# Corrs Projects Update

Q4 2020

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# Welcome to the latest edition of Corrs Projects Update Q4 2020

This publication provides a concise review of, and commercially focussed 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.


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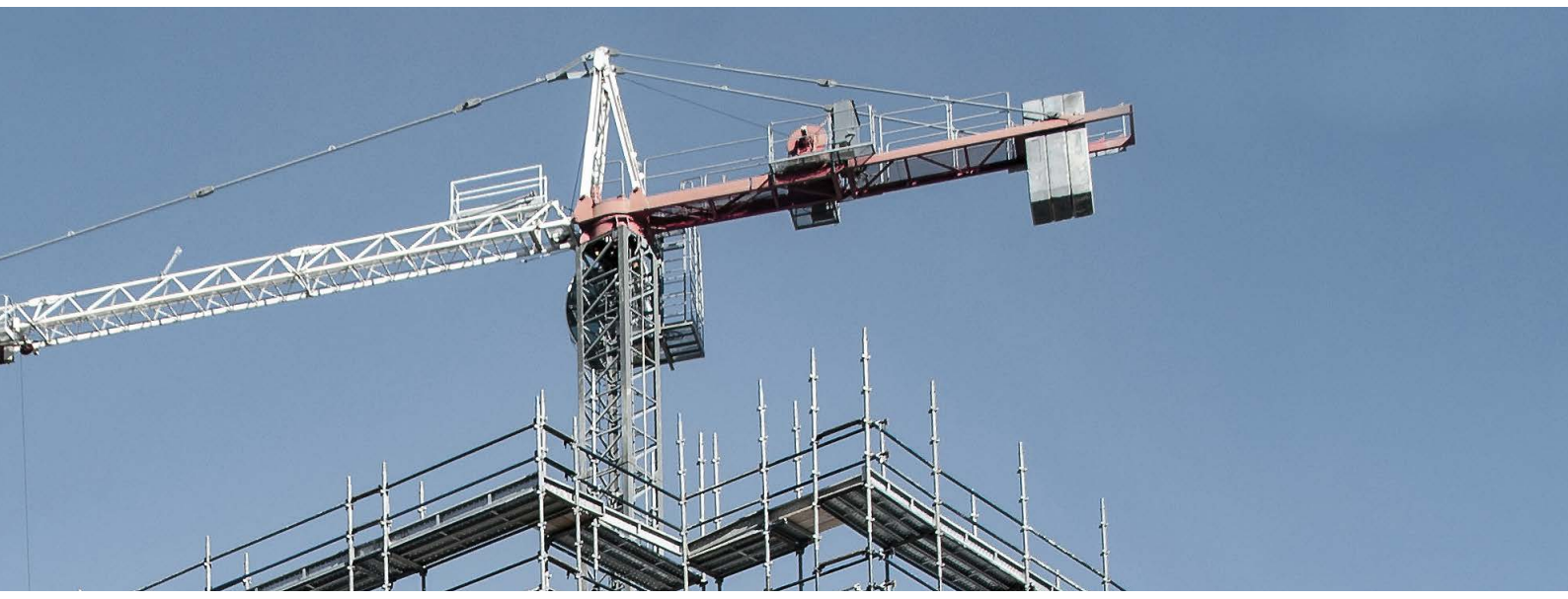
## Insights

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

The information contained in this publication is current as at November 2020.

# Contents





# Commonwealth

# Icon Co (NSW) Pty Ltd v Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets

[2020] FCA 1493

### Key takeaways

The equitable remedy of rectification may operate to correct a document that does not accurately reflect the bargain between contracting parties. Rectification requires clear and convincing proof.

### Keywords

rectification; insurance

## The facts

In late 2015, Icon Co (NSW) Pty Ltd (**Icon**) was contracted to design and construct the 37-storey high rise Opal Tower for a sum of over $150 million. Construction commenced in November 2015 and practical completion was achieved in August 2018. By 24 December 2018, and therefore within the 12-month defects liability period, major cracks were identified within wall panels, floor slabs and hobs on three levels of the Opal Tower.

Icon incurred more than $31 million in costs to rectify the defects. Icon was insured with Liberty Specialty Markets (**Liberty**) and QBE Underwriting Limited (**QBE**), but both insurers refused to indemnify Icon.

The Liberty insurance policy (**Liberty Policy**) commenced in September 2015 and was renewed annually. Icon would inform Liberty of new construction projects who would subsequently provide an "endorsement" confirming insurance cover for the new project. As Icon's new projects required third party liability insurance, QBE was engaged to provide this insurance for a three-month renewal period from around 20 September 2018 to around 31 December 2018 (**QBE Policy**).

## Claims

Icon commenced proceedings against Liberty and QBE. It claimed as follows.

### Claims against Liberty

1. **Run off claim**: The Liberty Policy provided for 'run off' cover that extended into the defects liability period.
2. **Statutory extension of coverage claim**: A project-specific insurance policy was in place for the project. As Liberty failed to provide notice regarding the expiration of the Liberty Policy, Liberty could not refuse to indemnify Icon for the costs associated with the defects.
3. **Rectification claim**: The Liberty Policy should be rectified to entitle Icon to be insured until the expiration of the defects liability period, as this was the parties' common intention when they entered into the Liberty Policy.

### Claim against QBE

Icon sought a declaration that the defects were 'in connection with' a 'product' as defined in the QBE Policy.

## Decisions

### Run off claim

Lee J was required to determine whether a 'run off' period was enlivened by Icon by virtue of Condition 15 of the Liberty Policy. Icon argued that, while it failed to request run off cover at practical completion, its notification to Liberty on being awarded the project, which made clear the defects liability period, was sufficient for Condition 15.

His Honour held that Condition 15 was ambiguous and necessarily required examination of extrinsic evidence.

In light of the parties' commercial positions, his Honour held that Icon could not reasonably have expected the Liberty Policy to continue throughout the defects liability period. This position was clear as Icon failed to expressly request run off cover, nor did it provide a list of contracts requiring such cover. Furthermore, an endorsement signed by an agent on behalf of Liberty stipulated that the 'Estimated Project Period' ended on or about 10 August 2018 which was prior to the defects liability period. Accordingly, Lee J held that Icon had failed to comply with Condition 15 and so could not claim for run off cover.

### Statutory extension of coverage claim

Icon argued that 'declarations' and 'endorsements' made in relation to the Liberty Policy gave rise to a new project-specific policy. As Liberty failed to provide notice of the expiry of the Liberty Policy, Icon argued that Liberty was required to indemnify it under section 58 of the *Insurance Contracts Act 1984* (Cth) (**ICA**). Section 58 of the ICA requires the insurance policy to be 'provided for a particular time' and to be 'of a kind that it is usual to renew or for the renewal of which it is usual to negotiate'.

His Honour rejected this argument on the basis that endorsements are to be treated as variations to the existing agreement. Further, Lee J held that Icon had adduced no evidence to prove that such project-specific policies were 'usual to review' or negotiate. Rather the evidence demonstrated that on occasion, Icon would notify Liberty of delays and extensions to the insurance policy. Thus, Icon could not rely on section 58 of the ICA.

### Rectification claim

Lee J held that there was a common intention between the parties (as a result of an endorsement of a document titled 'Annexure A') that the Liberty policy would provide insurance for the Project until the completion of the defects liability period, even if the annual period of insurance had expired. Therefore, his Honour concluded that the Liberty Policy was to be rectified by the inclusion of Annexure A.

His Honour noted that project-specific certificates of insurance and emails between the parties were compelling evidence of the parties' common intention, as references to the defects liability period were frequent. This was reinforced by the fact that Liberty was unable to point to any communication expressly excluding the defects liability period.

Furthermore, his Honour rejected Liberty's argument that a misunderstanding of the mechanics of the policy precluded one of the parties from holding the common intention, as the "common misinterpretation, contrary to the true agreement … grounds the equity".

### QBE claim

Lee J held that the project and its constituent parts satisfied both the plain English definition of 'product', and the defined term in the QBE Policy, given that the project was able to be 'supplied', 'installed', 'manufactured' or 'erected'. As the defects were 'in connection with' the 'Product', Icon succeeded in its claim against QBE.

## Conclusion

Icon succeeded in its rectification claim against Liberty and its claim against QBE.

https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca1493

# New South Wales

# The NSW reform agenda: restoring consumer confidence in the residential construction industry

### Key takeaways

In NSW, two new Acts have substantially tightened regulation of the construction industry, including by creating a new, retrospective duty of care and by imposing new registration requirements.


### Keywords

legislative reform in NSW; new statutory duty of care


## Background

A series of reforms were recently enacted by the NSW Government to promote accountability and restore consumer confidence in the residential construction industry. The NSW Parliament passed the *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**) and the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) (**RAB Act**), on 10 June 2020.

These pieces of legislation are the NSW Government's response to the national Building Confidence Report.[1] The legislation is also of increasing importance in the wake of the highly publicised alleged design and construction defects at the Opal and Mascot Towers in Sydney.

## Design and Building Practitioners Act 2020 (NSW)

The DBP Act was introduced to enshrine occupier protections in law as part of a wider agenda to restore public faith in the quality of buildings constructed in NSW. This is to be achieved through the introduction of the following features of the DBP Act:

- a statutory duty of care which will impose on persons who carry out construction work an automatic duty to exercise reasonable care to avoid economic loss caused by defects in a building;
- a system of registration for designers and building practitioners; and
- requirements for designers and builders to issue compliance declarations to confirm that work and any subsequent change to the work complies with the Building Code of Australia (**BCA**).

The most important feature of the DBP Act is the creation of the statutory duty of care. This development responds to the uncertainty in the common law over when a duty of care will be owed in respect of defective building work. The DBP Act is intended to overcome decisions such as that in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* which denied an owners corporation, as a successor in title to a developer, the benefit of a common law duty of care for negligent building work carried out by the original builder.

It is important to note that this statutory duty is retrospective in application, extending to economic losses of which the owner becomes aware or ought reasonably to have become aware of on or after 11 June 2010.

1 Peter Shergold and Bronwyn Weir, *Building Confidence Report: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia* (February 2018, Department of Industry, Science, Energy and Resources, https://www.industry.gov.au/data-and-publications/building-confidence-building-ministers-forum-expert-assessment).

## Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW)

The purpose of the RAB Act is to:

- ensure developers are not carrying out building work that may result in serious defects; and
- give the Department of Community Service (the **Department**) greater enforcement and investigation powers, including to order the rectification of work or prohibit building work from being completed. This will primarily be achieved by allowing the regulator to operate while buildings are still under construction in order to prevent defects from occurring and being inherited by future owners.

To achieve these objectives, the RAB Act obliges developers of residential apartment buildings to notify the Secretary of the Department before applying for an occupation certificate. Proposed applications for occupation certificates must be raised 6–12 months before the application is actually made, to enable the Government to undertake quality assurance checks if necessary. Failing to comply with this requirement can result in the Department prohibiting the issue of an occupation certificate.

The RAB Act also grants the Secretary of the Department investigative powers to ensure compliance with the Act, including:

- information gathering powers, including the power to require answers to questions; and
- powers to apply for search warrants to enter premises and conduct investigations.

Failure to comply with provisions of the RAB Act could result in fines ranging from $550 to $330,000. Additionally, the Secretary can recover the costs associated with enforcing building work rectification orders.

## Implications

For the first time in NSW, design practitioners will be legally obliged to ensure that any designs that are ultimately relied upon for building work comply with the BCA. Further, greater transparency and accountability will be achieved through requiring registered building practitioners to declare whether building work complies with the requirements of the BCA.

Although the main function of these reforms is to protect consumers, the legislation also goes a long way in offering protections for building practitioners. Specifically, the requirement that designers take responsibility for the compliance of their designs will aid building practitioners where they reasonably rely on and build in accordance with a regulated design, and its compliance declaration. The defence aims to ensure that builders are not penalised for properly complying with their obligations under the legislation.

# TFM Epping Land Pty Ltd v Decon Australia Pty Ltd

## [2020] NSWCA 93

### Key takeaways

A payment claim made under the NSW security of payment legislation will not be invalid merely because it includes claims for variations or interest accruing after the last available reference date, or because it is not accompanied by a compliant supporting statement.

### Keywords

quantum meruit in security of payment claims; supporting statements

## Facts

TFM Epping Land Pty Ltd (**TFM Epping**) engaged Decon Australia Pty Ltd (**Decon**) to construct a residential development in Sydney. On 3 June 2019, Decon lodged a progress claim worth $6.4 million under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**). TFM Epping did not serve a payment schedule under the SOP Act, making them liable to pay the claimed amount. TFM Epping did not pay the claimed amount.

In the NSW Supreme Court, Decon sought summary judgment for the claimed amount. TFM Epping filed a response arguing that the payment claim was invalid and was not properly served.

Henry J gave summary judgment for Decon on the basis that TFM Epping's response did not raise triable issues. TFM Epping appealed to the NSW Court of Appeal.

## Issues

The three issues before the NSW Court of Appeal were:

1. whether the payment claim was invalid because it was a quantum meruit claim for payment for variations, not a claim under the contract;
2. whether the payment claim was invalid because there was no available reference date for the claim; and
3. whether the payment claim was not validly served because it was not accompanied by a supporting statement.

## Decision

The Court of Appeal found in favour of Decon on all three issues, and dismissed the appeal.

### Issue 1 — was the payment claim invalid because it was a quantum meruit claim?

TFM Epping argued that the payment claim was invalid because it was a claim for reasonable remuneration not provided for by the contract (a quantum meruit claim), not a claim under the contract. The SOP Act does not create entitlement to progress payments for quantum meruit claims.

The Court of Appeal rejected this argument for two reasons.

First, the claim was phrased as a claim under the contract, not a quantum meruit claim. Furthermore, the contract made provision for variations.

Second, if TFM Epping believed that the amounts claimed for variations did not properly arise under the contract, its only recourse was to challenge the claim in a payment schedule under the SOP Act and resolve the matter through statutory adjudication. The SOP Act expressly prevented TFM Epping from raising a defence based on the merits of the claim, including this defence.

### Issue 2 — was the payment claim invalid because it lacked an available reference date?

TFM Epping also argued that the payment claim was invalid because it lacked an available reference date (as the claim included interest that accrued after the last available reference date). The High Court has made clear that the

existence of an available reference date is a jurisdictional requirement for a valid payment claim.[1]

The Court of Appeal rejected this argument on the basis that the inclusion of interest accruing after a reference date did not prevent a payment claim from being made with respect to that reference date. In light of that conclusion, there was no indication that no reference date was available.

As with the first issue, if TFM Epping had wished to challenge the inclusion of interest after the reference date in the payment claim, it was required to do so through a payment schedule and subsequent statutory adjudication.

It is important to note that the SOP Act was amended into 2019 to remove the concept of reference dates. These amendments only apply to contracts entered into on or after 21 October 2019. For such contracts, claimants will automatically accrue a right to monthly progress payments with no need to specify a reference date. However, for contracts entered into before 21 October 2019, the conclusions of the NSW Court of Appeal will continue to apply.

### Issue 3 — was the payment claim invalidly served because it was not accompanied by a supporting statement?

Finally, TFM Epping argued that the payment claim was invalidly served because it was not accompanied by a supporting statement. This argument was made on the basis that the SOP Act imposes criminal penalties for a payment claim not accompanied by a compliant supporting statement.

TFM Epping argued that the supporting statement that actually accompanied the payment claim was not compliant because it referenced works completed over a shorter period of time than the payment claim itself. The Court of Appeal also rejected this argument.

TFM Epping's argument was held to be incorrect because, while the SOP Act provides a criminal penalty for failure to provide an appropriate supporting statement, it does not expressly invalidate a payment claim served without a supporting statement, or the service of such a claim.

Additionally, there is no basis to infer a legislative intention that non-compliance with the supporting statement requirement invalidates the payment claim or the act of service. This is particularly the case as the SOP Act already prescribes a criminal penalty for failure to provide an appropriate supporting statement.

## Conclusion

The appeal was dismissed and TFM Epping was ordered to pay Decon's costs of the appeal.

This decision reinforces the courts' hesitation to deviate from the requirements prescribed by the SOP Act. It is crucial that parties comply with the procedural and contractual conditions precedent to making claims under the SOP Act as there is limited scope for parties to rectify non-compliance.

https://www.caselaw.nsw.gov.au/decision/5ebb4c1ee4b0f66047ed912b

1 *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340.

# C & V Engineering Pty Ltd v Hamilton & Marino Builders Pty Ltd

## [2020] NSWCA 103

### Key takeaways

A commercial contract, whether informal or formal, is to be interpreted by reference to its commercial purposes. The terms of the contract must be objectively determined by reference to what they would demonstrate to a reasonable businessperson. This also applies to informal contracts formed via email correspondence.

### Keywords

interpretation of informal contracts

## Facts

Hamilton & Marino Builders Pty Ltd (**Builder**) was engaged by a third party to build 55 units in Mascot, Sydney. The construction works included the provision and installation of metal joiners used to secure pre-cast concrete panels.

The Builder subsequently requested, via email, that C & V Engineering Pty Ltd (**Supplier**) provide a quotation for the supply and installation of the metal joiners at a rate per metal joiner. At this time, the precise number of metal joiners needed was unknown. By email, the Supplier quoted for the supply of 1,000 metal joiners. No formal contract was executed.

A month after the initial email exchange, the Builder notified the Supplier that the project required substantially fewer metal joiners than originally estimated. The Supplier refused to perform any further work, arguing that the Builder had an obligation to purchase a fixed number of metal joiners regardless of how many metal joiners were eventually used on the project. The Builder then instructed the Supplier to cease all works.

Each party asserted that the other had repudiated the contract. The Builder initiated proceedings in the Supreme Court of New South Wales.

At first instance, the judge found in favour of the Builder, holding that a contract was formed between the parties and this contract was not for a fixed number of metal joiners. While the Builder accepted the initial quotation, this was only an estimate and was subject to change.

Accordingly, there was an implied term that both parties were required to negotiate in good faith should the number of metal joiners required change from the estimate in the quotation. As such, the Supplier had repudiated the contract by refusing to perform further work, meaning the Builder was entitled to terminate the contract.

## Issue

On appeal, the issue was whether the primary judge had erred in finding that the agreement was not for a fixed volume of metal joiners.

## Decision

In the Court of Appeal, Meagher, White and McCallum JJA unanimously dismissed the appeal, with White JA delivering the lead judgment for the Court. White JA's judgment substantially agreed with the primary judge's reasoning.

On the question of what the terms of the informal contract were, White JA held that a proper construction of the email communications between the parties turned on what a reasonable businessperson would objectively view the terms to be.

On this, the Supplier argued that the emails showed that the Builder agreed to 1,000 metal joiners at a quoted price, as well as further costs for 'preliminaries' and 'site establishment'. The Builder argued that the emails proved that it had only agreed to pay the price per item.

White JA largely relied on the evidence accepted by the primary judge in adopting the 'reasonable businessperson' approach. The parties were communicating via email and orally discussing the estimated quantity of metal joiners. The email correspondence was thus to be viewed in this context of uncertainty as to the actual quantity of metal joiners required for the project.

Accordingly, White JA agreed with the primary judge's conclusion and emphasised that the parties were 'mutually aware' that they were communicating on the basis of an estimate, with the true quantity of metal joiners to be ascertained at a later date. That is, White JA accepted the Builder's contention.

Furthermore, it could not be said that the Builder accepted the Supplier's terms. At first instance, the judge found that the email from the Supplier that provided a quote constituted an offer, with the response from the Builder being the acceptance. The Builder's acceptance stated that they agreed to the price per metal joiner and supply 'as required'.

White JA considered, contrary to the primary judge, that this was not an acceptance, but rather a counter-offer as it attempted to add a new term. The reply to this email constituted an acceptance of the counteroffer of supply 'as required'.

## Conclusion

Plainly, courts may find that a contract has been formed by the exchange of emails. When negotiating commercial contracts written communications require care, in particular where the scope of work is estimated.

Here, as so often is the case, a formal written contract that included an entire agreement clause may have avoided the dispute.

https://www.caselaw.nsw.gov.au/decision/1725e42ef099da5fbbbb812c

# Cohen v Zanzoul trading as Uniq Building Group

## [2020] NSWSC 592

### Key takeaways

If a contract is terminated by the acceptance of a repudiation, any accrued rights and obligations, such as a cause of action for debt or damages, remain on foot.

A quantum meruit claim is not available to the extent there are enforceable rights which have accrued under a contract, notwithstanding the contract has been terminated following repudiation.


### Keywords

repudiation; quantum meruit


## Background

In mid-2013, Mr Paul and Mrs Phylicia Cohen (the **Cohens**) entered into a contract with Mr Danny Zanzoul (trading as Uniq Building Group (**Uniq**)) under which Uniq was to demolish one house and build a new one on land in Cammeray, New South Wales.

The contract set the Date for Practical Completion as 4 September 2014. For the purposes of the proceedings, the parties agreed the Date of Practical Completion was 17 November 2015 and the Defects Liability Period ran from 17 November 2015 to 17 May 2016.

Over the course of construction, Uniq submitted Progress Claims 1 to 23. The Cohens paid Progress Claims 1 to 18 in full, but only paid partial amounts towards Progress Claims 19 to 23. Ultimately, the Cohens' refusal to pay was based on outstanding 'significant defects' and Uniq's failure to issue some statutory declarations or statements. The Cohens did not issue a Progress Certificate in relation to the final progress claim, nor did they attempt to invoke any provisions under the contract regarding rectification of defective work.

After the expiry of the Defects Liability Period, the Cohens engaged a third party to complete and rectify allegedly incomplete and defective works.

In September 2017, the Cohens commenced proceedings in the NSW Civil and Administrative Tribunal, which were subsequently transferred to the Supreme Court. They claimed damages, interest and costs arising from incomplete and defective works, constituting breaches of implied warranties under s 18B of the *Home Building Act 1989* (NSW). Uniq cross-claimed, seeking amounts due under Progress Claims 19 to 23, margin and delay costs. Uniq further claimed that the Cohens had repudiated the contract and purported to accept the repudiation.

## Issues

The three issues before the Supreme Court were:

1. whether the Cohens repudiated the contract;
2. if so, whether Uniq was exonerated from liability for the defective work; and
3. whether restitution, on the basis of a quantum meruit claim, was available.

## Decision

The Supreme Court held that the Cohens had repudiated the contract, that Uniq had accepted the repudiation, and that the Contract was at end. However, this did not affect the Cohens' right to recover damages from Uniq in relation to any defective or incomplete building work, or Uniq's right to recover from the Cohens any amounts due under the contract, in a debt action. Further, a claim for quantum meruit was not available to Uniq.

### Issue 1 — did the Cohens repudiate the contract?

Stevenson J held that the Cohens continually repudiated their obligations under the contract. The contract did not permit the Cohens to withhold payment based on unspecified significant defects or Uniq's failure to provide documents such as statutory declarations verifying its payment claim.

As a result, the Cohens' withholding of payment amounted to an intention not to be bound by the contract, or alternatively, an intention to fulfil the contract in a manner inconsistent with their contractual obligations.

### Issue 2 — was Uniq thereby exonerated from liability for defective work?

Uniq sought to argue that because the Cohens had repudiated the contract, they were unable to enforce Uniq's obligation to pay any damages. Stevenson J rejected this submission, concluding it relied on the 'rescission fallacy', that repudiation, unlike rescission, does not have the effect of restoring parties to their position before they entered the contract.

Instead, while the parties are discharged from further performance, "rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected".[1] In this case, the Cohens maintained the right to recover damages from Uniq in relation to any defective building work, and Uniq maintained the right to recover as a debt from the Cohens any amounts due to it under the contract.

### Issue 3 — was restitution on the basis of a quantum meruit claim available?

In the alternative to the contractual claim, Uniq claimed preliminaries, margin and delay damages for the period between 4 September 2014 and 17 November 2015 on a quantum meruit basis.

Stevenson J held that a quantum meruit claim was not available to Uniq as its right to claim for preliminaries, margin or delay damages had already accrued under the contract by the time Uniq accepted the Cohens' repudiation and terminated the Contract. A separate problem was that Uniq failed to adduce the evidence needed to prove the entitlement.

## Conclusion

Uniq was entitled to be paid the shortfall on its Progress Claims, but failed to prove any entitlement to margin or delay damages. The Cohens were entitled to damages for the defective and incomplete building work identified by experts.

https://www.caselaw.nsw.gov.au/decision/5ec37a2fe4b0d927f74aff68

See also Stevenson J's related decision in *Cohen v Zanzoul trading as Uniq Building Group (No 2)* [2020] NSWSC 838: https://www.caselaw.nsw.gov.au/decision/17303dd03dfe55628513b399

1 Citing *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32, at [8] (Kiefel CJ, Bell and Keane JJ) and *McDonald v Dennys Lascelles Ltd* (1993) 48 CLR 457.

# Diona Pty Ltd v Downer EDI Works Pty Ltd

## [2020] NSWSC 480

### Key takeaways

Whether an adjudicator 'considered' the provisions of a contract is a question of fact. The plaintiff has the onus of establishing a basis for quashing an adjudicator's determination.

Section 32A of the *Building and Construction Industry Security of Payment Act 1999* (NSW) now provides that when an adjudicator's determination is infected with jurisdictional error, a court may set aside all or part of the determination.

### Keywords

jurisdictional error

## Facts

On 7 May 2019, Diona Pty Ltd (**Diona**) subcontracted Downer EDI Works Pty Ltd (**Downer**) to perform safety upgrades on the Great Western Highway at Blackheath, New South Wales. A payment dispute arose and an adjudicator determined that Diona should pay Downer $430,990.

In these proceedings, Diona claimed that the adjudicator should have determined that Diona pay Downer $400,990. Diona submitted that Downer was not entitled to two extension of time claims (EOT 18 and EOT 21). Together, EOT 18 and EOT 21 were worth $30,000.

## Issues

Diona argued that EOT 18 and EOT 21 had been made out of time and were 'absolutely barred' by clause 40 of the contract. Diona claimed that the adjudicator did not refer to clause 40 in the adjudication determination. Downer argued that if the adjudicator did act beyond jurisdiction, relief for Diona should be refused as a matter of discretion.

## Decision

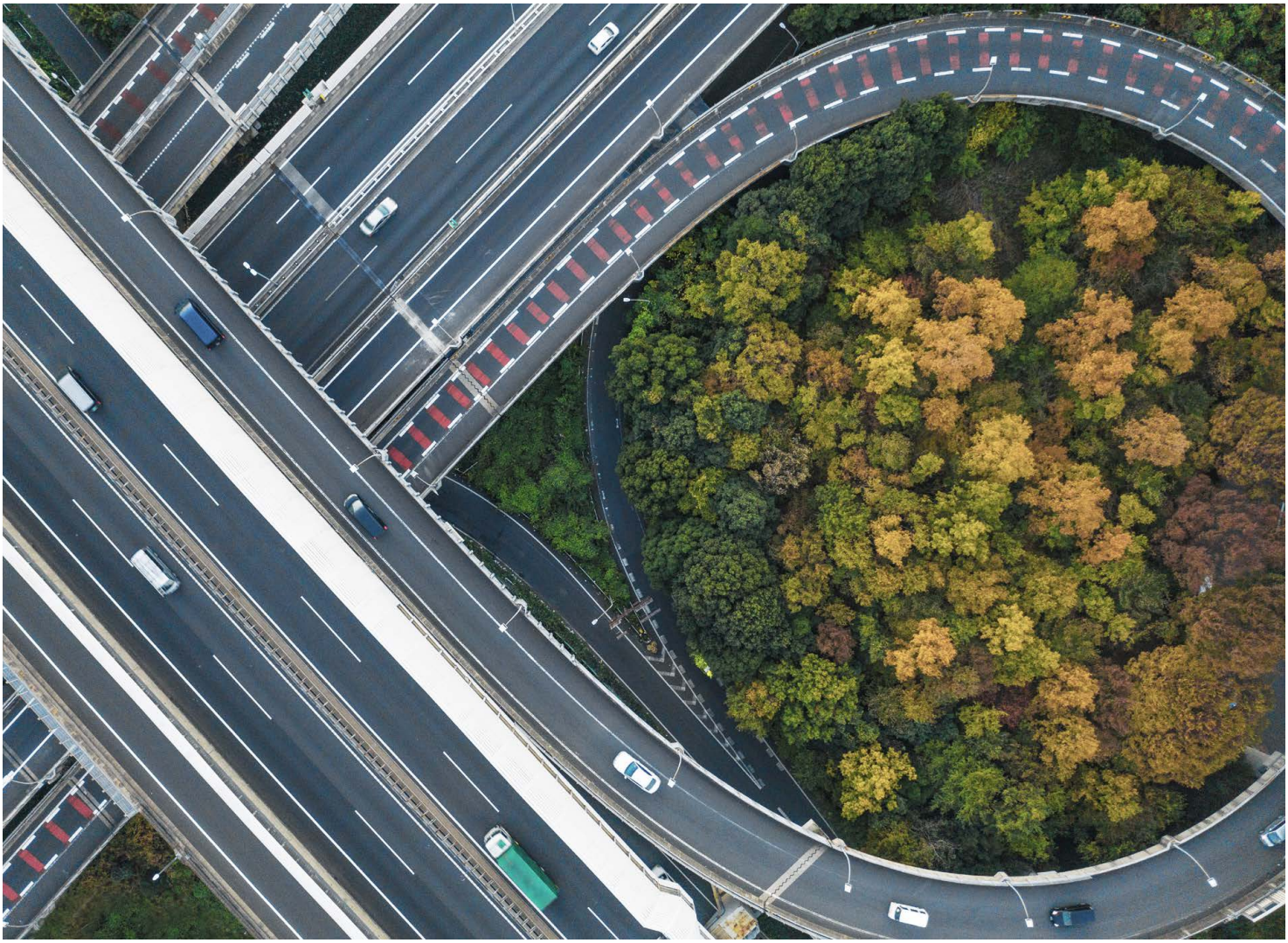
### Issue 1 — could it be inferred that the adjudicator did not consider clause 40?

Stevenson J was not prepared to find that the adjudicator had not considered the provisions of the contract. This was a question of fact.

His Honour indicated that it was possible that the adjudicator did not refer to clause 40 in the adjudication determination because Diona did not clearly articulate its argument in its adjudication response such that the point did not need to be dealt with.

Another possible reason was that the adjudicator misunderstood Diona's argument. Stevenson J noted that Diona's position was not explained with great clarity in the adjudication response.

Stevenson J accepted that the adjudicator may have come to the wrong decision about Downer's entitlement to EOT 18 and EOT 21. However, that of itself was not a basis to set aside the determination.



## Obiter dicta on discretion

As Stevenson J decided that the adjudicator had not acted beyond jurisdiction it was not necessary to consider this contention. Stevenson J, having heard arguments from both counsel, nonetheless briefly considered the issue. His Honour agreed with Diona that the circumstances in which the court can refuse relief, notwithstanding a finding of judicial jurisdictional error, are limited to cases where:

- the applicant had not exhausted other remedies;
- the applicant had excessively delayed prosecuting its case; or
- the making of an order would be futile.

Stevenson J observed that "if an adjudication determination is infected by jurisdictional error it is void, not voidable, and that the Court ought not exercise its discretion to, as it were, allow the determination to the extent that it is not infected by jurisdictional error".[1]

Importantly, his Honour noted that this question has been settled in respect of future proceedings because of section 32A of the *Building and Construction Industry Security of Payment Act 1999* (NSW):

> **32A Finding of jurisdictional error in adjudicator's determination**
>
> (1) If, in any proceedings before the Supreme Court relating to any matter arising under a construction contract, the Court makes a finding that a jurisdictional error has occurred in relation to an adjudicator's determination under this Part, the Court may make an order setting aside the whole or any part of the determination.
>
> (2) Without limiting subsection (1), the Supreme Court may identify the part of the adjudicator's determination affected by jurisdictional error and set aside that part only, while confirming the part of the determination that is not affected by jurisdictional error.

However, section 32A has no retrospective effect and therefore did not apply to the present case.

His Honour thus dismissed the claim.

https://www.caselaw.nsw.gov.au/decision/5eaba7cce4b0f66047ed8ea6

1 Referring to *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 19 at [55] and *Trysoms Pty Ltd v Club Constructions (NSW) Pty Ltd [2007]* NSWSC 1298 at [16].

# East End Projects Pty Ltd v GJ Building and Contracting Pty Ltd

## [2020] NSWSC 819

### Key takeaways

Contractual terms which make the right to payment contingent on service of a draft payment claim will generally be void under the *Building & Construction Security of Payment Act 1999* (NSW).

### Keywords

mandatory draft progress claims

## Facts

East End Projects Pty Ltd (**EEP**) engaged GJ Building and Contracting Pty Ltd (**GJBC**) to carry out construction works. Item 33 of the annexure to their contract specified that GJBC was required to give the superintendent a draft payment claim on or before the 25th day of each month, for work done to the last day of that month.

Clause 37.3 required GJBC to give the superintendent a final payment claim "no earlier than seven business days after the date of the draft payment claim". The effect of item 33 and clause 37 was to make the submission of a draft payment claim a precondition of payment.

On 28 May 2020, GJBC issued a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) for work to 30 April 2020. However, GJBC failed to issue a draft payment claim by 25 April 2020, as required by the contract.

EEP sought a declaration that the 28 May 2020 payment claim was void and of no effect. EEP's claim for relief turned on whether a reference date had arisen in respect of the payment claim when it was served. GJBC contended that clause 37 of the contract was void under section 34 of the Act and that the correct reference dates arose on the last day of each month, pursuant to section 8(2) of the Act, which provided:

> "In this section, 'reference date', in relation to a construction contract, means: …
>
> (b) if the contract makes no express provision with respect to the matter – the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month."

## Issues

The critical issue in this case was whether a contractual term which makes the right to payment contingent on the provision of a draft payment claim is valid. GJBC argued that clause 37 was void due to section 34 of the Act, which prohibits a contract from "excluding, modifying or restricting the operation of the Act".

## Decision

GJBC relied on the Queensland decision in *Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd*.[1] In Lean Field, Applegarth J held that a draft payment claim precondition, similar to the one in issue in the present case, was void because it amounted to "an unnecessary and impermissible constraint on the right to claim for payment under the Act".[2]

1 [2014] QSC 293 (***Lean Field***).

2 Citing *Lean Field* at [88], referring to the now repealed *Building and Construction Industry Payment Act 2004* (Qld).

EEP did not seek to challenge the correctness of the decision in *Lean Field*. Rather, it argued that that case could be distinguished because here, the requirement to serve a draft payment claim "could be seen as facilitative of the processes and rights conferred by the Act rather than a fetter on them." Ball J did not disagree with this and indicated that "there are reasons for thinking that the requirement to serve a draft in advance of a final claim is facilitative of the processes of the Act and the prompt payment of progress claims".

Notwithstanding, Ball J took issue with the mechanism by which the reference date was fixed under the contract: a problem because the contract required the draft payment to be served by the 25th day of a month. The effect was that GJBC would be prohibited from serving a payment claim at all in respect of that month if it failed to serve a draft on or before the 25th. Ball J acknowledged that in this instance, the occurrence of a reference date was contingent on the service of a draft payment claim by a specific date.

## Conclusion

Ball J held that clause 37 would have the effect of removing GJBC's entitlement to serve a payment claim if it failed to submit a draft claim by the 25th day of each month. This would result in "a serious restriction on the right to make a payment claim and therefore a serious restriction on the operation of s 8 of the Act".

Ball J held that the contract could not satisfy the requirements of section 8(2)(a) of the Act because it did not provide a date on which a payment claim may be made. Consequently, a reference date arose under the contract under section 8(2) of the Act.

Ball J dismissed the summons with costs.

https://www.caselaw.nsw.gov.au/decision/172ef0cb0784628cc26d3c44

# One Pro Baulkham Hills Pty Ltd v Ming Tian Real Property Pty Ltd

## [2020] NSWSC 1043

### Key takeaways

Conditions precedent may be read sequentially and cumulatively if the language indicates that this is objectively intended. For example, conditions precedent regarding financing may be read sequentially and cumulatively as the likely intention is that the contractor not be obliged to commence until all matters associated with the principal's funding are sorted.

### Keywords

Conditions precedent

## Background

On 22 December 2017, One Pro Baulkham Hills Pty Ltd (**One Pro**) engaged Ming Tian Real Property Pty Ltd (**Ming Tian**) to design and construct 40 townhouses in Baulkham Hills. Clause 9(a)(ii) of the contract set out four conditions precedent to Ming Tian's obligation to perform the work:

(A) "the Principal has secured financing for the cost of the [Work Under Contract] on terms and conditions acceptable to the Principal acting reasonably;

(B) all conditions precedent to the Principal making first draw on that financing have been satisfied;

(C) the Principal, the Contractor and the Principal's Financier have entered into any tripartite agreements required by the Principal's Financier on terms acceptable to all parties;

(D) the Principal has provided a Notice to Proceed to the Contractor in accordance with clause 7".

Within 20 business days of receiving the Notice to Proceed in clause 9(a)(ii)(D), Ming Tian was required to provide evidence of home warranty insurance under clause 50.4. Further, clause 47 provided that neither party was liable to the other for consequential loss.

On 27 September 2018, One Pro entered a Facility Agreement with CVS Lane Funding 57 Pty Ltd (**Financier**), satisfying clause 9(a)(ii)(A). The parties also entered into a Builder's Side Deed with the Financier, satisfying clause 9(a)(ii)(C).

Under the Builder's Side Deed, Ming Tian was to provide security to One Pro by way of bank guarantees (strictly, performance bonds). On 22 January 2019, the sole director of Ming Tian, Mr Meng Dai, provided One Pro bank guarantees that were allegedly not genuine.

On 31 October 2018, One Pro served on Ming Tian a purported Notice to Proceed. Under clause 7(a)(ii) of the construction contract, Ming Tian was required to commence the works within one month of the Notice to Proceed. On 16 April 2019, One Pro served Ming Tian a notice to show cause. However, One Pro never attempted to terminate the contract. Instead, the parties entered into a deed of termination on 1 May 2019.

## Issues

One Pro sought damages, including for the costs of finding a replacement contractor and for an increase in the cost of home warranty insurance. One Pro argued these losses arose from Ming Tian's failures to provide security by way of bank guarantee, and evidence of home warranty insurance. One Pro also sought compensation from the director of Ming Tian, Mr Meng Dai, for misleading or deceptive conduct under the Australian Consumer Law.

Ming Tian did not dispute that it had failed to provide the bank guarantee, evidence of home insurance, or that the bank guarantee provided was not a genuine document. As such, the key issues before the Supreme Court were

whether One Pro suffered loss by reason of:

1. Ming Tian not having provided the bank guarantees;
2. Ming Tian not having provided evidence of home warranty insurance; or
3. Mr Dai's misleading or deceptive conduct in providing non-genuine bank guarantees.

## Decision

One Pro failed to establish that it had suffered loss as a result of any breach of contract by the Ming Tian, or any misleading or deceptive conduct by Mr Dai.

### Issue 1 — Bank guarantees

The claim regarding the bank guarantees failed as One Pro did not establish loss caused by the failure to provide the bank guarantees.

One Pro claimed damages under various other heads of loss. With regard to the increase in construction price in finding a replacement contractor, Stevenson J held that this was a claim for loss of bargain damages that was unavailable. This was because the contract had been terminated by mutual agreement, rather than due to the wrongful conduct of Ming Tian.

Most of the other costs — including the increase in the cost of home warranty insurance and a late administration fee, and capitalised interest to the Financier — were classified as consequential losses. Under clause 47, such losses were excluded. Stevenson J rejected One Pro's argument that clause 47 did not survive termination, as the deed of termination had reserved all rights.

### Issue 2 — Home warranty insurance

Whether Ming Tian was in breach of its obligation to provide evidence of home warranty insurance depended on whether One Pro had served an effective Notice to Complete. In turn, whether an effective Notice to Complete had been served depended on whether the conditions precedent in clause 9(a)(ii) were sequential and cumulative.

Stevenson J held that the conditions precedent were sequential and cumulative, primarily because the object of these provisions was to ensure that "the Principal was not obliged to incur the expense of having the Contractor embark on the Work Under Contract and the Contractor was not obliged to take the risk of embarking on that work until such time as the Principal's funding is in place and available to be drawn down".

As a result of this construction, the Notice to Proceed that One Pro served on 31 October 2018 was ineffective as the requirements of clause 9(a)(ii)(B) had not, at the time, been satisfied. It followed that Ming Tian had not been obliged to provide evidence of home warranty insurance, and One Pro had suffered no resulting loss.

### Issue 3 — Misleading or deceptive conduct

One Pro also failed in its ACL claim as Ms Zhao had given evidence that after looking at the bank guarantees, she had telephoned Mr Dai requesting genuine guarantees. As such, One Pro did not rely on the bank guarantees or suffer any loss or damage because of Mr Dai's conduct.

## Conclusion

Stevenson J dismissed the proceedings with costs.

https://www.caselaw.nsw.gov.au/decision/173d66245678dfb6d3729622

# Queensland

# Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd

## [2020] QSC 133

### Key takeaways

A component of an adjudicator's decision which is tainted by jurisdictional error can be severed under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**).

An adjudicator is constrained by sections 82(4) and 88(3)(b) of the BIF Act and cannot consider extraneous reasons (or materials) which are not included in a payment schedule.

### Keywords

jurisdictional error; severability

## Facts

This case concerned a progress payment claim for works completed under a subcontract between Monadelphous Engineering Pty Ltd (**Monadelphous**) and Acciona Agua Australia Pty Ltd (**Acciona**). Under that subcontract, Acciona was to perform services and supply equipment and materials to upgrade a sewage treatment plant in Queensland.

The parties had also entered into a separate Collaboration Deed, which set out the parties' liability for 'CP costs', which were to be a shared obligation, subject to some conditions.

In June 2019, Acciona issued a progress payment claim for the following amounts:

- A$1,767,592;
- €752,932; and
- US$15,609.

Monadelphous responded with a payment schedule (the **Payment Schedule**) including the following amounts:

- A$40,165 in respect of the Australian dollar component of the payment claim;
- nil for the Euro and US dollar components of the payment claim; and
- a deduction of A$5,326,565 described simply as Monadelphous' "assessed amount for Acciona's contribution".

## Adjudication decision

The dispute proceeded to adjudication. The adjudicator determined Acciona was entitled to A$462,853 and €308,675.

However, the adjudicator determined that Monadelphous was entitled to set off A$4,424,904 against the amount payable to Acciona because of Acciona's purported breach of the Collaboration Deed. This had the effect of reducing Acciona's entitlement to nil.

This decision about set off was based on materials Monadelphous provided in its adjudication response but not in the Payment Schedule. On receiving these materials, Acciona sought further time to consider and respond to these submissions. The adjudicator denied the request.

## Issues

Acciona applied to the Supreme Court of Queensland for relief on grounds that the part of the adjudicator's decision which dealt with the claimed set off was attended by jurisdictional error. Acciona argued:

1. first, in breach of section 88(5) of the BIF Act, the adjudicator failed to give proper reasons for his decision that Monadelphous was entitled to a set off. This failure was said to amount to jurisdictional error; and

2. second (and importantly), the adjudicator acted in excess of his jurisdiction by finding that Monadelphous had the right to recover the claim which it set off. This was largely because:
   - the adjudicator failed to apply the subcontract properly (in breach of section 88(2) of the BIF Act); and
   - the adjudicator considered reasons advanced by Monadelphous in its adjudication response which were prohibited from being included under the section 82(4) of the BIF Act as they were not advanced in the Payment Schedule.

## Decision

### Was part of the adjudicator's decision affected by jurisdictional error?

Under sections 82(4) and 88(3)(b) of the BIF Act, the adjudicator must not consider any reason for withholding payment included in an adjudication response if that reason was not included in the payment schedule.

In relation to the amount withheld in the Payment Schedule, Monadelphous simply described the amount as an 'assessed amount for Acciona's contribution'. The Court found that Monadelphous did not explain in the Payment Schedule the basis on which it sought to withhold payment. It was not until Monadelphous' adjudication response that the basis of the set off became clear, that is, that it represented damages for alleged breaches of the Collaboration Deed.

Monadelphous argued that the adjudication response did not include "new reasons" but instead set out its justification for withholding the amount. The Court rejected this argument and said that the evident policy of the BIF Act is to ensure a respondent includes in its payment schedule any reasons for withholding payment on which it might wish to rely in any subsequent adjudication which would permit a claimant to engage with those submissions in the adjudication application. Allowing Monadelphous' argument would undermine the policy objective.

Accordingly, Monadelphous was prohibited from including the new reasons in its adjudication response.

By considering these reasons, the adjudicator had failed to comply with section 88(3)(b) of the BIF Act and the decision was affected by jurisdictional error. This was because the adjudicator had allowed the claim for set off on a basis other than the application of the contract and therefore had misunderstood the scope of his jurisdiction.

The Court summarised the position succinctly:

> "Adjudicators under the Payment Act do not have to get the answer right, but if it is demonstrated that they have not gone about their task … that the Payment Act requires, then they will have fallen into jurisdictional error because they will not have done the very thing … the Payment Act required them to do".[1]

### Could the part of the adjudicator's decision affected by jurisdictional error be severed?

Under section 101(4) of the BIF Act, the court may allow parts of the adjudicator's decision not affected by jurisdictional error to remain binding on the parties. Bond J held that the adjudicator's decision was made up of two parts:

- a decision about the merits of the claims advanced by Acciona; and
- a decision about the merits of Monadelphous' claimed set-off.

The evident intention of section 101(4) of the BIF Act was to permit the court to consider the components separately and notionally sever the part affected by jurisdictional error, leaving the part unaffected as binding on the parties.

In this case, the assessment of A$462,853 and €308,675 would remain binding.

## Conclusion

It is well known that respondents must include in their payment schedules all reasons for withholding payment or paying less than what is claimed. This decision reinforces the importance of including all reasons in the payment schedule. Further justifications in an adjudication response may be deemed to be a 'new reason'. If an adjudicator considers these justifications, a Claimant may be entitled to apply to the Court to set aside the determination to the extent it is affected by jurisdictional error.

https://www.sclqld.org.au/caselaw/QSC/2020/133

Note: Corrs acted for Acciona Agua Australia Pty Ltd.

1 *Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd* [2020] QSC 133, at [35] (Bond J), citing *Laing O'Rourke Australia Construction Pty Ltd v H&M Engineering and Construction Pty Ltd* [2010] NSWSC 818 at [34]–[39] (McDougall J).

# Chapel of Angels Pty Ltd v Hennessy Building Pty Ltd

## [2020] QCA 219

### Key takeaways

A contractor who performs building work outside the scope of its building licence is only entitled to receive 'reasonable remuneration' for that unlicensed work in accordance with section 42(4) of the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**).

### Keywords

QBCC licence; unlicensed building work; reasonable remuneration; quantum meruit.

## Facts

Chapel of Angels Pty Ltd (**Chapel of Angels**) engaged Hennessy Building Pty Ltd (**Hennessy**) to construct a wedding chapel, car park and other ancillary works at Montville, Queensland.

Hennessy held two licences: a builder (low rise licence) and a carpentry licence. During the course of the works, the parties fell into dispute. Chapel of Angels retook possession of the site and refused to pay any further sums claimed by Hennessy.

Chapel of Angels initiated proceedings in the District Court of Queensland seeking various relief, including restitution of all monies paid under the contract on the basis that Hennessy did not have the appropriate licence class to construct the chapel, being a Class 9(b) Type B building with a rise of two storeys. Hennessy defended the claim and counterclaimed for reasonable remuneration under section 42 of the QBCC Act or alternatively on the basis of a quantum meruit.

At first instance, Porter J determined that Hennessy did not have the appropriate licence class to build the chapel but it was licenced to complete a substantial part of the chapel works, the car park and the external works.

On the basis that some of the works fell outside Hennessy's licences, Porter J ordered that Chapel of Angels was entitled to recover all payments it had made under the building contract, being $632,615.32.

In assessing Hennessy's counterclaim for 'reasonable remuneration' under section 42 of the QBCC Act, Porter J accepted Hennessy's expert evidence and ordered Chapel of Angels to pay $700,108.20 to Hennessy for the licenced works but declined to order any amount for the unlicensed works as Hennessy had failed to prove what those works had cost Hennessy to perform.

## Issues on appeal

Chapel of Angels appealed the decision to the Queensland Court of Appeal but its application for leave to appeal was filed four months outside the time limit for appeal. As such, before dealing with the merits of the grounds for the appeal, the Court of Appeal was required to determine whether Chapel of Angels should be given an extension of time to bring the application for leave to appeal.

Ultimately, the Court determined that leave should not be given to Chapel of Angels as its appeal had limited merit; it advanced different arguments in its appeal compared to that which was presented at trial in the first instance and there was no significant reasons for the delay in filing the appeal.

Although leave was not ultimately granted, the Court of Appeal provided useful commentary on the prohibition against unlicensed building work and the 'reasonable remuneration' mechanism for such works under section 42(4) of the QBCC Act, as discussed further below.

## Unlicensed Building Work and 'Reasonable Remuneration'

Prior to the introduction of the 'reasonable remuneration' mechanism in section 42(4), the QBCC Act prohibited a contractor from recovering any money for undertaking unlicensed building work.

The Court of Appeal noted the previous judicial consideration[1] given to the Explanatory Notes for the amendments introducing the 'reasonable remuneration' mechanism for unlicensed building work which stated that "the new provisions will allow an unlicensed contractor to claim reasonable recovery of moneys actually expended for the supply of materials and labour, other than the contractor's own labour and profit…". In *Cook's Construction Pty Ltd,*[2] Keane J had regard to the amendments and the 'reasonable remuneration' mechanism, holding that the mechanism was directed towards the mischief of "the denial of all remuneration to an unlicensed builder".

In this case, the Court of Appeal was of the view that the amendments to the QBCC Act and the judicial consideration did not support Chapel of Angels' arguments as it would be incorrect to describe Hennessy as 'unlicensed' for carrying out building work when it held a contractor's licence for part of that work.

As to the extent to which the reasonable remuneration mechanism applies, the Court of Appeal said that subsections 42(3) and 42(4) of the QBCC Act are concerned with the building work actually performed outside the scope of the builder's licences.[3] The Court of Appeal said at that:

> "In this kind of case the building contract is unenforceable by the contractor in relation to the unlicensed work. Where (as in this case and as is commonly the case) the promise to carry out the unlicensed work is not severable from the balance of the contract, the contractor is unable to enforce the contract at all. Any non-contractual right the contractor may have to recover reasonable remuneration for the unlicensed work is restricted by section 42(4) and the contractor is exposed to prosecution for an offence for contravening at least one of the two prohibitions in section 42(1). From the consumer's perspective the results of this construction also do not seem obviously unreasonable. The consumer may be found liable to pay reasonable remuneration not limited in accordance with section 42(4) only in relation to the benefit the consumer has obtained as a result of the contractor carrying out building work for which it held a licence of the appropriate class, and the consumer will benefit from the limits in section 42(4) in respect of any work for which the contractor did not hold a licence of the appropriate class…"

On this basis, the Court of Appeal rejected Chapel of Angels' argument that subsection 42(4) of the QBCC Act did not apply to the licensed works performed by Hennessy.

The Court of Appeal also agreed with the reasoning adopted by Porter J at first instance that Hennessy was entitled to 'reasonable remuneration' under section 42(4) of the QBCC Act for both the licensed works and unlicensed works performed by Hennessy.

## Implications

Although the application for leave to appeal was dismissed (and the matters were not determined on appeal), the Court of Appeal has provided a very useful commentary on the application of the 'reasonable remuneration' mechanism under section 42(4) of the QBCC Act.

The Court of Appeal's reasoning suggests that, if the promise to pay for the unlicensed works is severable from the promise to pay for the licensed works under the contract, the 'reasonable remuneration' mechanism will only apply to the unlicensed works component and the contract will remain enforceable as regards the licenced works.

https://www.queenslandjudgments.com.au/case/id/346080

1 *Cook's Construction Pty Ltd v SFS 007.298.633 Pty Ltd (formerly t/as Stork Food Systems Australasia Pty Ltd)* [2009] QCA 75.
2 *Cook's Construction Pty Ltd v SFS 007.298.633 Pty Ltd (formerly t/as Stork Food Systems Australasia Pty Ltd)* [2009] QCA 75.
3 *Chapel of Angels Pty Ltd v Hennessy Building Pty Ltd* [2020] QCA 219 at [49], [50].

# McCarthy v TKM Builders Pty Ltd

## [2020] QSC 301

### Key takeaways

The Queensland Supreme Court has reaffirmed McMurdo J's judgement in Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd[1] that service of documents via Dropbox link is not effective service for the purposes of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) and the *Acts Interpretation Act 1954* (Qld). Without proper service of an adjudication application, an adjudication cannot be validly undertaken.

### Keywords

Electronic service of documents; security of payment

## Facts

Mr McCarthy (**McCarthy**) engaged TKM Builders Pty Ltd (**TKM**) under a construction contract for a building project at Bells Creek. On 15 June 2020, TKM purported to serve on McCarthy a copy of its adjudication application by email.

The email attached the QBCC adjudication application form but did not attach TKM's submissions. The submissions, which were referred to in the application form, were not attached to the application form and could only be accessed by opening a Dropbox link which was provided in the covering email.

Upon his receipt of the email, McCarthy did not open the Dropbox link and did not obtain the documents contained within the Dropbox link. Instead, McCarthy forwarded the email to his solicitors with instructions for them to respond to the email.

In McCarthy's adjudication response, which was prepared by his solicitors, it was submitted that the adjudicator did not have jurisdiction to determine the dispute because McCarthy had not been given a copy of the adjudication application as required by section 79(3) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**).

The adjudicator found in favour of TKM, deciding that "it had been demonstrated that [Mr McCarthy] was in possession of a copy of the adjudication application and its supporting submissions. If a document has been received by the other party, the manner in which it was served is unlikely to matter".

McCarthy applied to the Supreme Court of Queensland seeking to have the adjudication determination set aside for jurisdictional error.

## Decision

Martin J, having regard to section 79 of the BIF Act and section 39 of the *Acts Interpretation Act 1954* (Qld), which provides the methods by which personal service of documents may occur, concluded that, by merely referring Mr McCarthy to a link to a Dropbox file, service had not been properly effected. His Honour followed the same reasoning adopted by McMurdo J (as McMurdo JA then was) in *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* (**Basetec**).

In Basetec, the respondent purported to serve multiple adjudication applications by email and Dropbox links. Similarly, the adjudicator in that case determined that service had occurred and the date of service was taken to be the date on which the email containing the Dropbox link was received.

1 [2015] 1 Qd R 265.

On application to the Supreme Court of Queensland to set aside the adjudication determination, McMurdo J held that service had not occurred on the date of the receipt of the emails, stating that:

> "Actual service does not require the recipient to read the document. But it does require something in the nature of a receipt of the document. A document can be served in this sense although it is in electronic form. But it was insufficient for the document and its whereabouts to be identified absent something in the nature of its receipt. The purported service by the use of the Dropbox facility may have been a practical and convenient way for CGE to be directed to and to use the documents. But at least until 2 September 2013 (when Mr How became aware of the contents of the Dropboxes), it did not result in the person to be served becoming aware of the contents of the document."

Applying this reasoning, Martin J determined that Mr McCarthy did not become aware of the contents of the document merely by being referred to a link to a Dropbox file. It followed that he was not 'given' the adjudication application as required by section 79 of the BIF Act.

As to the question whether proper service was a necessary precondition for adjudication, Martin J followed the decision in *National Management Group Pty Ltd v Biriel Industries Pty Ltd*, finding that service was required before an adjudication may be validly undertaken.[2]

Accordingly, as service had not occurred and Mr McCarthy had not been given a copy of the adjudication application, the adjudicator did not have jurisdiction to determine the adjudication.

The position taken by Martin J in *TKM Builders* aligns with the current position in New South Wales. In *Parkview Constructions Pty Limited v Total Lifestyle Windows Pty Ltd t/a Total Concept Group* [2017] NSWSC 194 (**Parkview**), Hammerschlag J held that documents on a USB are not 'in writing' for the purposes of the NSW security of payment legislation and service of a USB was not effective service, stating:

> "[A USB stick] does not represent or reproduce words in visible from in the way section 21 of the Interpretation Act has in mind. Looking at it, one sees only a small piece of plastic, perhaps with some circuitry on it. It is a device which, if actioned, is capable of representing or reproducing what is stored on it in visible form.
>
> "In order to access what is stored on it, the recipient must take the step of accessing, opening and viewing the files stored on it. To take delivery of a USB stick as service of an instrument stored on it in writing, is as untenable as it would be to take delivery of a compact disc, cassette or vinyl record as itself constituting aural transmission of what is recorded on it.
>
> "To access information on a USB stick, the recipient must have compatible technology. This cannot be regarded as an inevitability, even today."

## Conclusion

The Queensland Supreme Court has reaffirmed that service of an adjudication application by an online file sharing platform, such as Dropbox, will not constitute effective service under the BIF Act. Although it may seem that the law is not keeping pace with the ways parties commonly transmit materials in everyday business, the Court's reasoning is sound for the practical reasons outlined in Basetec and Parkview.

To prevent service being rendered ineffective (and a finding that any resulting adjudication is void for jurisdictional error) caution should be exercised in the way in which adjudication materials are served and traditional methods should be favoured.

https://www.queenslandjudgments.com.au/case/id/346076

2 *National Management Group Pty Ltd v Biriel Industries Pty Ltd* [2019] QSC 219.

# Victoria

# Leeda Projects Pty Ltd v Zeng

## [2020] VSCA 192

### Key takeaways

Where a builder has breached an implied term to complete works within a reasonable time, the principal will be entitled to damages. The way damages are assessed may depend on the nature of the property and its intended use. Damages for loss of use and enjoyment may be the norm, but here, the principal was awarded wasted costs of ownership.

### Keywords

delay; loss of use and enjoyment of property; wasted costs of ownership

## Facts

Mrs Zeng engaged Leeda Projects Pty Ltd (**Leeda**) to fit out the empty 87th floor of the Eureka Tower as a private art gallery with residential facilities (**Property**).

Around 11 months after execution of the contract, a dispute arose regarding Leeda's payment claims. Shortly thereafter, Leeda suspended work on the project and sued in the County Court, seeking payment of the rejected payment claims, plus interest and costs.

Work on the project did not recommence for some 28 months. Once work did recommence, practical completion was achieved five months later, and Leeda gave up possession of the Property shortly thereafter. In total, around 45 months had elapsed since the contract was signed.

After reaching practical completion, Leeda commenced proceedings in the Victorian Civil and Administrative Tribunal for payment of a claim assessed and approved by the nominated architect. Mrs Zeng made a counterclaim for damages for the delay in completing the works.

Although the contract did not specify a date for practical completion, Mrs Zeng argued that the contract contained an implied term to complete the works within a reasonable time, and that term had been breached by Leeda's protracted suspension of work. Mrs Zeng claimed substantial loss and damage arising from this alleged breach.

The Tribunal found in favour of Mrs Zeng's counterclaim, ruling that a requirement to complete works within a reasonable time was implied by law. Nonetheless, the Tribunal found Mrs Zeng was entitled only to nominal damages. Because Mrs Zeng never intended to reside permanently in the Property or to use the Property as a rental investment, the Tribunal considered that her claim for damages amounted to a claim for 'disappointment, inconvenience and vexation' — a category of claim foreclosed by *Baltic Shipping Company v Dillon*.[1]

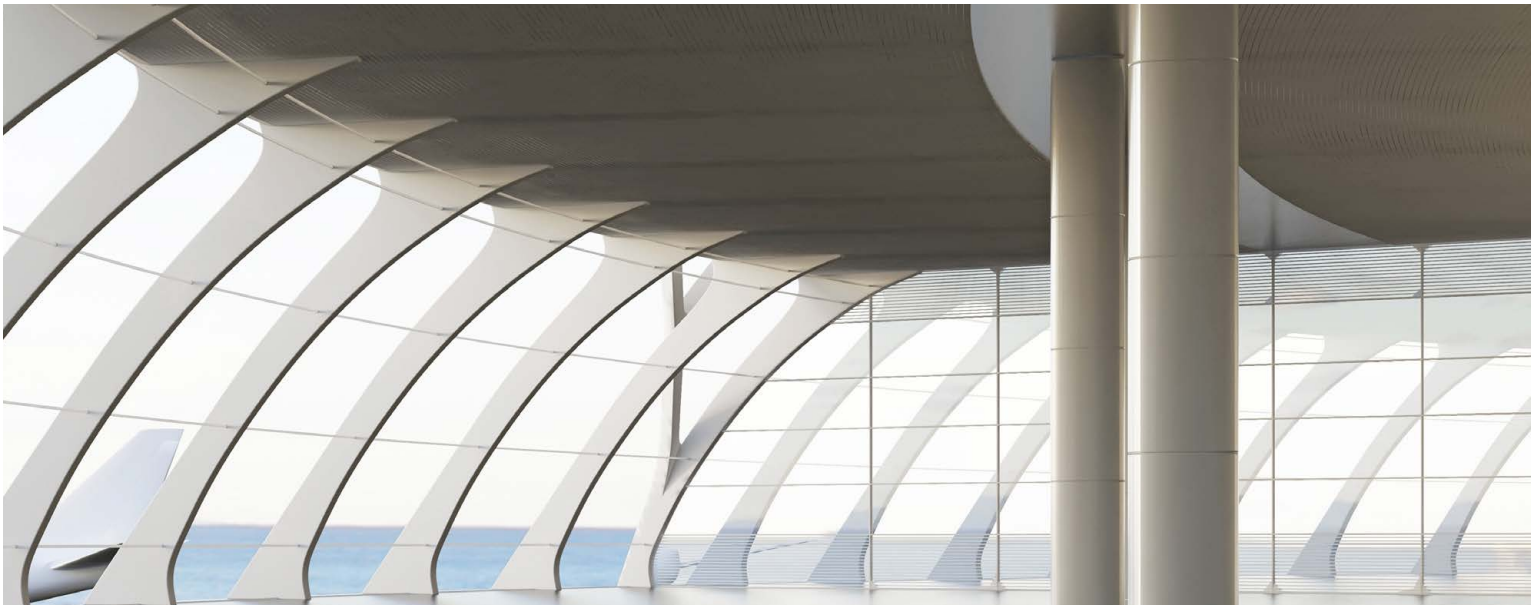
Mrs Zeng was granted leave to appeal against the Tribunal's decision on the question of whether the Tribunal erred in finding that she was not entitled to general damages. On appeal, McDonald J considered that the Tribunal had indeed fallen into error by failing to recognise the distinction between Mrs Zeng's claims for:

- damages for loss of use and enjoyment; and
- damages for disappointment, inconvenience and vexation.

McDonald J held that Mrs Zeng had established her claim regarding loss of use and enjoyment, and that the appropriate measure of loss was the rental value of the Property during the period of delay — that being the normal measure of damages where a builder fails to complete works on time.[2]

1 (1993) 176 CLR 344.

2 *Zeng v Leeda Projects Pty Ltd* [2019] VSC 106 at [32]–[33].



## Issues

Leeda sought leave to appeal the decision of the trial judge on three grounds. Most relevantly, Leeda advanced the proposal that the trial judge had erred in concluding that Mrs Zeng was entitled to damages other than nominal damages.

### Issue 1 — was Mrs Zeng entitled to more than nominal damages?

Tate, Kaye and McLeish JJA unanimously held that Mrs Zeng was entitled to damages for breach of the implied term causing the loss of use of the Property. Even though Mrs Zeng did not incur any direct expenses as a result of Leeda's breach, their Honours considered it to be largely uncontentious that Mrs Zeng was entitled to substantial rather than nominal damages. McLeish JA emphasised the well-established principle from *Hadley v Baxendale,*[3] that damages are to be awarded for breach of contract so as to place the injured party in the same position they would have been had the contract been performed.

### Issue 2 — what is the appropriate measure of damages?

In determining the appropriate measure of damages, their Honours held that an analysis of the authorities lent little support to the idea that the appropriate measure of damages was the notional market rental value of the Property for the relevant period.

Their Honours emphasised the unique circumstances of this case; namely, that the property in question was real property which Mrs Zeng intended neither to rely upon as a place of residence nor to utilise as a source of income. Consequently, their Honours considered marine vessels to be a largely analogous form of property, and following a detailed analysis of admiralty law, their Honours concluded that the most appropriate measure of damages was the quantum of wasted costs of ownership.

As such, their Honours held that Mrs Zeng was entitled to damages reflecting the cost of owning the Property for the period during which it was not available for her use or enjoyment as a direct result of Leeda's breach. In this instance, that cost consisted of owners' corporation fees, council rates, and electricity and water charges. Their Honours were further satisfied that this loss was a reasonably foreseeable consequence of Leeda's breach.

### Issue 3 — is the appropriate measure of damages a principle of general application?

Whilst Kaye JA suggested that this measure of damages is the appropriate measure whenever real property intended only for personal use is rendered unavailable by breach of contract, McLeish JA, with Tate JA agreeing, preferred not to embrace such a principle of general application. Instead, McLeish JA emphasised that the number of analogous cases was too few to support the identification of a broader principle.

## Conclusion

Although Leeda's appeal was successful, the quantum of damages (calculated in accordance with the revised methodology) remained substantial.

This decision highlights that an implied term to complete works within a reasonable time may subsist within a construction contract, even if a date for practical completion is not specified. In the event that such a term is breached, the method for calculating damages to which the Principal will be entitled will depend entirely on the nature of the property and its intended use.

http://www.austlii.edu.au/au/cases/vic/VSCA/2020/192.html

3 (1854) 9 Exch 341; 156 ER 145

# Overseas

# Uber Technologies Inc. v. Heller

## 2020 SCC 16

### Key takeaways

The Supreme Court of Canada has struck down an arbitration clause on the basis that it was unconscionable.

At least in Canada, standard form contracts may now be more vulnerable to challenge on the basis of unconscionability as they are more likely to involve some form of inequality of bargaining power.

When drafting standard form contracts, drafters should ensure that arbitration clauses provide an accessible means of dispute resolution.

### Keywords

unfair contract terms; unconscionability

## Facts

In 2016, David Heller, an UberEATS driver in Toronto, entered into a standard form services agreement with Uber. The services agreement included an arbitration clause which required that all disputes be first submitted to mediation and, failing resolution, be resolved by arbitration in the Netherlands according to the relevant International Chamber of Commerce (**ICC**) Rules.

The up-front cost of commencing an arbitration with the ICC is US$14,500, plus legal fees and other costs of participation. This up-front cost alone represents most of Mr Heller's annual income. Mr Heller commenced a class action against Uber alleging that Uber and UberEATS drivers are employees who are entitled to the protections in Ontario's Employment Standards Act, 2000, S.O. 2000 (**ESA**), and that Uber had violated provisions of the ESA.

Uber sought a stay of the proceedings in favour of arbitration pursuant to the arbitration clause. Mr Heller argued that the arbitration clause was invalid on two grounds:

1. it was unconscionable; and
2. it contracted out of mandatory ESA protections.

## Earlier decisions

The Ontario Superior Court stayed the proceeding, determining that the issue of the arbitration clause's validity should be referred to arbitration in the Netherlands in accordance with the principle that arbitrators are competent to determine their own jurisdiction. In the alternative, the motion judge held that the arbitration clause was not invalid due to unconscionability or because it contracted out of the ESA.

The Ontario Court of Appeal unanimously allowed Mr Heller's appeal and set aside the motion judge's order, finding that the arbitration clause was invalid both because it was unconscionable and because it contracted out of the ESA.

Uber was granted leave to appeal to the Supreme Court of Canada.

## Decision

In an 8–1 decision, the Supreme Court of Canada dismissed the appeal. In joint reasons delivered by Abella and Rowe JJ, the majority held that the arbitration clause was invalid because it was unconscionable. Brown J agreed that the arbitration clause was invalid but on the basis that it was contrary to public policy as it denied access to justice by imposing undue hardship. Côté J dissented and would have granted a stay on the condition that Uber advance the up-front cost of initiating the arbitration.

## Applicable arbitration legislation

The threshold issue was whether the Arbitration Act, 1991, S.O. 1991 (**AA**), or the International Commercial Arbitration Act, 2017, S.O. 2017 (**ICAA**) which implements the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**) governed Uber's motion to stay.

The majority stated that it was necessary to determine whether the ICAA applies by examining the nature of the parties' dispute, not by making findings about their relationship. The Model Law applies to "commercial" disputes, which does not capture labour and employment disputes. The parties' dispute was fundamentally about labour and employment, so the AA applied, rather than the ICAA.

Brown J agreed with the result but on the basis that the nature of the parties' relationship determined which statute applied and that that was the very question to be decided.

Côté J dissented, taking the view that the analysis turned on the nature of the relationship of the parties, which was commercial in nature, such that the ICCA would apply. However, if the AA were to apply, this would not change Côté J's analysis of whether the arbitration clause is invalid.

## Jurisdiction

The AA requires a court to stay judicial proceedings where there is an applicable arbitration clause, with limited exceptions, including where the arbitration agreement is invalid.

As a general rule, under Canadian law, in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator unless the challenge is based solely on a question of law or is based on a question of mixed fact and law but requires only a superficial review of the evidentiary record.[1]

The majority considered that it would be possible to resolve the validity of the arbitration clause through a superficial review of the evidentiary record. However, they recognised a further basis to depart from the general rule of arbitral referral, namely that a court should not refer a challenge to an arbitrator's jurisdiction where there is a genuine challenge to that jurisdiction and there is a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator.

The majority found that Mr Heller made a genuine challenge to the validity of the arbitration clause and the cost to Mr Heller of commencing the arbitration 'impose[s] a brick wall' on the resolution of his claims such that there was a real prospect that the arbitration clause's validity could not be resolved without a court decision.

Brown J would have recognised a further, narrow exception to the general rule of arbitral referral for cases where arbitration is inaccessible as the arbitration clause effectively bars any claim.

Côté J disagreed and considered that Mr Heller's arguments challenging the validity of the arbitration clause would require more than a superficial review of the record as it would require review of testimonial evidence, and should therefore be referred for arbitration.

1 See *Dell Computer Corp. v. Union des consommateurs* [2007 SCC 34, [2007] 2 S.C.R. 801]; *Seidel v. TELUS Communications Inc. 2011 SCC 15*, [2011] 1 S.C.R. 531.

## Validity of the arbitration clause

### Unconscionability

The majority held that the doctrine of unconscionability has two requirements:

1. an inequality of bargaining power, which exists where one party cannot adequately protect their interests in the contracting process; and
2. a resulting improvident bargain, which unduly advantages the stronger party or unduly disadvantages the more vulnerable.

This test is less strict than the four-step test applied in earlier cases, which required an 'overwhelming' imbalance of bargaining power between the parties, a 'grossly unfair' and improvident transaction, that there was no independent advice, and the strong party knowingly taking advantage of the more vulnerable party.

The majority considered that this allows the doctrine to have a modern application in the context of standard form contracts because of their potential to impair a party's ability to protect their interests in the contracting process and make them more vulnerable (although the majority did note that a standard form contract would not, of itself, establish an inequality of bargaining power). Further, the unconscionability of the arbitration clause can be considered separately from that of the contract as a whole.

The majority found that there was an inequality of bargaining power in this case as the arbitration clause was part of a standard form contract which Mr Heller was powerless to negotiate, and there was a "significant gulf in sophistication" between Mr Heller and Uber.

A person in Mr Heller's position could not be expected to understand that the arbitration clause imposed a US$14,500 hurdle to relief, especially because it provided no information about the costs. The arbitration clause was also improvident as the cost to arbitrate effectively made arbitration "realistically unattainable and rendered Heller's contractual rights illusory".

Brown and Côté JJ both rejected the majority's approach, which "drastically expand[s] the doctrine's reach without providing any meaningful guidance as to its application", including by concluding that a standard form contract denotes the degree of inequality of bargaining power necessary to trigger the application of the doctrine. They also disagreed that the doctrine can be applied to individual terms of a contract, rather than the overall bargain.

### Contracting out of mandatory ESA protections

Given the conclusion that the arbitration clause was invalid because it is unconscionable, the majority did not decide whether it was also invalid because it had the effect of contracting out mandatory protections in the ESA.

https://www.canlii.org/en/ca/scc/doc/2020/2020scc16/2020scc16.html

# A-G (Virgin Islands) v Global Water Associates Ltd

## [2020] UKPC 18

### Key takeaways

Where the first contract in a two-contract design, build and operate procurement is breached with the consequence that the second is rendered incapable of being performed, the existence of separate contracts will not of itself preclude the contractor from recovering damages representing the amount it would have earned under the second contract.

A principal entering into a two-contract procurement should ensure that it includes a term in the design and build contract limiting its liability in damages to the contractor's loss of earnings under that contract.


### Keywords

Remoteness; design, build and operate contracts; two-contract procurements


## Facts

The Government of the Virgin Islands (**Government**) and Global Water Associates Ltd (**GWA**) entered into a pair of related contracts pursuant to a design, build and operate (**DBO**) scheme, namely:

1. a Design Build Agreement (**DBA**), under which GWA agreed to design and build a water treatment plant; and
2. a Management, Operation and Maintenance Agreement (**MOMA**), under which GWA was to manage, operate and maintain the plant, retaining the profit thereby generated.

The following features of the two contracts and the circumstances in which they were entered into are significant:

- both contracts contained the same definition of 'Commencement Date', being the date on which 'the Treatment Plant' was first capable of operating at a specific capacity;
- both contracts incorporated the same Government-approved design documents;
- the DBA provided that, upon substantial completion of the plant, GWA would issue a commencement notice "indicating the commencement of the management, operation and maintenance phase"; and
- both contracts were entered into on the same day and were signed by the same persons on behalf of the parties.

The Government breached the DBA by failing to provide a project site suitable for construction of the plant. GWA validly terminated the contract, with the consequence that it was unable to make the profits it would have made under the MOMA.

GWA sued for breach of the DBA, seeking damages representing the amount it would have earned under the MOMA had the scheme gone ahead.

## Issue

The outcome of the case turned on a single issue: whether the damages claimed by GWA were too remote. The Court of Appeal had determined that issue adversely to GWA, holding that the 'natural and direct' consequence of breach of the DBA was that GWA would lose any money it was entitled to receive under that agreement.

## Decision

### Remoteness: applicable principles

The Board briefly surveyed the case law on remoteness of damage, extracting the following propositions:

a. whether a particular loss is too remote is not simply a function of the probability of its occurrence — the answer depends on the common expectations of the parties at the time the contract was entered into;

b. a loss will be too remote if the type of loss could not reasonably have been contemplated by the defendant as a 'serious possibility' at the time the contract was made; and

c. the test in (b) is objective, but whether it is satisfied in a given case depends on the defendant's actual knowledge at the relevant time.

### Application to the present case

Applying those principles, the Board held that the loss claimed by GWA was not too remote. The features of the contracts described above, and the fact that they were entered into on the same date by the same representatives, formed the basis for the Board's conclusion. At the time the DBA was executed, the parties must have been aware that GWA was set to make money under the MOMA, and that performance of the MOMA was conditional on the completion of the DBA.

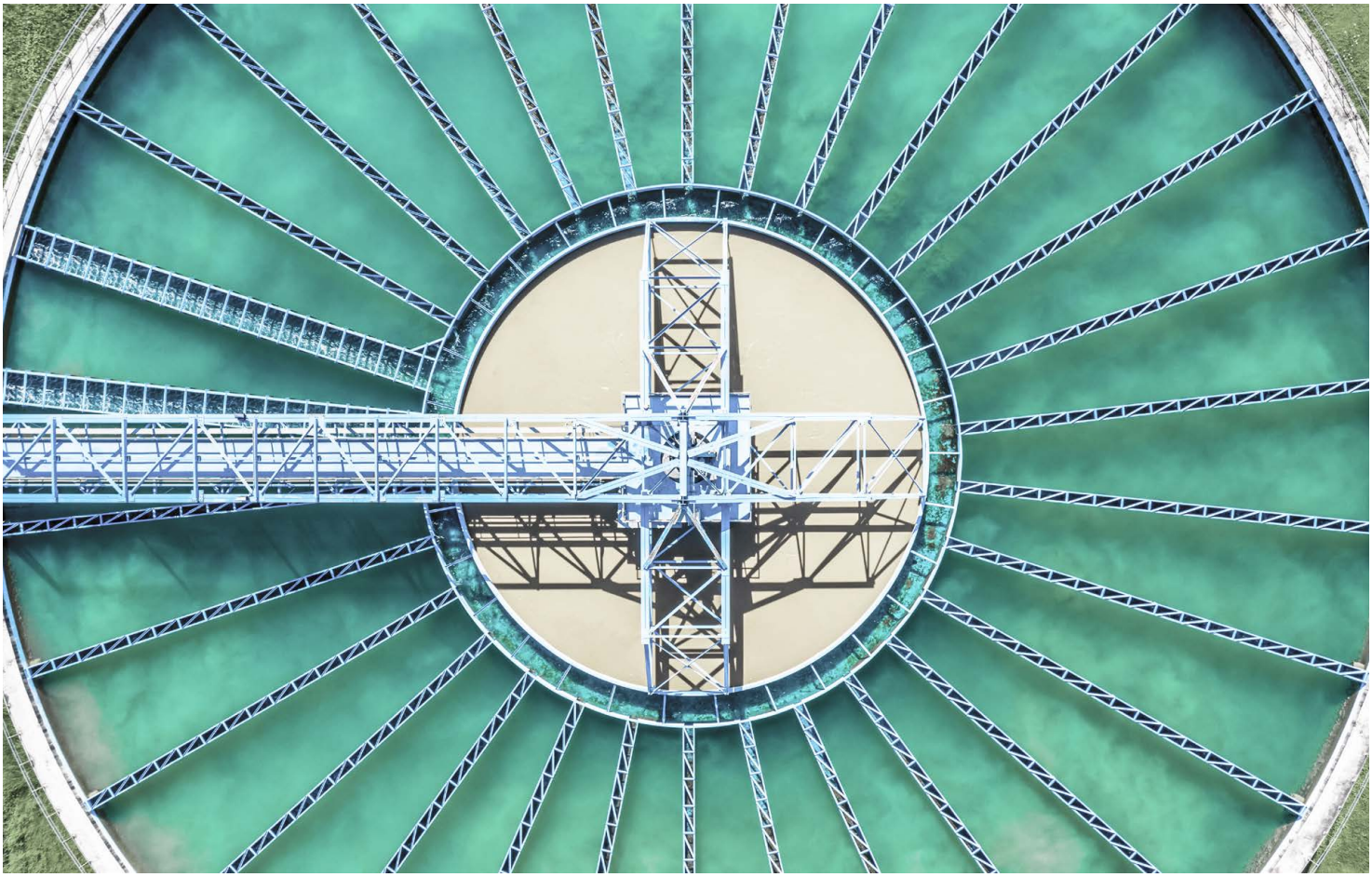
Central to the Board's conclusion was its treatment of *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] SGCA 24 (**Burgundy**). That case concerned a contract whereby Transocean would provide a drilling rig and drilling services to Burgundy.

It was a condition precedent of the contract that the parties would enter into an escrow agreement to provide security for funds due to Transocean under the drilling contract. When Burgundy failed to provide security, Transocean terminated the drilling contract. The Singapore Court of Appeal held that Transocean was not entitled to damages representing the profit it would have made under the drilling contract.

The Board considered that the determinative fact in Burgundy was that Transocean could have performed the drilling contract without the security Burgundy was obliged to provide under the escrow agreement. That was not the case here.

The vital connection between the contracts made it clear that the Government could not employ another contractor to build the plant and subsequently perform the MOMA. The MOMA was a contract under which GWA would manage, operate and maintain the plant it had designed and constructed under the DBA. The existence of separate contracts did not of itself have the result that GWA could only recover in respect of loss directly attributable to breach of the DBA.

https://www.bailii.org/uk/cases/UKPC/2020/18.html



# DBE Energy Limited v Biogas Products Limited

## [2020] EWHC 1232

### Key takeaways

Courts will examine the circumstances of a case to determine the scope of a party's design obligations under a contract.

Design obligations may not be limited to the design of particular, discrete components that a contractor has been engaged to produce. Sometimes, the contractor's obligations will extend further, including ensuring that the components they have designed are able to be safely integrated into the project as a whole.

### Keywords

design obligations

## Facts

The claimant, DBE Energy Ltd (**DBE**), owned an anaerobic digestion facility (**AD Facility**) in Surrey, England. The defendant, Biogas Products Ltd (**Biogas**), is a company specialising in the design and construction of components of anaerobic digestion plants.

DBE engaged Biogas to design, manufacture and supply components to be incorporated in its AD Facility. In particular, DBE entered into two contracts with Biogas for the design, manufacture and supply of four tank heaters and two pasteuriser tanks, respectively.

The standard terms of the contracts included a clause requiring Biogas to perform its obligations under the contract with the utmost skill, care and diligence. It was also conceded by both parties that the statutory implied terms of fitness for purpose and satisfactory quality under UK consumer legislation applied.

It was agreed in discussions between Biogas and DBE that Biogas would also work closely with the process designer engaged by DBE to develop the process design for the AD facility, and Biogas charged for its services.

During commissioning of the AD Facility, it became apparent that both the tank heaters and pasteuriser tanks were defective. They ultimately failed as they were not designed for the operating pressures of the hot water system to which they were connected.

## Issues

The key issues arising in the proceeding were:

1. whether Biogas was in breach of the contracts by failing to perform its obligations with the utmost skill, care and diligence;
2. whether Biogas owed DBE a duty of care in tort and whether Biogas was in breach of such a duty; and
3. whether Biogas was in breach of the statutory implied terms of fitness for purpose and satisfactory quality.

These issues necessarily required consideration of the scope of Biogas' design obligations under the contracts and whether the scope extended to ensuring that the tank heaters and pasteuriser tanks were compatible with the rest of the components of the facility, in particular the hot water system.

Biogas, in this respect, argued that the design obligations owed by a party are determined by the contractual documents and accompanying specifications. In this case, Biogas argued it had little or no contractual obligation to have regard to the design requirements of the hot water system into which the tank heaters and pasteuriser tanks were to be installed and DBE did not provide a specification identifying the operating pressures of the hot water system.

# Decision

## Contractual obligations

The Court rejected Biogas' argument, holding that as part of its express obligation to exercise utmost skill, care and diligence, Biogas was obliged to ensure that it understood what the operating pressures in the hot water system would be and to take these into account in the design of the tank heaters and pasteuriser tanks, such that they could be safely integrated into the overall design of the AD Facility.

The contracts could not be seen in isolation from the other activities that Biogas was engaged in on site, ie assisting with both process and mechanical design. Biogas was not engaged as a subcontractor to provide a component as a discrete or isolated piece of work.

Although there was a lack of contractual documentation, it was clear from the evidence that Biogas was to be involved in both the mechanical and process design of the AD facility, which included the hot water system.

The fact that DBE had also engaged a separate process designer did not divest Biogas of its duties in respect of that work.

The Court found that Biogas failed to exercise reasonable care and skill under both contracts. In the circumstances, a reasonably competent designer and supplier of tank heaters and pasteuriser tanks would have taken steps to ascertain whether they were capable of withstanding the operating pressures of the hot water system to which they would be connected.

The Court held that the exercise of the utmost care and skill also requires and includes compliance with all applicable legislation and regulations.

However, it was found that the failure to exercise reasonable care only caused the failure of the pasteuriser tanks and did not cause the failure of the tank heaters.

The Court also held that there was insufficient evidence that DBE had failed to mitigate its loss by proceeding with the commissioning of the second pasteuriser tank despite the failure of the first pasteuriser tank.

## Duty of care and negligence

Biogas owed DBE a concurrent duty in tort. The Court held that Biogas' position was analogous with that of a design and build contractor, which can owe a duty of care in tort coterminous with its contractual duties.

Biogas assumed responsibility for ensuring the compatibility of the design of the tank heaters and pasteuriser tanks with the hot water system and DBE relied on Biogas' expertise in dealing with both process design and mechanical design.

For the reasons discussed above in relation to Biogas' contractual obligations, Biogas was found to be negligent in addition to being in breach of the contracts.

## Statutory implied terms

The Court further found that neither the tank heaters nor pasteuriser tanks were fit for their purpose, as required by UK consumer legislation. Here, fitness for purpose required that the tank heaters and pasteuriser tanks not only be effective in operation as components in their own right but also that they be able to be safely integrated into the hot water system at the AD Facility.

However, the Court did not find that the components were of unsatisfactory quality as there was insufficient evidence to indicate defective workmanship.

## Damages awarded

DBE was awarded:

- the cost of installing temporary tanks;
- management fees;
- SCADA programmer fees;
- the cost of replacing and reinstalling the pasteuriser tanks; and
- loss of revenue.

Biogas failed to establish its counterclaim for unpaid invoices.

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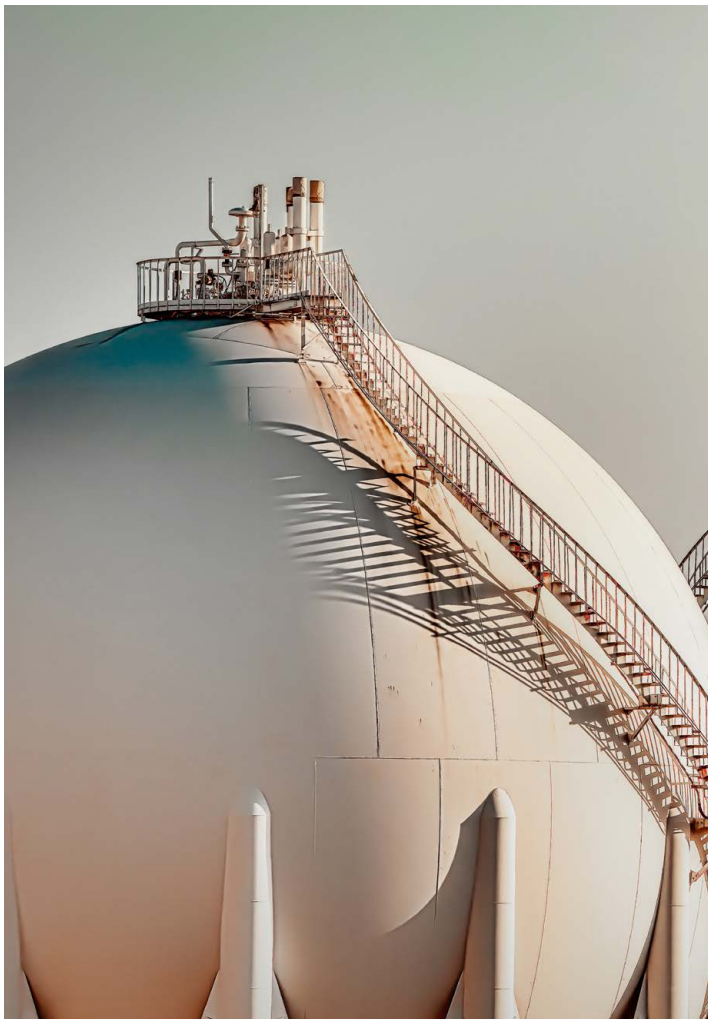
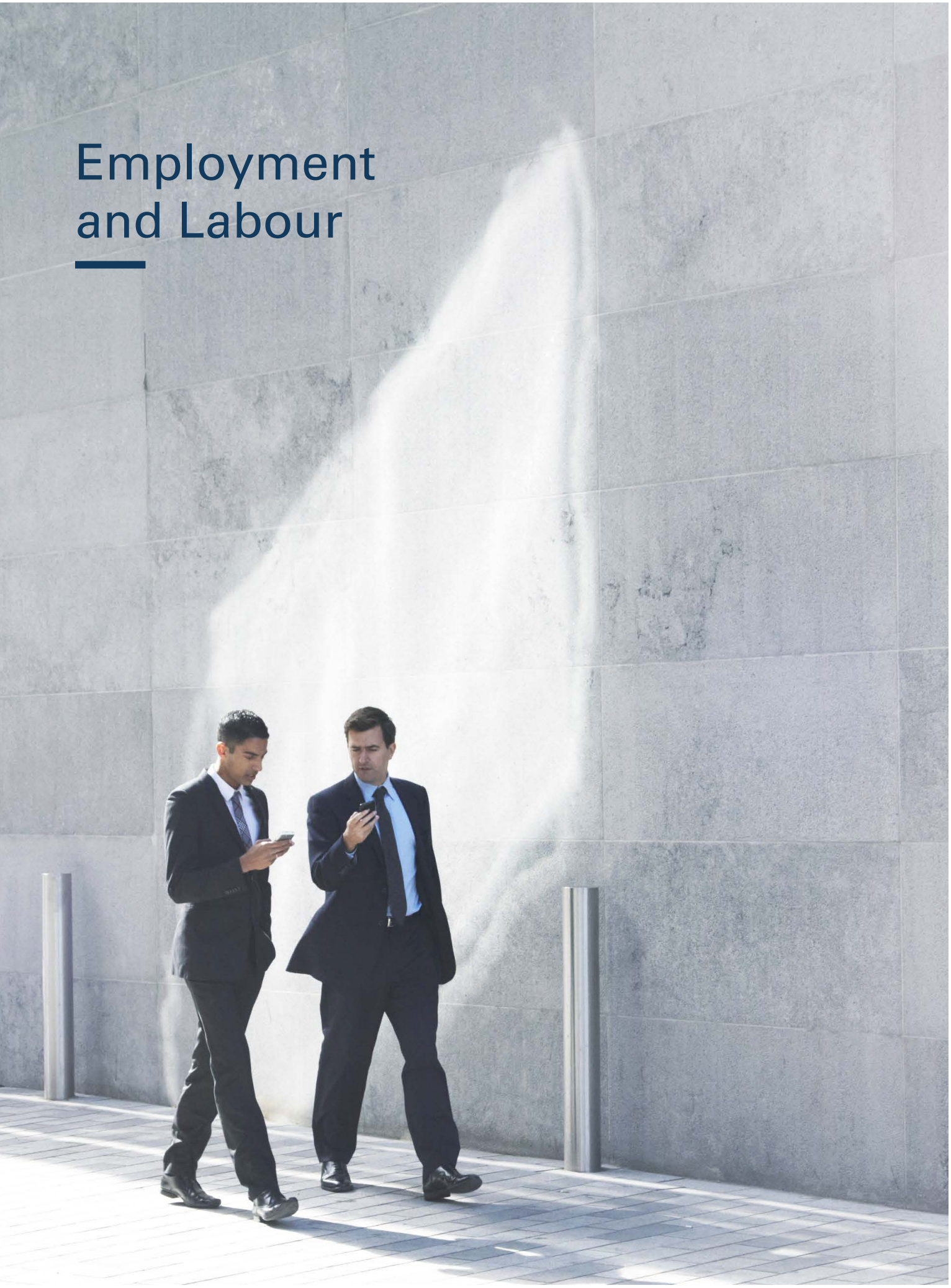


# Employment and Labour



# Freedom of speech: how does it exist in an employment context?

Cases involving employees who publicly express personal opinions and beliefs through social and mainstream media continue to challenge long-established employment principles.

For employers, it has become increasingly difficult to maintain control over the behavioural expectations they set for employees, particularly in relation to conduct that occurs outside of work hours.

With the introduction of the *Human Rights Act 2019* (Qld) in Queensland on 1 January 2020 and following the recent decision of *James Cook University v Ridd* [2020] FCAFC 123, it is important that employers remain mindful of their employees' right to freedom of speech.

## Case study: Ridd v James Cook University

Professor Peter Ridd, an academic and employee of James Cook University (the **University**) was dismissed from his employment with the University after it was found that he breached the Code of Conduct by denigrating the University and his colleagues and by failing to maintain confidentiality during the disciplinary process.

The University issued a censure to Professor Ridd after he expressed concerns in both an email to a journalist and an interview on Sky News about the science underpinning the Federal Government's spending on the Great Barrier Reef.

In his view, the research that demonstrates damage to the Great Barrier Reef is wrong and there are systemic quality assurance concerns with the underlying science. As part of this, Professor Ridd claimed that key stakeholders of the University needed to "check their facts before they spin their story" and "can no longer be trusted".

The University issued a formal censure to Professor Ridd after finding that he had engaged in conduct contrary to the Code of Conduct as he expressed a professional opinion in a manner that was not collegial and impacted on his colleagues, the reputation of the University and its stakeholders.

Despite this, Professor Ridd continued to make public comments expressing his views. The University ultimately issued Professor Ridd with two speech directions, five confidentiality directions, a 'no satire' direction and two censures in relation to his conduct.

The University subsequently terminated Professor Ridd's employment after it determined that he:

- breached the Code of Conduct on 17 occasions;
- repeatedly breached confidentiality directions; and
- failed to treat colleagues with respect.

In the first instance, Judge Salvatore Vasta of the Federal Circuit Court considered whether the findings about Professor Ridd's conduct, the directions and censures issued to him and the termination of his employment were contrary to the James Cook University Enterprise Agreement 2013-2016 (the **Agreement**).[1]

The Agreement contained a clause which set out a right to intellectual freedom and stated the University's commitment to acting in a manner consistent with that, provided staff do not harass, vilify, bully or intimidate those who disagree with their views.

Professor Ridd's legal representatives argued that each allegation of misconduct related to him exercising intellectual freedom in accordance with the Agreement. The University maintained it had never sought to silence Professor Ridd or infringe on his right to intellectual freedom, but rather acted on concerns of serious misconduct and breaches of the Code of Conduct.[2]

Judge Vasta found that the Code of Conduct was subordinate to the Agreement and that it was only when behaviour was not covered by the intellectual freedom clause in the Agreement that the Code of Conduct could apply. Judge Vasta determined that each of the 17 findings of misconduct, the directions and censures issued to Professor Ridd and his dismissal were unlawful.

On 22 July 2020, on appeal to the Federal Court of Australia, Justices John Griffiths and Sarah Derrington considered whether, properly construed, the Agreement provided Professor Ridd with a right to express his opinions in a way that was unconstrained by the Code of Conduct.

1 *Ridd v James Cook University* [2019] FCCA 997.
2 *James Cook University v Ridd* [2020] FCAFC 123.

Justices Griffiths and Derrington determined that while the Agreement informed the "content of the exercise of intellectual freedom", the Code of Conduct "regulates the manner in which that freedom may be exercised".

Justices Griffiths and Derrington held that the intellectual freedom clauses of the Agreement did not excuse Professor Ridd's conduct and that the University did not contravene the *Fair Work Act 2009* (Cth) when it dismissed him.

## The Human Rights Act 2019 (Qld)

The *Human Rights Act 2019* (Qld) (the **HR Act**) makes significant changes to the way in which administrative decisions are to be made in Queensland.

The HR Act introduces 23 civil, political, economic, social and cultural human rights with the fundamental objective of "building a culture in Queensland where human rights are respected, protected and promoted."

The HR Act requires that:

- parliament consider human rights when proposing and drafting legislation;
- courts and tribunals interpret legislation in a way that is compatible with human rights; and
- public entities, performing a public function, make decisions compatible with human rights.

A public entity is an organisation or body which provides services to the public on behalf of the State or another public entity. Public entities must consider the protected rights under the HR Act when making any decisions. The protected rights must be balanced against the rights of others and public policy issues of significance.

With the commencement of the HR Act, the question arises: how will protected rights, in particular the right to freedom of expression, operate alongside an employer's right to regulate conduct where there is a sufficient connection to employment?

Recent authorities have made clear that the use of social media in a manner contrary to an employer's interests can constitute a valid reason for dismissal.[3] However, the protections afforded to employees by the HR Act in this context are yet to be tested.

The right to freedom of expression contained in section 21(2) of the HR Act creates challenges for employers in circumstances where the expression of an opinion, observation or belief by an employee is contrary to their employer's expectations.

## Implication of the Ridd case for employers

The Ridd case is a good example of the inherent tension that can often exist between the right to freedom of speech and an employer's ability to set expectations in documents that can potentially curtail that, for example in a Code of Conduct.

When considering whether an employee has engaged in misconduct, employers need to consider the interplay between all relevant rights and obligations, including those set out in an enterprise agreement and any Code of Conduct.

There is a risk that employment decisions and disciplinary outcomes will be unlawful if the rights to free speech are not expressed to be subject to other obligations, such as a Code of Conduct.

Employers covered by the HR Act also need to consider the potential operation of that regime. In *Castles v Secretary to the Department of Justice* [2010] 28 VR 141, the Court said:

> "it will be sufficient in most circumstances that there is some evidence that shows the decision maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person and that the countervailing interests or obligations were identified."

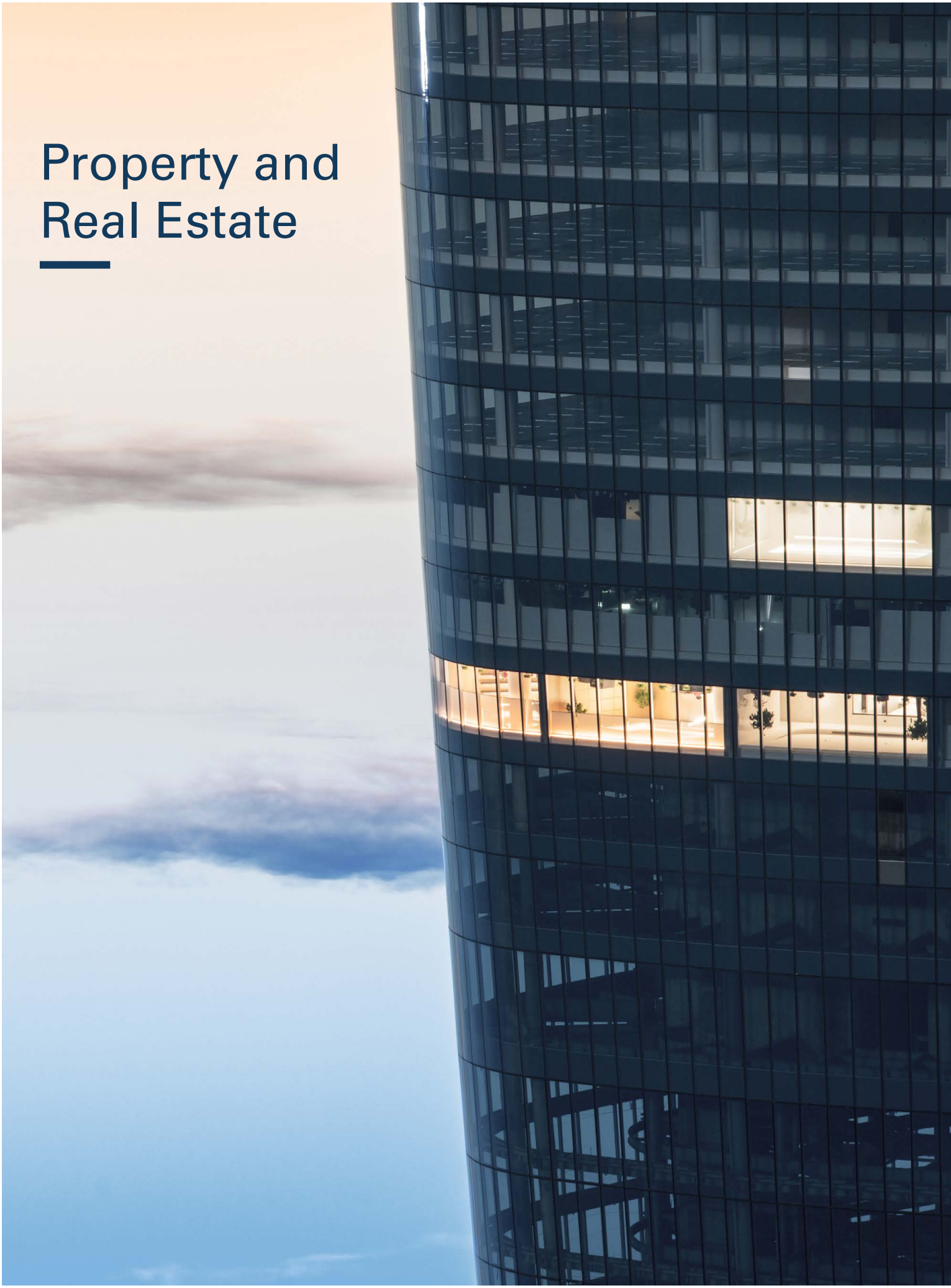
## Key takeaways

Following these developments, key takeaways emerge:

1. employers need to ensure that employment contracts and policies appropriately capture the behavioural values and expectations of their organisation and how these operate with other rights, such as an employee's right to express their personal views and opinions;
2. employers need to consider the interplay between the rights and obligations in employment related documents, for example how enterprise agreements and a policy such as a Code of Conduct operate together; and
3. employers need to ensure that they strike the right balance between regulating employee conduct and behaviour while at the same time allowing employees to appropriately exercise their own rights, such as the right to express their personal views and opinions.

3 *Renton v Bendigo Health Care Group* [2016] FWC 9089; *James Cook University v Ridd* [2020] FCAFC 123.

# Property and Real Estate



# Build-to-rent: can it drive (part of) the construction industry in a COVID-normal world?

Purpose-built rental properties, commonly known as 'build-to-rent' (**BTR**) in Australia, are considered an essential component of the housing market in most sophisticated economies.

In order to address an increasing demand for rental properties that will only be accelerated by the economic impacts of COVID-19, a wider range of housing types, tenures and price points is needed in Australia, particularly in urban locations.

Could build-to-rent be the solution to broadening Australia's housing horizons?

In comparison to other nations around the world, Australia does not offer a large degree of variety when it comes to housing alternatives. Our East Coast capital cities – namely Sydney and Melbourne – are considered to be some of the least affordable housing markets in the world, offering next to no purpose-built, professionally managed rental housing. With decades of buy-to-let investor activity in the past, Australia's residential sector is fragmented, with almost all private rented accommodation in the hands of individual landlords.

In recent years, a shift towards rental housing has swept across the globe. The combination of personal preferences and demographic trends, as well as constraints on purchase affordability, has meant that more individuals are not only renting, but renting for longer periods of time.

## What is build-to-rent?

Most sophisticated economies consider purpose-built rental housing properties, or BTR, an essential component of their housing market. The United States and many other nations which have an established market refer to this asset class as 'multi-family' as multiple families live in a single building (with one owner). The term BTR reflects the nascent nature of this asset class in Australia – we don't have existing assets and, as such, new buildings are being built for the purpose of renting, rather than for the traditional purpose of selling.

BTR properties are large scale developments with a single owner who designs and procures construction with the intention of long-term ownership. They are developer-owned and managed on-site, offering amenities and services, community programing and 24/7 maintenance for residents, and give residents the opportunity to engage in a long-term, undisturbed tenancy in their apartments.

BTR housing represents an efficient use of land by bringing positive economic multipliers for the communities where such properties are developed. Given the increasing scale and ownership of BTR, this form of housing lends itself to major mixed-use urban renewal and could serve as a catalyst to attract other forms of investment to areas and precincts, as well as promote infrastructure investment.

## How is it different to a standard apartment tower?

A key advantage of BTR projects (particularly in the current economic climate) is that they do not rely on pre-sales to finance their development, the consequence being that positive consumer sentiment is not needed in order to facilitate positive economic output. For this reason, we're expecting numerous BTR projects to begin construction in the short term when obtaining pre-sales for a new apartment project would likely be challenging.

As a BTR project is designed for long-term ownership by a developer (rather than the quick sale in traditional apartment towers), the developer will retain responsibility for ongoing maintenance and repair. Accordingly, there is likely to be greater focus on quality materials and construction methodology.

The BTR model also incentivises adopting energy efficiency and renewable energy technologies as upfront costs are recouped during operations and in long-term asset value.

## A macro view is needed

From an investment perspective, BTR is very similar to other types of income generating properties. However, unlike other classes of properties, leases in BTR buildings are generally shorter term with tenants who are not entities of substance.

This means that the normal test of weighted average lease expiry (**WALE**) and concepts of tenant covenant and pre-commitment are not as relevant. What is relevant is a macro view of the market, vacancy rates and rents, a location, design and strategy that will attract and retain tenants and a proactive manager who can minimise debtors and keep the vacancy rate low.

## Funding options

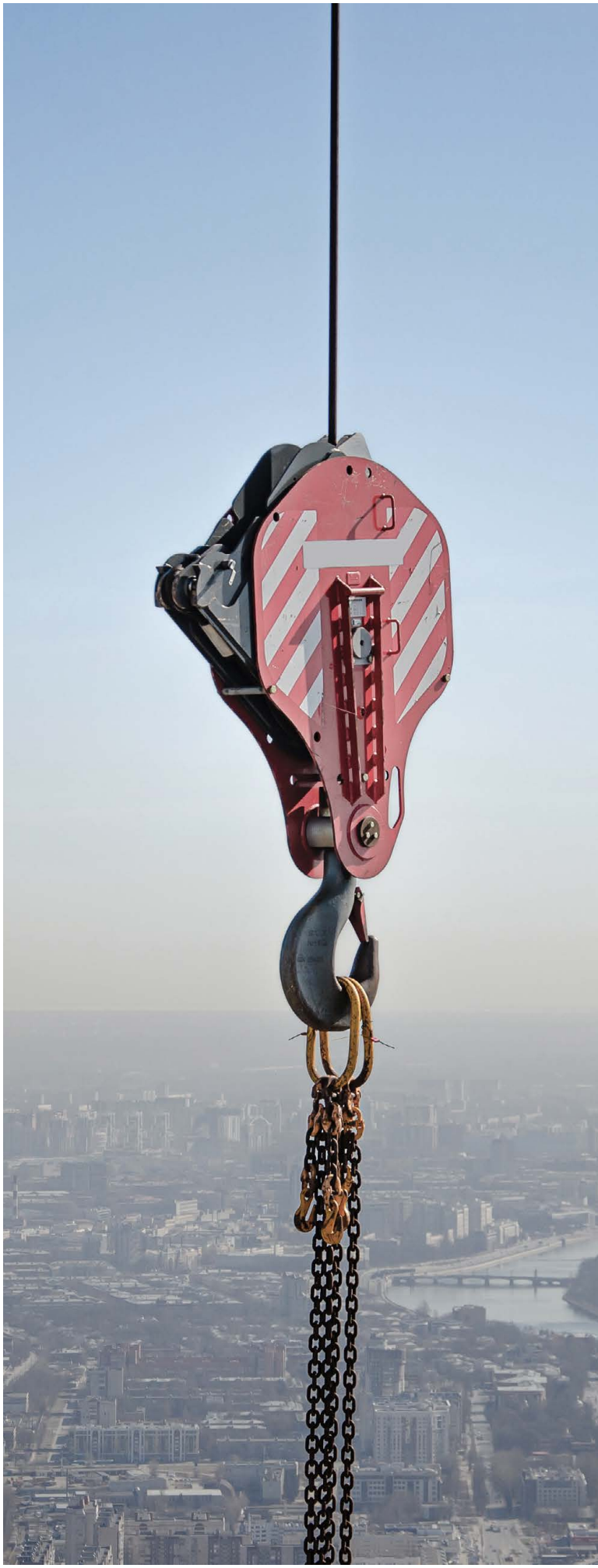
A shorter term WALE and turnover of tenants requires a new way of thinking from a financing perspective. For example, financiers of BTRs will need assurance regarding market demand for a project, the management arrangements of the property and the attractiveness of the building to tenants on an ongoing basis.

However, the progress of BTR overseas and locally has shown that solutions are emerging. In off-shore markets, BTR housing has been categorised as a low-risk, core real estate asset class for institutional investment, providing for lower risks and lower yields over the long term.

Since the model is dependent on occupancy and steady rental growth, owners are incentivised to deliver high quality product and amenities. This makes BTR attractive for superannuation, pension funds and risk-averse investors looking for returns over a period of decades.

## Final thought

BTR can create thousands of construction and property management jobs almost immediately. BTR properties also provide a greater sense of community, something which will be increasingly important given the prevalence of feelings of isolation arising from the COVID-19 crisis.



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The article discusses the recent 'gas-led recovery' announcement by Prime Minister Scott Morrison, which includes a series of measures aimed at preventing forecast shortfalls in dispatchable power and addressing price equity in the East Coast gas market.

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## GAR Know-How Construction Arbitration 2020: Australia

Corrs contributed the Australia section to Global Arbitration Review's 2020 Construction Arbitration Know-How, a publication that provides an overview of common construction arbitration issues across different jurisdictions.

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## Changing legal landscape forces builders and developers to revisit their obligations and liabilities

The article outlines why developers and builders need to carefully consider their obligations under current and impending legislative requirements that govern the building and construction sector.

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## Corrs High Vis: Episode 43 – Common issues involving major developments above and near existing rail corridors

The podcast discusses common issues involving major developments above and near existing rail corridors.

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Chambers Asia Pacific Guide, 2018–2020

Best Lawyer – Alternative Dispute Resolution, Litigation and Regulatory Practice
Best Lawyers Peer Review, 2013–2020

Best Lawyer – Construction/Infrastructure Law
Best Lawyers Peer Review, 2011–2020

Leading Individual – Construction
Asia Pacific Legal 500, 2018

The [Construction] team's prize litigator
Asia Pacific Legal 500, 2011–2018

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"Andrew has demonstrated a great approach in prioritising to meet the challenge of dual negotiations. His enthusiasm, knowledge, attention to detail and performance in meetings has been outstanding"
Energy and resources client

"Andrew demonstrates a strong power of analytical reasoning and excels in analytical thinking"
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Asia Pacific Legal 500 2018

Dispute Resolution and Litigation
Asialaw Leading Lawyers 2016–2018

Leading Construction & Infrastructure Lawyer
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"He provided valuable support, strategic advice, insight and good humour in a troublesome case"
CEO, Statutory Body

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Best Lawyer – Natural Resources, Energy, Mining and Oil & Gas
Best Lawyers Peer Review, 2009–2020

Best Lawyer – Climate Change
Best Lawyers Peer Review, 2010–2020

Brisbane Energy Lawyer of the Year
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"The best construction lawyer in the market"
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Best Lawyer – Planning and Environment
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Leading Planning & Development Lawyer, Queensland Doyle's Guide to the Australian Legal Profession, 2018, 2019

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**Best Lawyer – Planning & Environment**
Best Lawyers Peer Review, 2010–2020

**Best Lawyer – Land Use and Zoning**
Law Best Lawyers Peer Review, 2018–2020

**Best Lawyer – Regulatory Practice**
Best Lawyers Peer Review, 2013–2020

**Queensland Land Use and Zoning Lawyer of the Year** Best Lawyers Peer Review, 2019

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**Best Lawyer – Labour and Employment**
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**Best Lawyer – Occupational Health & Safety** Best Lawyers Peer Review, 2018–2020

**Lawyer of the Year – Employee**
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"Professional, attentive, responsive and considers the bigger picture"
General Counsel Australasia, manufacturing client

"A highly capable and dependable lawyer who always has her eye on the tasks ahead and factors them into her strategic decision making and matter management"
Senior Legal Counsel, property client

"Her expertise across jurisdictions has been of particular benefit to us given our national portfolio"
Senior Legal Counsel, multinational developer

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**Pre-eminent Lawyer** Doyles Guide, 2019

**Leading Lawyer – Infrastructure & Project Finance**
Chambers Asia Pacific and Global Guides, 2009–2019

**Best Lawyer – Project Finance and Development Practice**
Best Lawyers Peer Review, 2017–2019

**Best Lawyer – Mining Law**
Best Lawyers Peer Review, 2016–2019

**Best Lawyer – Construction/Infrastructure Law**
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Property Industry Client, 2020

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Leading Construction Lawyer Victoria
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"A big-picture thinker" and "someone who can easily distil complex matters into simple issues."
Chambers Asia Pacific Guide, 2018

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Leading Lawyer : Construction – Australia
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Doyle's Guide – 2018–2019

Leading Lawyer – Construction & Infrastructure
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Best Lawyer – 2020 Lawyer of the Year, Construction/Infrastructure Law – Melbourne
Best Lawyers Peer Review, 2019

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Leading Lawyer: Employment Australia
Chambers Asia Pacific Guide, 2012–2020

Leading Lawyer: Government - Australia
Chambers Asia Pacific Guide, 2018–2020

"Genuinely tries to always support the needs of his clients and to deliver tailored, customised solutions" Chambers Asia Pacific Guide, 2018

"He is very intelligent and strategic"
Chambers Asia Pacific Guide, 2018

Best Lawyer – Labour & Employment
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Recommended – Who's Who Legal
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Recommended – Who's Who Legal
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"Best Lawyer in Transport & Logistics"
Euromoney LMG Australasia Women in Business Law Awards 2013

Nominee "Legal Mentor of the Year"
Lawyers Weekly Women in Law Awards 2015 and 2016

Nominee for Mentor of the Year
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Chambers Asia Pacific Guide, 2018

Leading Lawyer - Construction & Infrastructure
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Leading Lawyer – Infrastructure & Project Finance
Chambers Asia Pacific Guide, 2017–2019

Leading Lawyer – Infrastructure
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"Stands out for his refreshing attitude … He's excellent at all levels. He's direct and straight and understands the subtleties."
Chambers Asia Pacific 2020, Band 3: Government

Best Lawyer – Government Practice
Best Lawyers in Australia 2020

Finalist, Government Lawyer of the Year
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"Jared's advice and guidance was a valuable asset" Hon Marcia Neave AO, Commissioner, Royal Commission into Family Violence;

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Leading Construction & Infrastructure Litigation Lawyers – Victoria (Recommended)
Doyles Guide, 2018–2019

"Horsfall is a specialist in construction dispute resolution and has previously advised on infrastructure and development projects such as the Adelaide Desalination Plant and Origin Energy's BassGas project in Victoria."
Australasian Lawyer, February 2014

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"A clear standout"
Asia Pacific Legal 500, 2015, 2016

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Senior Legal Counsel, multinational developer

"He is approachable and accessible, adapting his style and language as appropriate to the audience and topic"
CEO, not-forprofit housing provider

"The advice provided and work done by David on the legal documentation was instrumental in the success of the project"
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Chambers Asia-Pacific 2020

"She's good at developing alternative commercial solutions for dealing with risks"
Chambers Asia-Pacific 2019


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Chambers Asia Pacific Guide, 2015


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"Her client service is second to none, and she often goes above and beyond to provide advice producing a result which is strategic and commercial."
Chambers Asia Pacific Guide, 2018


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Leading Leasing Lawyers – NSW 2019
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Property Developer Client

"She has an extremely strong legal mind, is great on the pure property side, a hard worker and quick to get us what we need"
Property Developer Client


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**Best Lawyer – Occupational Health and Safety Law**
Best Lawyers Peer Review, 2018–2020

**Best Lawyer – Employee Benefits**
Law Best Lawyers Peer Review, 2018–2020

**Recommended Lawyer – Employment (Employer Representation)**
Doyle's Guide, 2012–2017, 2019


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**Rising Star**
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**Best Lawyer – International Arbitration**
Best Lawyers Peer Review, 2018–2020

**Leading Lawyer – Construction (WA)**
Doyle's Guide to the Australian Legal Profession, 2012–2018

**Who's Who Legal**
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**"A standout from a construction perspective"** and **"the leading practitioner in the West."**
Well regarded for his practice on contentious matters, he often represents contractors and construction companies with regard to major disputes. A client notes that he is **"very easy to deal with and also very clever."**
Chambers Construction – Australia 2020


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Expertise Based Abroad in Papua New Guinea: General Business Law - PNG
Chambers Asia Pacific & Global Guide, 2020

Leading Lawyer – Papua New Guinea
Chambers Asia Pacific Guide, 2018

Expertise based abroad in Australia – Papua New Guinea
Chambers Asia Pacific & Global Guides, 2019

Best Lawyers – Corporate Law
Best Lawyers 2020

"It's great to get this transaction across the line and I just wanted to thank all of you for your contribution over the last year – including all those who worked so tirelessly over the last few days and especially Nick Thorne who has provided fantastic support from the very beginning."
Oil and Gas client

"Provided outstanding support on the deal ."
Oil and Gas client

"Responsive, commercial and a pleasure to work with." Corporate client

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