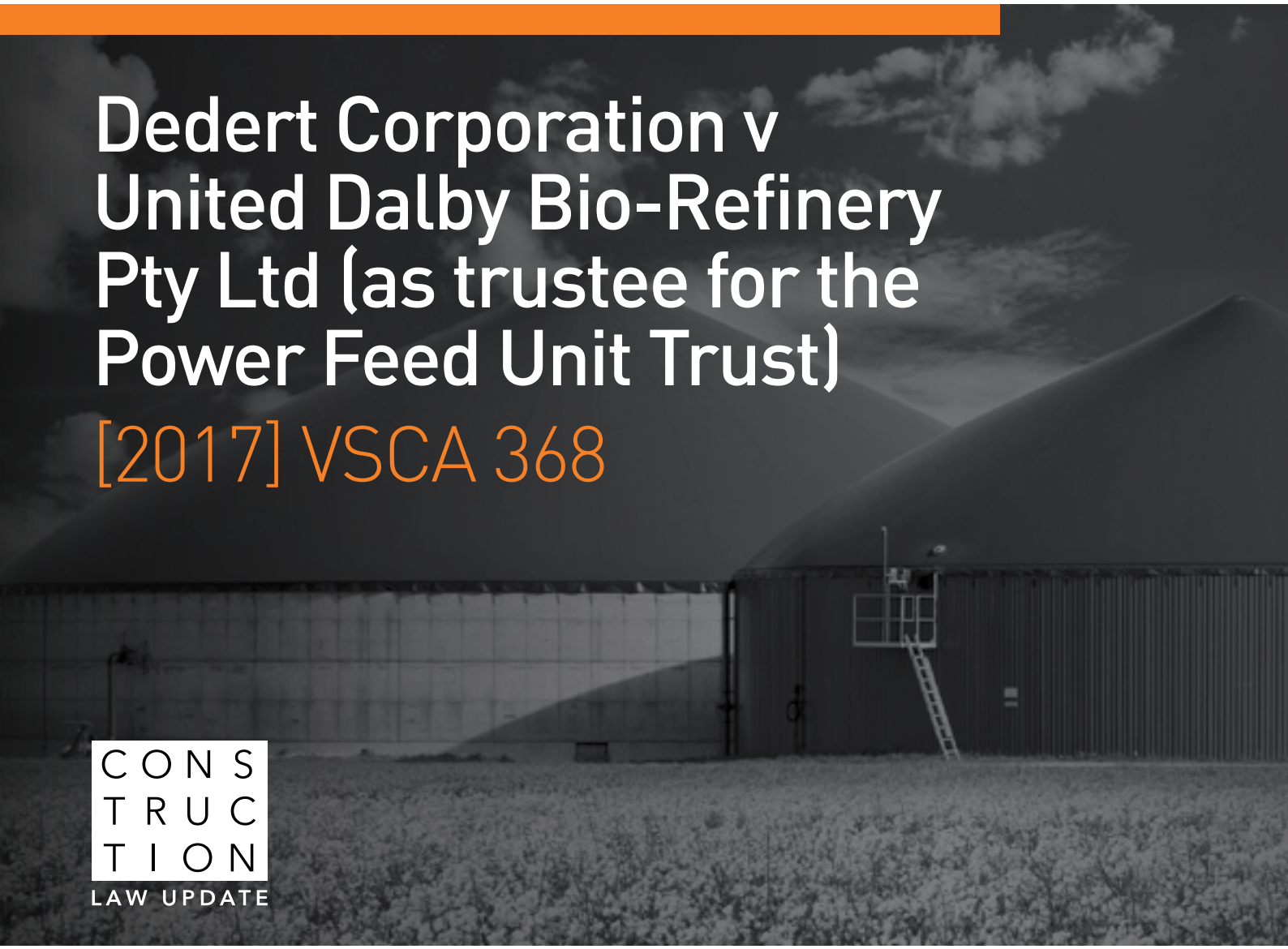
The Court found that Belgravia owed AGS no fiduciary duty because:

- AGS' only vulnerability to Belgravia was the same as any contracting party has to breach by another (although Belgravia, by the exercise of its rights under the Management Agreement, could affect AGS's rights, AGS had entered into the Agreement knowing this, and Belgravia was entitled to pursue its own commercial interests under the Management Agreement);
- the Agreement was elaborate and spelled out the parties' rights and obligations, which was difficult to reconcile with an obligation that one party act for or on behalf of or in the interests of the other;
- there was no evidence of inequality of bargaining power;
- although the parties had had dealings since 1997, the Court said that at best this may result in an expectation by AGS that its relationship with Belgravia in relation to the Dingley Facility would continue — the mere fact that one party puts trust in the other is not sufficient to attract equitable relief;[9] and
- the presence of clause 21 of the Agreement (above) tended to favour a conclusion that no fiduciary relationship existed, and it worked against any argument that the relationship between AGS and Belgravia was one of the established categories of relationships giving rise to fiduciary duties, such as a partnership.

http://classic.austlii.edu.au/au/cases/vic/VSCA/2017/326.html

Where the commercial relationship is governed by a contract, the ordinary rules of construction apply in determining the existence of a fiduciary duty

3 At [120]
4 At [121], quoting Mason J in Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, 96–7
5 At [125]
6 At [126]
7 At [126]
8 At [127]
9 At [135]



Dedert Corporation v United Dalby Bio-Refinery Pty Ltd (as trustee for the Power Feed Unit Trust) [2017] VSCA 368

CONSTRUCTION LAW UPDATE

Background

United Dalby Bio Refinery Pty Ltd (**United Dalby**) engaged Dedert Corporation (**Dedert**) for the design, construction, supply and installation of a Swiss Combi ecoDry system at United Dalby's refinery in Dalby, Queensland, for a lump sum of $US5,423,400. The contract was an amended form of AS 4902–2000.

In accordance with clause 5.1, Dedert provided United Dalby with a bank guarantee totalling $US542,340.

Following the supply and installation of the system, United Dalby alleged that the system was defective in a number of respects, and that the cost of rectification would be $866,354.24.

By letter dated 13 November 2017, United Dalby gave Dedert's solicitors five days' notice of its intention to call on the bank guarantee in respect of alleged losses as a consequence of those defects. The letter stated:

> *"[United Dalby's] position is that [Dedert] has not complied with its obligations under the Contract and that [United Dalby] has suffered direct losses equalling or exceeding the amount of the bank guarantee in respect of the matters set out below....*
>
> *Accordingly, [United Dalby] will call on the Bank Guarantee at the expiry of the relevant notice periods in accordance with the Contract."*

In response, Dedert applied for an injunction to restrain United Dalby from calling on the guarantee.

The judge delivered an ex tempore ruling, holding that Dedert was not entitled to the injunction. Dedert sought leave from the Victorian Court of Appeal to appeal from that decision.

Key takeaways

1. Where a contract provides for a qualification on the right to have recourse to security, that qualification must be met in order to draw on the security.
2. It is, therefore, important to clearly draft provisions relating to recourse to security in order to minimise the risk of recourse not being enforceable.
3. It is generally permissible to look to the prescribed form of security in construing a recourse provision in a contract, but not where the security is not provided until some time after the Contract was executed.

Keywords:

Interlocutory injunctions; recourse to security; AS4902-2000; unliquidated damages

Relevant provisions

In determining the application, the Court considered a number of relevant provisions contained in the general conditions, including:

5.1 Provision

Security shall be provided in accordance with Item 14 or 15. All delivered security, other than cash or retention moneys, shall be transferred in escrow.

5.2 Recourse

Security shall be subject to recourse by a party who remains unpaid after the time for payment where at least 5 days have elapsed since that party notified the other party of intention to have recourse.

5.4 Reduction and release

Within 14 days of the date of practical completion, the Principal will release and return letter of credit 1 (see item 14) to the Contractor.

Upon payment of any amount of the Lump Sum Amount to the Contractor, the Contractor's entitlement to security shall be reduced by the percentage or amount In Item 15(d) and the reduction shall be released and returned within 14 days to the Principal. A party's entitlement otherwise to security shall cease 14 days after final certificate. Upon a party's entitlement to security ceasing, that party shall release and return forthwith the security to the other party.

39.7 Set off

The Principal may set-off any amount due and payable by the Contractor to the Principal against any amount that the Principal owes the Contractor under the Contract. If the moneys payable to the Contractor are insufficient to discharge the liability of the Contractor to pay such sum to the Principal, the Principal may have recourse to the security provided by the Contractor.

39.9 Recourse for unpaid moneys

Where, within the time provided by the Contract, the Contractor fails to pay the Principal an amount due and payable under the Contract, the Principal may have recourse to security under the Contract and any deficiency remaining may be recovered by the Principal as a debt due and payable from the Contractor to the Principal.

46.3 Security held under the QBCC Act after Practical Completion

The parties agree that to the extent that the Contract provides for the total of:

(a) all retention monies (if any) withheld by the Principal; and

(b) all security held by the Principal,

to exceed 2.5% of the contact price for the Contract (which under the QBCC Act includes adjustments for variations) after practical completion of the Works has been reached, the amount of the excess does not relate to the need to correct defects in the Works under the Contract identified in the defects liability period, but relates to the recovery by the Principal of any monies that may become payable to the Principal by the Contractor under or in connection with the Contract, the Contractor's performance of the Contract or any breach of the Contract by the Contractor."

Submissions

Dedert submitted that United Dalby was not entitled to have recourse to the guarantee under clause 5.2, because the claims made by United Dalby were not in respect of an amount which "remain[ed] unpaid after the time for payment [had] elapsed".

United Dalby submitted that clause 5.2 did not exhaustively govern all the recourse by United Dalby to the security. United Dalby relied on clauses 39.7, 39.9 and 46.3 to assert that the Contract contemplated recourse to the security by United Dalby in respect of amounts which may become payable for breach of contract, but which were not at the time of the claim due and payable.

Initial decision

The judge dismissed the application on the basis that the balance of convenience favoured the refusal of an injunction. In reaching this decision, his Honour:

1. rejected the contention that clause 5.2 prescribed the circumstances in which the security could be called upon;[1]
2. took into account (and found to be relevant) clauses 39.7 and 46.3 and the terms of the bank guarantee; and
3. concluded that the security was a "risk allocation device" pending resolution of all disputes.

Further, his Honour was not satisfied that Dedert had established that there was a serious issue to be tried as to whether United Dalby was entitled to have recourse to the bank guarantee.

Grounds for appeal

Dedert relied on three proposed grounds of appeal:

Ground 1 The judge erred in law in construing the contract to mean that the negative stipulation in clause 5.2 (that recourse was permitted "where (a party) remains unpaid after the time of payment") did not preclude United Dalby from having recourse to the bank guarantee where it had a claim for unliquidated damages for breach of contract.

Ground 2 The judge erred by:

1. construing clause 46.3 of the contract as constituting a stand-alone right of recourse to the bank guarantee; and
2. ruling that clause 46.3 supported a conclusion that the contract permitted recourse for claims which may become due for unliquidated damages for breach of contract.

Ground 3 The judge erred in using the terms of the bank guarantee to construe the terms of the Contract.

Decision

The Court (Priest and Kaye JJA, Wheelan JA in dissent) held that the correct construction of the Contract was that United Dalby was not entitled to have recourse to the bank guarantee in respect of the foreshadowed claim for unliquidated damages.

Further, the question of which side was favoured by the balance of convenience had become irrelevant by virtue of the Court reaching a concluded view as to the correct construction of the contract between the parties.

Grounds 1 and 2

The Court upheld grounds 1 and 2 on the basis that on the correct construction of the terms of the Contract, clause 5.2 precluded United Dalby from recourse to the security in respect of an asserted claim by it for unliquidated damages for breach of contract.

The critical question the Court considered was whether under clause 5.2, the losses asserted by United Dalby in its letter constituted monies which "remain unpaid after the time for payment". The Court commented (at [121]):

> *"on its correct construction, the contract contained qualification to the right of United Dalby to have recourse to the security, which qualification has not been satisfied on the facts of this case."*

The Court also found that the phrase "due and payable" in the context of the contract had a particular meaning (being an amount certified by the Superintendent, or otherwise specifically provided by the Contract, to be due and payable).

Ground 3

It is generally permissible, for the purposes of construing a recourse provision in a contract, to have regard to the prescribed form of a performance guarantee (or other security) contained in the contract.

However, in this case, the Court found this approach was not permissible because the guarantee was issued by the bank almost two years after the contract was executed and was not in the form prescribed by the Contract.

Notwithstanding this, this ground was not upheld because the Court was satisfied that the judge did not have specific regard to the terms of the guarantee for the purpose of construing the terms of the Contract.

http://classic.austlii.edu.au/au/cases/vic/VSCA/2017/368.html

1 His Honour distinguished *RCR O'Donnell Griffin Pty Ltd v Forge Group Power Pty Ltd* [rec and mgr appointed) (in liq) [2016] QCA

L U Simon Builders Pty Ltd v Victorian Building Authority [2017] VSC 805

CONSTRUCTION LAW UPDATE

Facts

The decision comes in the wake of numerous buildings around the world shooting into flames, partially as a result of the use of flammable wall cladding.

Following incidents such as the fires at the Lacrosse apartment building in Melbourne and the Grenfell Tower in London, the use of building products which do not comply with building standards has become a fiery hot topic.

Amongst other things, these fires have put a spotlight on the question of rectification costs — who is responsible? While the Supreme Court's decision did not directly deal with this question, it did clarify that there are limits on the regulator's powers to make the *builder* responsible for rectification of non-compliant buildings. From this decision, the conclusion can be drawn that *owners* are likely to be the primary party left to explore the complicated legal position of liability for (and quantification of) rectification solutions.

Below, we offer an overview of the power to issue "directions to fix", and consider the implications of the Supreme Court's decision in *LU Simon v VBA* for owners' corporations, building owners and government departments.

The power to issue 'directions to fix': an overview

Owners have always been the party with a primary obligation to ensure the safety of a building. This position is reinforced by:

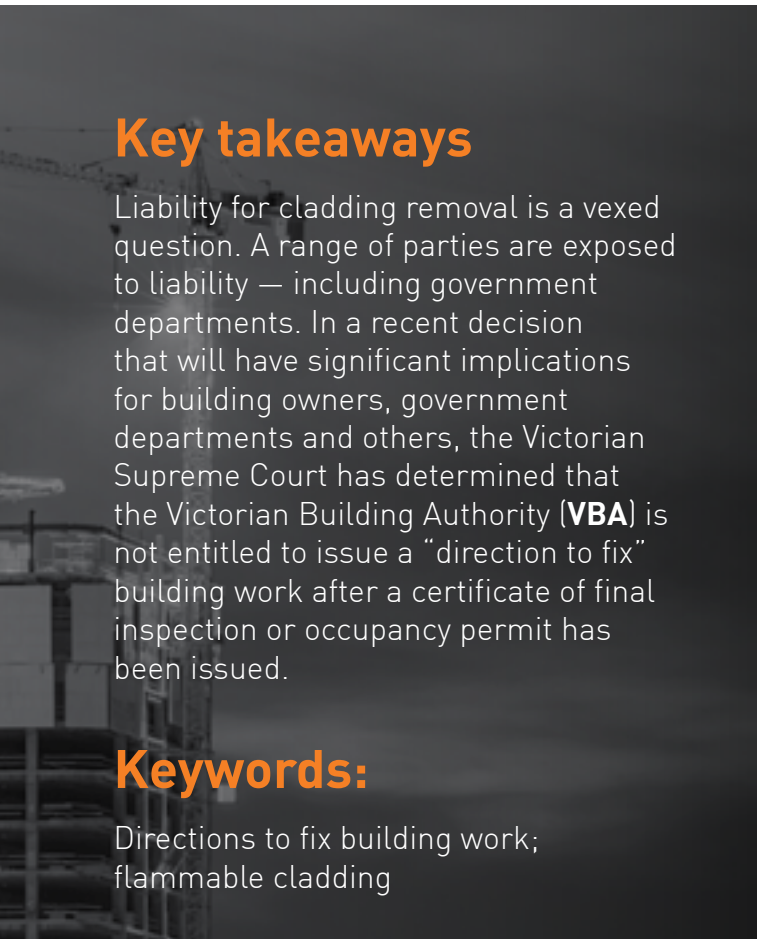
- the Metropolitan Fire Brigade's powers to issue fire prevention notices; and
- municipal building surveyors' powers to issue emergency orders.

Both of the above powers place responsibility for rectification on the building owner.

However, the VBA has the power to issue a builder a "direction to fix" building work under section 37B of the Building Act 1993 (Vic) (**Building Act**) if, after inspection of the building work, it believes on reasonable grounds that the building work does not comply with the Building Act, the Building Regulations or the building permit.

Issuance of a "direction to fix" is a powerful way for the rectification of non-compliant buildings to be enforced against a party that is not the building owner.

However, the power of this enforcement mechanism has been notably limited following the Supreme Court's decision in *LU Simon v VBA*.



Key takeaways

Liability for cladding removal is a vexed question. A range of parties are exposed to liability — including government departments. In a recent decision that will have significant implications for building owners, government departments and others, the Victorian Supreme Court has determined that the Victorian Building Authority (**VBA**) is not entitled to issue a "direction to fix" building work after a certificate of final inspection or occupancy permit has been issued.

Keywords:

Directions to fix building work; flammable cladding

Facts and findings of the case

The VBA issued LU Simon Builders (**LU Simon**) directions to fix building work with respect to six apartment buildings for which LU Simon was specified as the "builder" in the relevant building permits.

One of these buildings was the Lacrosse apartment building in the Docklands in Melbourne, which was clad in flammable (and non-compliant) aluminium composite panels.

For each of the buildings, occupancy permits and certificates of final inspection had been issued prior to the VBA issuing the relevant direction to fix — in some cases, occupancy permits had been issued as many as nine years earlier.

LU Simon sought a declaration in the Supreme Court that the VBA was not entitled to issue directions to fix with respect to the six apartment buildings. It claimed that according to the text and context of section 37B of the Building Act, it was clear that the power to issue a direction to fix was unavailable after a certificate of final inspection or an occupancy permit had been issued.

The VBA unsuccessfully attempted to claim that the ambit of its power under section 37B was so wide that it could give a builder a direction to fix "*at any time at all, even 50 or 100 years after the building work in question was completed*" and an occupancy permit or certificate of final inspection had been issued.

The Supreme Court accepted LU Simon's arguments and found that the VBA only has a finite time — being the time prior to a certificate of final inspection or occupancy permit is issued — to issue a direction to fix building works.

It followed that the VBA could not enforce the six directions to fix in question.

Implications of the decision

The Supreme Court's decision in *LU Simon v VBA* will have significant implications for owners' corporations and building owners generally.

Now that the opportunities for the VBA to issue a direction to fix on builders is limited by a clear time-bar, it is foreseeable that there will be more instances in which builders "push back" on liability (particularly around cladding issues) for rectification costs. This will leave building owners to wear that hefty burden or otherwise fight to recover the rectification costs from responsible parties via litigation.

In this sense, the Supreme Court's decision has left building owners to fend for themselves.

There is a view that settlements reached to date with builders over cladding rectification have occurred under the understanding that the VBA could direct rectification. With that risk removed, it is not yet clear how the building industry will respond.

However, with the Victorian Cladding Task Force acknowledging that government should act as an exemplar in auditing and then removing suspect cladding from its buildings, there will likely be significant risk of expensive disputes arising.

This then raises the question of whether legislative amendment of section 37B of the Building Act could be appropriate.

http://classic.austlii.edu.au/au/cases/vic/VSC/2017/805.html

Note: This article by Ben Davidson and Emily Steiner first appeared online at http://www.corrs.com.au/thinking/insights/victorian-supreme-court-decision-on-directions-to-fix-allows-builders-to-avoid-the-heat/.

Other recent developments

Fluor v Shanghai Zhenhua Heavy Industry Co Ltd [2018] EWHC 1

Keywords:

Assessment of loss; waiver; delay analysis

Key takeaways

When contractors are seeking to recoup money from a subcontractor whose breach causes the principal loss:

1. The identification of that loss is ascertained on a retrospective basis. That analysis will not necessarily produce the same outcome as it would if it were made on a prospective basis.
2. It is critical to consider carefully any agreement with the subcontractor during the project, as a waiver will limit how much of the loss caused by the subcontractor's breaches can be recovered.
3. In the context of a settlement agreement with the principal for the costs caused by the subcontractor's breach, recovery of the settlement sum from the subcontractor will depend on whether the settlement is objectively reasonable, which the court will determine.

Facts

Great Gabbard Offshore Winds Ltd (**GGOWL**) engaged Fluor to engineer, procure and construct the foundation and supports of wind turbines for a wind farm in the North Sea. Fluor subcontracted with Sanghai Zhenhua Heavy Industries (**ZPMC**) for the fabrication of large steel cylindrical structures called monopiles as well as connectors called transition pieces.

On delivery, testing revealed cracks in the monopiles and transition pieces. GGOWL issued Non-Conformance Reports (**NCR**s) requiring the rectification of the defects before installation in the sea bed, and additional testing. In an earlier liability decision, the Court found that the cracks were breaches of contract but that the rectification and additional testing required by the NCRs may not in fact have been necessary. Further issues on the project arose relating to electrical defects in the transition pieces and roundness of the monopiles.

In a letter of waiver (**Waiver**) to ZPMC, Fluor agreed that ZPMC would assign its claims for the costs incurred in the additional testing and rectification work it was required to perform, and to waive any claims against ZPMC in respect of additional costs and delays it suffered as a result of three specified NCRs.

Fluor claimed damages from ZPMC, including the settlement amounts Fluor had paid GGOWL under a settlement agreement between Fluor and GGOWL (the **Agreement**) for the delay costs caused by ZPMC's breaches.

Decision

Identifying waived loss

A complicating factor in this case in determining damages and the correct apportionment to ZPMC of the settlement sum was the extent of the extinguishing effect the Waiver had had on Fluor's claims against ZPMC.

While ZPMC claimed the Waiver applied to all claims arising from the defect, Fluor asserted — directly contrary to the position it took at an earlier arbitration — that the costs and delays did not flow from NCRs, as the rectification work would have had to have been carried out in any case.

While acknowledging that the underlying causes of the losses were ZPMC's breaches of contract, Edwards-Stuart J characterised the Waiver in relation to the NCRs as having intervened in the flow of loss, whether or not the rectification and testing would have been carried out in any event:

> *"However, the effect of the waiver and warranty letter is that to a large extent, the NCRs "trump" those breaches of contract by relieving ZPMC of the consequences that would ordinarily flow from those breaches."* [1]

Fluor was therefore only entitled to costs which arose prior to the issue of the NCRs.

Prospective versus retrospective delay analysis

The parties disagreed about whether the delay should be assessed from a prospective or retrospective point of view. After opining that each analysis will not necessarily produce the same answers as the other, Edwards-Stuart J determined that a retrospective approach was required in this case. His Honour commented that a prospective analysis *"is the correct approach when considering matters such as the award of an extension of time"*.[2] In this case though, in assessing the critical path and the costs waived, his Honour took account of all of the events that occurred, including changes to the availability of vessels and how further defects were managed.

As such, the costs which were waived were determined to include all the loss that did in fact flow from the requirements of those NCRs which were the subjects of the Waiver, rather than the costs only of the work actually stipulated in the NCRs.[3]

Edwards-Stuart J gave the example of the loss arising from the inability to use a ship necessary for the installation of the pieces, in the winter months. This was held to be a direct consequence of the issues of the NCRs, which had delayed installation into the sea bed beyond the scheduled time.

Reasonable settlement

His Honour outlined the legal principle which applied when claiming from a subcontractor the amount settled by the contractor with the principal as a result of a claim that arose because of the subcontractor's breach:

> *"It is settled law that, in principle, C can recover from a contract breaker, B, sums that it has paid to A in settlement of a claim made by A against C in respect of loss caused by B's breach of its contract with C.*
>
> *However, C's settlement with A must be an objectively reasonable settlement and, if it is, that sum represents the measure of C's damages in respect of B's contract (assuming there were no other heads of loss). Even if C can show that its settlement with A was at an undervalue, the settlement sum still represents a ceiling on the amount that it can recover from B."*[4]

The complicating factor in this case was that the settlement was "global" in respect of multiple claims and counter-claims, but only a portion of the settled claims were in respect of ZPMC's breaches. In those circumstances, the Court's task was to identify what proportion of the settlement sum was attributable to ZPMC's breaches (and not waived), and then consider whether that proportion was a reasonable settlement.[5]

Edwards-Stuart J identified that two items settled under the Agreement, which Fluor claimed from ZPMC, had not been waived by Fluor. He found these amounted to £13.825 million out of the larger settlement sum. His Honour concluded that the settlement was objectively reasonable, taking in account the length of negotiations, the benefit of legal advice obtained by each side and that the reasonable settlement value of the claims was in fact "very close to the sum paid or foregone by Fluor", and that this result alone made the settlement "self-evidently reasonable".[6]

http://www.bailii.org/ew/cases/EWHC/TCC/2018/1.html

The complicating factor in this case was that the settlement was "global" in respect of multiple claims and counter-claims

1 At [277]
2 At [275]
3 At [278]
4 At [466]–[467]
5 At [480]
6 At [542]

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