MinterEllison

Construction Law Update

June 2017

Contents

Legislative update

Commonwealth

Personal Property Securities Amendment (PPS Leases) Act 2017 (Cth)

Darren Sumich | Wayne Fellows | Amy Dunphy

Catchwords

Personal Property Securities – Personal Property Security Register – PPS Leases

Summary

On 20 May 2017 amendments commenced to section 13 of the *Personal Property Securities Act 2009* (Cth) (**PPSA**) to reduce red tape and regulatory risks associated with registering short term or 'indefinite term' PPS leases on the Personal Property Security Register (**PPSR**).

What has changed

The timeframes for registering PPS leases have been extended and clarified.

To require registration as a PPS lease on the PPSR, a lease or bailment of goods (that otherwise satisfies the requirements for a PPS lease) entered into after 20 May 2017:

- must have a minimum term of **more than** two years (increased from a term of more than one year);
- will no longer be deemed to be a PPS lease if it is for an 'indefinite term' **unless and until** it runs for a period of **more than** two years. That is, leases (and bailments) with no fixed end date can be registered towards the end of the two-year period instead of needing to be registered at the start;
- that is renewable either automatically or at the option of one of the parties must be for a combined period **in excess** of two years (increased from over one year); and
- that is for a shorter-term arrangement of **up to** two years, the lessee or bailee must retain uninterrupted possession (with consent) for more than two years (increased from more than one year).

Leases or bailments entered into before the amendments commenced are unaffected by the changes.

Implications for the construction industry

Given that a failure to register a lease in time can result in loss of priority against other secured parties, a third party taking the property free of the security interest or loss of the security interest in the event of insolvency, the changes provide greater protection and flexibility to companies engaged in the business of leasing goods.

Despite the extra comfort that the changes bring, it remains unclear whether a lease that did not start out as a PPS lease but later becomes a PPS lease after two years will vest in the grantor in the event of the grantor's insolvency if the security interest has not been registered within six months before the day on which the winding up began or 20 business days after the security agreement commenced as required by section 588FL of the *Corporations Act 2001* (Cth). Further questions arise as to whether a PPS lease will retain the benefit of 'super-priority' as a purchase money security interest (which it would otherwise be afforded) if not registered within 15 business days of the lessee (or bailee) taking possession of the equipment or goods (and not two years later) as required by section 62 of the PPSA. For best protection, any hire arrangement should continue to specify if the term of the hire is intended to be more than two years and outline the scope and time for any extensions. Caution should also be exercised in assessing whether an agreement for lease or bailment of property creates a term of two years from its creation as distinct from the lessee or bailee having possession. Registrations should continue to be made in a timely manner.

Importantly, the amendments **do not** modify the operation of the PPSA in relation to leases which are 'in-substance' security interests.

While a PPS Lease will typically apply to goods intended to be delivered back to the owner after the term of the hire has finished, an 'in substance' lease under section 12(1) of the PPSA arises where a transaction secures payment or performance of an obligation and the lessee becomes the owner of the goods once the terms of the lease have been fulfilled. Notably, a lease may be a PPS lease and an 'in-substance' lease.

For construction companies in the business of hiring or leasing goods, understanding the differences between 'in substance' leases and PPS leases will be even more important following the changes in registration timelines in order to perfect their security interests and protect title to equipment.

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New South Wales

Electronic Transactions Legislation Amendment (Government Transactions) Act 2017 (NSW)

Richard Crawford | Simon Moses

Summary

The *Electronic Transactions Legislation Amendment (Government Transactions) Act 2017* (NSW) (**Amending Act**) received royal assent on 27 June 2017. The Amending Act came into force on the same day. The Amending Act amends a number of other Acts, including the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**).

Service by email now available

Relevantly, pursuant to the Amending Act, any notices (including payment claims, payment schedules and adjudication applications) required to be served in accordance with the SOP Act can now also be served via email (with the relevant email address being **any** email address notified by the recipient to the sender as being an address for service of such notices).

Service by facsimile

The Amending Act also removes the ability of notices required to be served in accordance with the SOP Act to be served via facsimile.

Importantly, where an existing contract expressly permits service via facsimile, service via this method will still be valid for the purposes of the SOP Act as section 31(e) of the SOP Act (which provides that the parties can agree to methods of service of notices under the SOP Act) remains in force.

Recommendations

We recommend that industry participants immediately:

- review their existing contracts and confirm that any email address included in the contract is still valid and/or that the recipient is still employed by the organisation;
- notify counterparties of a general email address for service of notices under the SOP Act; and
- update their precedents accordingly.

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Victoria

Building Amendment (Enforcement and Other Measures) Act 2017 (Vic)

Owen Cooper | Tom Kearney | Rahul Bhattacharya

Summary

On 25 May 2017, certain parts of the *Building Amendment (Enforcement and Other Measures) Act 2017* (Vic) (**Act**) came into operation. The most significant of the newly-operational provisions impose serious penalties on builders who carry out works without a building permit.

Stronger penalties for illegal building works

Under the Act, individuals and corporations who carry out building works while knowing that:

- a building permit is required for the work and a building permit is not in force; or
- the work is not carried out in accordance with the *Building Act 1993* (Vic) (**Building Act**), the building regulations (as prescribed under the Building Act) or the relevant building permit for the works,

are carrying out illegal building works (**Illegal Building Works**).

The new Act imposes tough new penalties: undertaking Illegal Building Works is an indictable offence, and carries a maximum penalty of five years' jail time and fines of $93,276 for individuals and $466,380 for corporations.

Other key changes

Some of the other key changes that came into force on 25 May 2017 under the Act include:

- extending the liability for offences under the Building Act committed by a member of a partnership to every other member of the partnership;
- transitional provisions that provide for bodies corporate to be registered as building practitioners; and
- improving the ability of commissioners and persons employed or engaged by the Victorian Building Authority (**VBA**) to exercise their functions under the Building Act by expanding existing protections against personal liability.

The remaining parts of the Act that are not yet operational will introduce additional reforms, including more expansive injunction powers for courts, such as to halt building works or order rectification works, and strengthening regulations for building inspections to improve quality and transparency.

The remaining provisions of the Act will come into operation on 1 July 2019 or such earlier date as proclaimed.

Implications for the industry

The new penalties for Illegal Building Works are designed to deter builders from intentionally carrying out building works that are in breach of the Building Act or a building permit.

However, in order to prove such an offence there must be evidence that the builder knew that the works would breach the requirements of the Building Act or a building permit. This may be challenging in all but the most flagrant cases of misconduct.

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In the Australian courts

Commonwealth

470 St Kilda Road Pty Ltd v Robinson [2017] FCA 597

Owen Cooper | Tom Kearney | Desiree Chong

Catchwords

Consumer law – Statutory declaration – Whether statutory declaration is misleading and deceptive – Negligence – Whether statutory declaration contained negligent misstatements

Significance

The decision provides guidance on the legal meaning of a statutory declaration and the circumstances when a statutory declaration will be misleading and deceptive.

Facts

In October 2010, Reed Constructions Australia Pty Ltd (**contractor**) entered into a design and construct contract with Reshape Developments Pty Ltd (**developer**), representatives of 470 St Kilda Road Pty Ltd (**applicant**) under the contract (**contract**), for the redevelopment of an office building at that address.

The contract provided for the contractor to make monthly payment claims for work undertaken in that month. This process involved forwarding to the developer each payment claim, consultant reports regarding performance of work and a statutory declaration regarding payment of subcontractors and suppliers.

In December 2011, the Chief Operating Officer of the contractor, Glenn Robinson (**respondent**) in support of the contractor's payment claim for $1,426,641.70 (**payment claim**) swore a statutory declaration (**statutory declaration**) stating:

> *'That to the best of my knowledge and belief having made all reasonable enquiries, at this date –*
>
> *…all sub-contractors or suppliers of materials who are or at any time have been engaged on the work under the Contract have been paid in full all monies which have become payable all sub-contractors or suppliers of materials who are or at any time have been engaged on the work under the Contract have been paid in full all monies which have become payable'.*

In January 2012, in reliance upon the statutory declaration, the applicant paid the full amount of the payment claim to the contractor.

In February 2012, the applicant discovered that the contractor's payments of subcontractors or suppliers had been overdue from October and November 2011. In March 2012, the applicant terminated the contract.

In July 2012, a liquidator was appointed to the contractor.

Subsequently the applicant commenced proceedings against the respondent personally.

Decision

The court found that the statutory declaration was materially untrue and that the respondent was personally liable under the Australian Consumer Law for the repayment of the payment claim plus interest.

The respondent contended that the statutory declaration was a statement as to his state of mind and not an absolute statement to the effect that all subcontractors and suppliers had been paid.

O'Callaghan J rejected these submissions, determining that a statutory declaration is a solemn promise containing an acknowledgement that it is true and correct and is made in the belief that making a false declaration will render the maker liable to the penalties of perjury.

O'Callaghan J determined that the evidence proved that the respondent had knowledge of the contractor's precarious financial position and, contrary to his statutory declaration, he did not make all reasonable enquiries to determine whether payments were made to all subcontractors or suppliers, because he failed to look at any actual invoices or relevant recent monthly reports.

Accordingly, the court decided that the statutory declaration was misleading and deceptive. It was not relevant that the respondent was not being dishonest in making the statutory declaration and that he did not deliberately make a false declaration.

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New South Wales

Laing O'Rourke Australia Construction Pty Ltd v Kawasaki Heavy Industries Ltd [2017] NSWSC 541

Richard Crawford | Fiona Elliot | Jo de Bruyn

Catchwords

Contract construction – whether an existing interlocutory injunction restraining the beneficiary from calling on a bond should be continued – condition precedent to beneficiary's entitlement to call on bond

Significance

A party who procures the issue of a performance bond may be entitled to an injunction where there is a serious question to be tried that, on the proper construction, there is no agreement to call on the bond in the circumstances.

Facts

Laing O'Rourke Australia Construction Pty Ltd (**Laing O'Rourke**) and Kawasaki Heavy Industries Ltd (**Kawasaki**) are parties to a subcontract (**JKC Subcontract**) with JKC Australia LNG Pty Ltd (**JKC**) to construct a number of cryogenic tanks. The relationship between Laing O'Rourke and Kawasaki is governed by a Consortium Agreement. Amongst other things, the Consortium Agreement divides the JKC Subcontract scope between the parties.

Under the JKC Subcontract, Kawasaki provided, on behalf of both it and Laing O'Rourke, an unconditional and irrevocable performance bond (**Kawasaki Bond**).

If JKC makes a call on the Kawasaki Bond, clause 14 of the Consortium Agreement provides that both Kawasaki and Laing O'Rourke must contribute to that call in proportion to their liability under the Consortium Agreement. Under this clause, Laing O'Rourke was also obliged to provide surety bonds to Kawasaki (**Laing O'Rourke Bonds**).

Laing O'Rourke agreed to perform certain obligations of the work within Kawasaki's scope (**Subcontract Works**). On 12 June 2012, Kawasaki delivered to Laing O'Rourke a 'Purchase Order' pursuant to which Laing O'Rourke agreed to perform the Subcontract Works. Article 6 of this Purchase Order also obliged Laing O'Rourke to deliver surety bonds to Kawasaki.

Kawasaki attempted to call on the Laing O'Rourke Bonds to the value of $52.3 million. The parties have now fallen out and are each asserting that the other is liable to it in damages. JKC has not called on the Kawasaki Bond.

Laing O'Rourke was granted an interlocutory injunction restraining Kawasaki from calling on the Laing O'Rourke Bonds.

Laing O'Rourke sought to have the injunction continued pending the determination of an arbitral tribunal which is yet to be appointed under the Consortium Agreement.

Decision

The court found that Laing O'Rourke had established its case and granted the continuation of the existing injunction.

Stevenson J held that the proper construction of the Consortium Agreement needed to be determined objectively by reference to its text, context and purpose. It was accepted that:

- the Consortium Agreement strongly indicated, though does not state, in terms, that the parties intended that Kawasaki could only call on the Laing O'Rourke Bonds if there was a call on it by JKC for the Kawasaki Bond; and
- the Purchase Order was intended to confirm the Consortium Agreement, not to expand the circumstances in which the Laing O'Rourke Bonds could be called on by Kawasaki.

The balance of convenience was strongly favourable to the continuation of the existing injunction on the basis that:

- there was no substantial prejudice to Kawasaki;
- no arbitral tribunal had been established to deal with the underlying dispute (as required under the Consortium Agreement); and
- a call made on the Laing O'Rourke Bonds had the potential to prejudice Laing O'Rourke's prospects of bidding for participation in an unrelated project.

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Queensland

Civil Mining & Constructions Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd [2017] QSC 85 at [887] – [906]

David Pearce | Allie Flack | Alexandria Hammerton

Catchwords

Contract – construction and interpretation of clauses – application of *Queensland Building and Construction Commission Act 1991* (Qld) to contract

Significance

The Supreme Court of Queensland confirmed that a contract will be considered a 'building contract' under the *Queensland Building and Construction Commission Act 1991* (Qld) if it contains even a minor amount of 'building work'.

Facts

Wiggins Island Coal Export Terminal Pty Ltd (**Principal**) engaged Civil Mining & Construction Pty Ltd (**Contractor**) to perform earthworks and other civil works in relation to the Principal's coal export terminal in Gladstone. Amongst other work the Contractor was required to construct hardstand pavements in three areas and two fauna rope bridges over the inland conveyor.

The Principal admitted that the Contractor was entitled to the payment of interest on any moneys held to be due and payable to the Contractor. The parties disputed the rate of interest which would apply. If the contract was for 'building work' under the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**), then interest would be paid at the penalty rate prescribed by section 67P of the QBCC Act.

The Contractor claimed that the pavements works were roadworks not intended for public use but were for use by subsequent contractors at the site. The Principal submitted that the pavement work was more correctly characterised as 'excavating' and 'earthmoving' works and were captured by the relevant exemptions in the *Queensland Building and Construction Commission Regulation 2003* (Qld) (**QBCC Regulation**), or, in the alternative, were temporary.

Decision

The Supreme Court of Queensland held that penalty interest was payable pursuant to section 67P of the QBCC Act. Flanagan J found that the pavement works were 'building work' under the QBCC Act.

His Honour held the works were properly characterised as roadworks as opposed to earthmoving or excavation works. His Honour stated that although the pavement works fell under a section titled 'Rail Receive Bulk Earthworks', the work was more than simply earthmoving and excavating, and included works that would appropriately be classified as roadworks. Importantly, his Honour found that there was no evidence to suggest the works were for public use, and therefore they were not caught by the roadworks exemption in the QBCC Regulation. Flanagan J also accepted the Contractor's submission that the works were not temporary works, as the contract demonstrated they were to be used by subsequent contractors.

Given his Honour's decision in relation to the pavement works, Flanagan J did not have to decide whether the fauna rope bridge work was 'building work' under the QBCC Act.

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D'Arro v Queensland Building and Construction Commission [2017] QCA 90

Michael Creedon | Ben Garvey

Catchwords

Administrative Law – *Queensland Building and Construction Commission Act 1991* (Qld) - retrospective operation of amendments

Significance

The case confirms that an Act will not offend the presumption against retrospective operation if it has future consequences for events which had occurred before the enactment, provided that the Act does not otherwise alter any rights or liabilities which the law had defined by reference to past events.

Facts

Mr D'Arro, the applicant (**builder**) together with four associated companies operated a design and construction business. The builder and the company which handled construction were each licensed under the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**).

In 2009, liquidators were appointed to each of the four companies. In 2010 the builder was made bankrupt.

Because of these events the respondent, Queensland Building and Construction Commission (**QBCC**), decided that the builder was an 'excluded individual' pursuant to section 56AC of the QBCC Act. As a result of being considered an 'excluded individual' for these multiple relevant events, the builder fell under the definition of a 'permanently excluded individual' for the purposes of the QBCC Act and thus was precluded from being granted any further licences by the QBCC.

The builder applied to be categorised as a 'permitted individual' for each of those relevant events, so that he would not be considered an 'excluded individual' for these events. The QBCC refused his application. The builder applied to the Queensland Civil and Administrative Tribunal (**QCAT**) to review the QBCC's decision.

After the hearing, but prior to the decision being handed down, the QBCC Act was amended. Relevantly, the amendments provided that an individual who is an 'excluded individual' for a relevant event does not also become an excluded individual for another relevant event if the QBCC is satisfied that both events were consequences flowing from what was, in substance, the one set of circumstances. If this was the case, the QBCC was permitted under the amendments to categorise an individual as a 'permitted individual' in relation to the relevant excluding event.

The builder argued that, as both the insolvency of his companies and his personal bankruptcy arose from the same set of circumstances, the amendments operated to preclude him from being categorised as a 'permanently excluded individual' and allowed the QBCC to classify him as a 'permitted individual' for the relevant events. The QBCC argued that the application of the amendments to the QBCC Act in QCAT would give the legislation amending the QBCC Act retrospective operation because the QBCC Act (in the form prior to the amendments) operated upon the date of each relevant event to categorise the builder as an excluded individual, thereby creating a liability in the builder which could not be retrospectively changed by the operation of the amendments.

Despite the amendments, QCAT confirmed both of the QBCC's decisions. The builder appealed to QCAT's Appeal Tribunal. Although noting that the member erred in several respects, the Appeal Tribunal rejected the builder's contention that the QCAT at first instance erred in law by failing to apply the amendments made to the QBCC Act, as opposed to the QBCC Act as it was at the commencement of the matter. The builder appealed to the Court of Appeal.

Decision

The court allowed the builder's appeal and ordered that the matter be remitted to QCAT for reconsideration in accordance with the amendments to the QBCC Act. It was noted by the court that because QCAT was deciding de novo, ie reviewing the decision by way of a fresh hearing on the merits, the law as it then existed is applied, not the law as it existed at an earlier time. Accordingly, the question was whether the amendments made to the QBCC Act did not form part of that law to be applied by QCAT in a de novo review of the QBCC's decisions because the amendments were not expressed to operate retrospectively.

The court stated that the amendments would only operate retrospectively if they changed the builder's licence status as it was at a time before the amendments were enacted. Simply because the amendments applied with reference to events that had occurred before the enactment of the amendment did not mean they applied in the circumstances so as to confer, impose, or otherwise affect rights or liabilities which the law had defined by reference to past events.

The court noted that simply being classified as an 'excluded individual' under the QBCC Act did not, of itself, create any liabilities in relation to the builder. Any relevant liability was created by the subsequent cancellation of the builder's licence, or a refusal to grant a further licence, consequent upon the decision that the builder was an 'excluded individual' which was not the case here.

Accordingly, QCAT ought to have considered the amendments in reviewing the QBCC's decisions de novo.

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Mango Boulevard Pty Ltd v Mio Art Pty Ltd & Ors [2017] QSC 87

Andrew Orford | Ben Garvey

Catchwords

Arbitration – *Commercial Arbitration Act 2013* (Qld) – judicial review

Significance

This case provides clarity on the status of arbitral awards under the *Commercial Arbitration Act 2013* (Qld) (**Act**). It confirms that Queensland is in line with other jurisdictions when reviewing arbitral awards.

Facts

In 2003 the parties entered into a joint venture to purchase and develop land. The land was purchased by Kinsella Heights Developments Pty Ltd (**Kinsella**) (a company which was wholly owned Ms Perovich) and Mr Spencer on behalf of the Spencer Family Trust (together, the **original owners**). Mango Boulevard Pty Ltd (**purchaser**) subsequently purchased one half of the shares in Kinsella by a Share Sale Agreement (**Agreement**) which provided that calculation and payment of the purchase price for these shares was delayed until preliminary development approval was obtained.

The parties disputed the eventual calculation of the purchase price for shares, and the original owners sought to have this issue arbitrated under the Agreement. The parties litigated a dispute about whether the relevant arbitration clauses of the Agreement were engaged. It was held that the clauses of the Agreement were engaged, and in 2013 the calculation of the purchase price for the shares was referred to arbitration.

In June and December 2016 the arbitrator made two awards regarding the purchase price of the shares. The arbitration, however, had not been concluded as a final award on costs had not been made. Mango Boulevard applied to set aside both awards. As the second award relied on the first award, it fell to the court to consider whether the first award should be set aside.

The purchaser argued that the arbitrator's awards dealt with matters beyond the scope of the reference to arbitration, and that the arbitrator failed to accord procedural fairness and natural justice which deprived the purchaser of its ability to present its case.

The original owners requested that, if the court allowed the application to set aside the award under section 34 of the Act, the court should suspend the setting aside of proceedings for a period to give the arbitrator an opportunity to resume the arbitral proceedings.

Decision

The court dismissed the application.

Jackson J highlighted that the issue for consideration was whether the purchaser had made a case for setting aside the awards under section 34 of the Act, and, if so, whether the court should suspend the setting aside of the arbitral proceedings to give the arbitrator an opportunity to take such action as in the arbitrator's opinion would eliminate the grounds for the awards being set aside.

Jackson J held that the purchaser had not made out a case to set aside the awards. His Honour held that despite the purchaser's complaints about how the arbitrator had valued the purchase price of the shares, the arbitrator had not decided matters beyond the scope of the submission to arbitration. Further, while Jackson J accepted that notions of procedural fairness and natural justice were appropriately considered as a basis for setting aside an award under the Act, his Honour held that the arbitrator's conduct in the circumstances was not such so as to cause any real practical injustice to the purchaser.

In obiter, Jackson J stated that while section 32 of the Act made it clear that a final award terminated the arbitral proceedings and thus the mandate of the arbitral tribunal, this was not the case in respect of any 'partial' awards. Further, his Honour stated that while the provisions of the Act were such that an order to set aside an award had the effect of setting the arbitral proceedings at naught, this did not prevent the parties to the arbitration agreement referring this dispute again. There was, however, nothing in the Act which expressly provided for either a remitter or a new hearing in respect of any award that is set aside under section 34 of the Act.

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Stuart v Queensland Building and Construction Commission [2017] QCA 115

David Pearce | Petrina Macpherson | Hazal Gacka

Catchwords

Queensland Civil and Administrative Tribunal – leave to appeal decision of Appeal Tribunal – costs orders

Significance

The Queensland Court of Appeal dismissed an application for leave to appeal a costs decision of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal (**QCAT**) because the decision was not an appealable decision under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (**Act**).

Facts

A dispute arose between the applicant, Stuart, and the owners of a house that the applicant was engaged to construct, which became the subject of a complaint by the owners to the Queensland Building Services Authority, now the Queensland Building and Construction Commission (**QBCC**). The QBCC determined that the owners' termination of the contract for the applicant's default was valid and directed the applicant to perform rectification works. The applicant sought a review of the decision of the QBCC.

QCAT set aside the decision on the basis that the contract had been mutually abandoned by the parties, and made two ancillary orders:

- to return the matter to the QBCC to determine whether the applicant had been in breach of the contract at the date of termination by mutual abandonment; and
- in the event that this issue was determined in the affirmative, whether an insurance claim was appropriate.

The applicant was successful in his appeal to the QCAT Appeal Tribunal contending that there was no basis for the two ancillary orders. However, the Appeal Tribunal dismissed the applicant's application for an order for costs. The applicant sought leave from the Court of Appeal to appeal this decision.

Decision

The Court of Appeal held that the decision of the Appeal Tribunal was not a 'final decision' within the meaning of the Act and could not be the subject of an application for leave to appeal to the Court of Appeal. The Court of Appeal also refused the application for leave but made no order as to costs (which meant that the parties bear their costs).

Sofronoff P, with Morrison and Applegarth JJ agreeing, found that section 150 of the Act limits appeals to the Court of Appeal to three matters:

- decisions to refuse an application for leave to appeal to the appeal tribunal;
- a cost-amount decisions; and
- the final decision.

Sofronoff P analysed the meaning of 'the final decision' under the Act and found that the definition of the term and the references to the term throughout the Act were indicative of its use to describe *'a final decision in relation to the subject of the proceeding'*. His Honour found that there can only be one 'final decision' under the Act and decisions about costs would not constitute a 'final decision'.

His Honour found that if decisions other than the final decision could be made the subject of an appeal to the Court of Appeal, it would impede the object of the Act, which is to *'have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick'*.

His Honour considered the applicant's alternative submission that the Court of Appeal ought to grant declaratory relief on the basis of a review of the merits of the Appeal Tribunal's decision. His Honour was of the view that while some exceptional cases of excess jurisdiction may arise warranting such a review, this was not such a case.

According to his Honour, this was a 'hard case' because the applicant was the subject of a complaint that proved to be unfounded and was out of pocket for a very substantial sum despite having won against the QBCC. His Honour noted that substantial costs were also incurred in the appeal when the Court of Appeal lacked jurisdiction to decide the issues raised. His Honour ruled that, in the circumstances, the parties should bear their own costs of the appeal.

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South Australia

Maxcon Constructions Pty Ltd v Vadasz & Ors [2017] HCATrans 112

James Kearney | Lisa Papanicolaou | Sarah Swan | Mitchell Francis

Catchwords

Building and Construction Industry Security of Payment Act 2009 (SA) – where adjudicator made a determination that an amount be paid by an appellant – where appellant sought judicial review of determination – whether Full Court erred in following *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379 and concluding that the SA Act excluded judicial review for an error of law on the face of the record

Significance

The High Court has granted special leave and the appeal will consider matters including whether an adjudication determination under the *Building and Construction Industry Security of Payment Act 2009* (SA) (**SA Act**) can be judicially reviewed for a non-jurisdictional error of law.

The special leave application was heard with an equivalent special leave application arising from the judgment of *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379 (**Probuild**) in respect of the *Building and Construction Industry Security of Payment Act 1999* (NSW) which was also granted. The outcome of these appeals will be very significant in determining the certainty of adjudications under the Security of Payment legislation in the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria.

Facts

On 12 May 2017, Maxcon Constructions Pty Ltd (**Maxcon**) applied to the High Court of Australia for special leave to appeal the decision of the Full Court of the South Australian Supreme Court in *Maxcon Constructions Pty Ltd v Vadasz (No 2)* [2017] SASCFC 2 (**Decision**). (The facts of the Decision are referred to in our March update.)

In summary, the Full Court found that the adjudicator had erred as a matter of law in concluding certain provisions of the construction contract were 'pay when paid' provisions and consequently void pursuant to section 12 of the SA Act. The Full Court first found that this error was not a jurisdictional

error, and, secondly, that judicial review was not available for non-jurisdictional error of law. The Full Court reached this view on the basis they were bound to follow the Probuild decision. However, Blue and Hinton JJ indicated that, based on first principles and in the absence of persuasive authority, they would have found that judicial review was available for non-jurisdictional error.

Maxcon's application for leave to appeal the Decision raised the following grounds:

- whether judicial review is unavailable for non-jurisdictional errors on the face of the record made by adjudicators in security of payment matters;
- whether the Full Court was correct in determining that the adjudicator's error in applying the SA Act (and section 12 in particular) was indeed a non-jurisdictional error; and
- whether it would have been appropriate for the court to partially preserve and partially set aside the adjudicator's decision should it have found it had jurisdiction to grant certiorari.

Decision

Gageler, Nettle and Edelman JJ granted special leave to Maxcon to appeal the Decision in the High Court on all three grounds.

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Victoria

Melbourne Steel Erectors v M&I Samaras [2017] VSC 308

Owen Cooper | Tom Kearney | Alyssa Dixon & Elizabeth Schuster

Catchwords

Withdrawal of payment claim - duplication of final payment claim in respect of the same reference date - Whether error of law amounting to jurisdictional error

Facts

Payment claims under the Act

In January 2015, M&I Samaras (**respondent**) and Melbourne Steel Erectors (**claimant**) entered into a contract whereby the respondent engaged the claimant to erect the structural steel for the Chadstone Shopping Centre Retail Development Stage 40, in return for which the respondent agreed to pay the claimant the amount of $3,550,291.00 (plus GST).

On 20 October 2016, the claimant submitted a 'Progress Payment Claim No.21' in the amount of $3,595,362.04 (**first claim**). The respondent sought clarification regarding the first claim by way of a payment schedule and letter from the respondent's legal representation, Ezra Legal.

On 1 December 2016, the claimant submitted a subsequent 'Progress Payment Claim No.21' in the amount of $3,595,362.04 (**second claim**). On 14 December 2016, the respondent provided a payment schedule to the claimant in reply indicating that the second claim was invalid and that the claimant was indebted to the respondent in the amount of $1,552,725.26.

On 23 December 2016, the claimant made an adjudication application under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**).

The adjudication determination

In the adjudication, the claimant contended that it withdrew its first claim by consent or with the agreement of the respondent. The respondent submitted that the second claim was invalid by reason of section 14(8) of the Act because the second claim was the second payment claim in respect of the same reference date and was, for that reason, invalid pursuant to section 14(6) of the Act.

The adjudicator was satisfied that the first claim was a valid payment claim under the Act because it sufficiently identified the work such that the respondent could within reason understand the claim and be able to respond to it.

The adjudicator held that the respondent did not make any offer for the claimant to withdraw the first claim and issue a fresh payment claim. The adjudicator found that the claimant's second claim constituted a second final payment claim as it was submitted by the claimant in respect of the same reference date and was therefore invalid pursuant to sections 14(6) and 14(8) of Act.

The claimant sought judicial review of the adjudication determination on the basis that the finding that the first claim was not withdrawn following an invitation from the respondent to resubmit the payment claim:

- contained errors of law on the face of the record; and
- was contrary to the evidence before the adjudicator.

Decision

The court dismissed the claimant's application and held that:

- the adjudicator had not erred in finding that the second claim contravened sections 14(8) and 14(6) of the Act; and
- the adjudicator did not have jurisdiction under the Act to determine any dispute in respect of the payment claim.

Digby J held that:

- the Ezra Legal letter was not an invitation to withdraw the first claim;
- there appeared to be no correspondence or communication from the claimant to the respondent seeking confirmation of what the claimant contended was an offer conveyed by the Ezra Legal letter; and
- at no time did the claimant communicate that it was withdrawing or abandoning the first claim. Accordingly, the first claim was not withdrawn.

His Honour further held that it was open for the adjudicator to determine that the first claim was a valid payment claim within the meaning of the Act. Accordingly, at the date of issue of the second claim, the first claim remained on foot because it had not been withdrawn, and, therefore, the second claim was invalid under sections 14(8) and 14(6) of the Act.

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Minesco Pty Ltd v Anderson Sunvast Hong Kong Ltd [2017] VSC 299

Owen Cooper | Tom Kearney | Robert Meade

Catchwords

Judicial review – delay in commencing proceeding – natural justice

Significance

The decision provides guidance on 'special circumstances' for an extension of time to apply for judicial review and the obligation for an adjudicator under the *Building and Construction Industry Security of Payment Act 2002* (Vic) to be seen to provide natural justice.

Facts

Anderson Sunvast Hong Kong Ltd (**claimant**) agreed to design, fabricate and supply curtain wall units to Minesco Pty Ltd (**respondent**) for installation on the Monash Children's Hospital in Clayton, Victoria.

In August 2016 the respondent issued a 'nil' payment schedule in response to the claimant's final payment claim, prompting the claimant to submit an adjudication application under the *Building and Construction Industry Security of Payment Act 2002* (Vic). The respondent provided an adjudication response containing two reasons for withholding payment not in the payment schedule.

In September 2016 the claimant, at the adjudicator's request, provided further submissions on the additional reasons which included three unsolicited submissions which were not a response to the adjudicator's request (**unsolicited submissions**). The respondent wrote to the adjudicator requesting that the adjudicator disregard the unsolicited submissions and received no response. On 16 September 2016 the adjudicator made a determination for the claimant to pay the respondent $231,608.05.

On 20 December 2016 the claimant obtained judgment against the respondent for the amount. On 24 January 2016 the respondent commenced proceedings for judicial review of the determination.

Decision

The court granted the respondent an extension of time to apply for judicial review, and quashed the determination on the grounds that the adjudicator had breached his obligation to provide natural justice.

Extension of time to bring application for judicial review

Vickery J found that while the respondent was late in applying for judicial review under the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), 'special circumstances' under rule 56.02 applied. His Honour granted an extension of time in light of:

- the delay only lasting two months and spanning the Christmas and New Year holiday period;
- the respondent's unreciprocated attempts to resolve this dispute without litigation;
- the respondent promptly issuing proceedings once the claimant obtained judgment to enforce the determination;
- the claimant not suffering any specific prejudice as a result of the extension of time; and
- the respondent having an arguable case for judicial review.

Denial of natural justice

While Vickery J was not satisfied that the adjudicator had actually considered the unsolicited submissions and therefore denied the respondent natural justice, his Honour held that by failing to advise the respondent:

- that he was disregarding the unsolicited submissions; or
- that he was considering the unsolicited submissions and that the respondent should provide further submissions,

the adjudicator had created the appearance that natural justice was not being afforded to the respondent. His Honour determined that the above constituted a breach of a rule of natural justice and accordingly quashed the adjudication determination.

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In the United Kingdom courts

Persimmon Homes Ltd v Ove Arup & Partners Ltd [2017] EWCA Civ 373

Owen Cooper | Tom Kearney | Thomas O'Bryan

Catchwords

Contract interpretation – limitation of liability – latent conditions – contamination

Significance

This case demonstrates the UK courts' willingness to give a broad meaning to the natural meaning of an unqualified exclusion of liability clause.

Facts

In or around 1992 Ove Arup & Partners Limited and Ove Arup & Partners International Limited, the defendant engineering consultant (**consultant**), was engaged as civil engineers in connection with a regeneration project for contaminated land previously used as a dock to export coal (**site**). This engagement continued throughout the 1990s.

In 2007 the plaintiff consortium of developers formed between Persimmon Homes Limited, Taylor Wimpey UK Limited and BDW Trading Limited (**developers**) engaged the consultant to provide further consultation services with regard to the developers' bid to purchase the site. The developers' bid was successful.

On 22 September 2009 the developers further engaged the consultant to provide consultation services for a building project at the site (**contract**). The contract included a limitation of liability clause which provided that:

> *'The Consultant's aggregate liability under this Agreement whether in contract, tort (including negligence), for breach of statutory duty or otherwise (other than for death or personal injury caused by the Consultant's negligence) shall be limited to £12,000,000 (twelve million pounds) with the liability for pollution and contamination limited to £5,000,000 (five million pounds) in the aggregate.* ***Liability for any claim in relation to asbestos is excluded****.* [emphasis added]'

In July 2012 the developers discovered asbestos on the site. The developers alleged that the asbestos encountered was substantially more than was expected. The developers alleged the consultant had been negligent in failing to identify and report upon that asbestos at an early stage.

Decision

The court accepted that clause 6.3 of the contract excluded the developer's liability relating to the asbestos.

The court identified three limbs in clause 6.3 of the contract as follows:

- first limb: a limit of £12,000,000 in relation to claims regarding 'contract, tort (including negligence), for breach of statutory duty or otherwise (other than for death or personal injury caused by the Consultant's negligence)';
- second limb: a limit of £5,000,000 in relation to 'the liability for [emphasis added] pollution and contamination'; and
- third limb: a complete exclusion for '[l]iability for any claim in relation to asbestos'.

There was no dispute between the parties as to the effect of the first limb.

The developers contended that in the second and third limbs the word 'for' meant that the limitation of liability was for causing pollution and contamination and the spread of asbestos. The consultant contended that the developers' interpretation did not make sense and that the third limb related to any claim concerning asbestos.

The court determined that both the natural meaning of the words and business common sense led to the conclusion that clause 6.3 of the contract excluded the consultant's liability for any claim concerning asbestos.

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