MinterEllison

Construction Law Update

July 2017

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Legislative update

Queensland

Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Bill 2017 (Qld)

David Pearce | Sarah Cahill | Hazal Gacka

Significance

The inferno that engulfed the Grenfell Tower in west London on 14 June 2017 and tragically claimed at least 79 lives has once again brought the issue of cheap, imported and highly flammable cladding to the forefront. Non-conforming cladding was found to be a significant factor in high-rise fires here in Australia (most notably the fire in Melbourne's Lacrosse Tower in 2014).

Minister for Housing and Public Works Mick de Brenni hopes that his proposed *Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Bill 2017* (Qld) (**Bill**), which will increase accountability and broaden the powers of the Queensland Building and Construction Commission (**QBCC**), might prevent such an incident occurring in Queensland.

Overview

The Bill amends the *Queensland Building and Construction Commission Act 1991* (Qld) and will establish a chain of responsibility, placing duties on supply chain participants at all stages to ensure that building products used in Queensland are safe and fit for purpose.

Key definitions

A person will fall within the chain of responsibility if they design, manufacture, import or supply a building product and know, or are reasonably expected to know, the product will or is likely to be associated with a building, as well as if they install the building product into the building in connection with relevant work.

Non-conforming building products are building products that are not safe for use, or that do not comply with relevant regulatory provisions, or that are not capable of being used to the standard represented by the person responsible for the product.

Key provisions

The Bill proposes a primary duty on each person in the supply chain to ensure, insofar as reasonably practicable, that a product is not a non-conforming building product. The Bill also proposes additional duties to be imposed upon certain persons to ensure that information for a product, such as its suitability, travels with the product.

The Bill will create a number of offences, such as where a person in the chain of responsibility breaches a duty or has reasonable suspicion or knowledge that a building product is non-conforming for an intended use and does not give notice to the QBCC.

Executive officers will need to exercise 'due diligence' (including taking reasonable steps to acquire, and keep up to date, knowledge of matters about the safe use of building products) to ensure that their company complies with the duties.

The Bill will establish a Building Products Advisory Committee and allow the Minister for Housing and Public Works to issue a warning statement about a product and issue a recall order where deemed necessary. It will also significantly broaden the QBCC's powers of entry.

Next steps

To date, a number of States and Territories have acknowledged that they have a problem with non-compliant cladding (cladding that does not comply with the Building Code). In the review that followed the Lacrosse fire, the Victorian Building Authority found that, of 170 buildings audited, 51 percent had non-compliant external cladding. The NSW Department of Planning & Environment is allegedly concerned that up to 2,500 buildings in the Greater Sydney area may contain non-compliant cladding.

The Minister for Housing and Public Works Mick de Brenni believes the Bill will establish a model for other jurisdictions looking to improve their own legislative frameworks around non-conforming building products. Complementary measures to support jurisdictional legislative amendments, including the establishment of a national building regulators forum to provide cross-jurisdictional advice about the identification and eradication of non-conforming building products, are being considered. The Bill has been referred to the Public Works and Utilities Committee of the Queensland Parliament for inquiry and report by 7 August 2017.

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South Australia

Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 (SA)

James Kearney | Mitch Francis | Rebecca Clafton

Background

After nearly three years of reviews and consultation with the construction industry, the *Building and Construction Industry Security of Payment (Review) Amendment Bill 2017* (SA) (**Bill**) was tabled last week in the Parliament of South Australia. The Bill proposes amendments to the *Building and Construction Industry Security of Payment Act 2009* (SA) (**Act**) with the stated aim of increasing transparency of the Act and thereby its use within the industry.

Former District Court judge, Mr Alan Moss, undertook an initial review of the Act in 2015, providing a suite of recommendations later tabled in Parliament (**Moss Review**). Following the collapse of Tagara Builders in 2016, the Small Business Commissioner (**Commissioner**) undertook further industry consultation.

Both reviews identified that the Act is failing to achieve its underlying purpose, which is to ensure smaller sub-contractors achieve payment without unnecessary delay, due in part to the Act being under-utilised by the very entities it aims to protect. For example, despite soaring insolvency rates in the industry of late, only 38 adjudication applications were submitted across South Australia in the 2015/16 financial year; most of these applications were not made by small sub-contractors.

Accordingly, the Bill proposes a series of amendments, targeted at rectifying under-use of the Act, whilst resolving administrative and governance issues that have plagued the Act's application.

Key Changes

Penalty Provisions

In order to address the Commissioner's finding that subcontractors may fear retribution from head contractors if they make use of the Act, the Bill proposes a new offence relating to assault or other threatening behaviour in relation to progress payments. The Bill proposes harsh penalties for entities that engage in direct or indirect assault, threatening behaviour, or intimidation, in order to apply undue pressure on a party to not seek payment under the Act. These penalties include fines of up to $250,000 for bodies corporate, and up to $50,000, or two years in prison, or both, for individuals.

This amendment demonstrates the Commissioner's intention to make examples of individuals and companies that engage in this behaviour. Head contractors and developers, and their agents, will need to be conscious of the serious penalties which may soon attach to this conduct.

Commissioner's functions – increasing transparency

The Bill seeks to formalise the Commissioner's responsibility to administer the Act and also sets out further functions of the Commissioner. Those functions include the Commissioner:

- having the power to publish determinations of adjudicators in relation to adjudication applications, in a manner determined by the Commissioner;
- investigating and researching matters affecting the interests of parties to construction contracts; and
- conducting and facilitating education programs intended to provide greater transparency of the adjudication process, and educate subcontractors and other building industry participants of their rights and obligations under the Act.

Authorised Nominating Authorities

The Commissioner's review identified perceptions of bias from, and conflicts of interest with, Authorised Nominating Authorities (each an **ANA**) in relation to parties applying for adjudication under the Act. The Bill proposes greater regulatory power to the Minister of Small Business (**Minister**) to restrict ANAs, including:

- the imposition of a renewable five-year term to act as an ANA (previously open-ended); and
- the requirement that an ANA provide the Commissioner with a copy of any adjudication determination or other information upon request, with penalties imposed for non-compliance.

If the Bill is passed in its current form, all current ANAs will have their powers revoked and will need to reapply to the Minister to continue operating as an ANA.

Business Day

In an attempt to prevent parties being 'ambushed' with payment claims over the Christmas/New Year shut-down period, the Bill clarifies that, for the purposes of the Act, any day that falls between 22 December in any year and 10 January of the following year is excluded from the definition of 'business day'.

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In the Australian courts

Commonwealth

Hi-Rise Access Pty Ltd v Standards Australia Limited [2017] FCA 604

Owen Cooper | Tom Kearney | Thomas O'Bryan

Catchwords

Misleading or deceptive conduct – representations made by Australian Standards

Significance

This decision considers whether Standards Australia, when preparing and releasing Australian standards, does so 'in trade or commerce' within the meaning of section 18 of the Australian Consumer Law.

Key provisions

Section 18 of the Australian Consumer Law (**ACL**) provides that:

> *'A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.'*

Facts

In December 2013, Standards Australia (**respondent**) published the AS 1657-2013 '*Fixed Platforms, walkways, stairways and ladders - Design, construction and installation*', a standard primarily concerned with safe working at height. AS 1657-2013 superseded AS 1657-1992, a 1992 standard which dealt with the same subject matter.

Hi-Rise Access Pty Ltd (**applicant**) was a consulting and engineering company specialising in height-safety, fall protection and suspended access. AS 1657-2013 was significant to the applicant's business because it closely coincided with the type of design, construction and installation work that the applicant undertook.

The applicant commenced proceedings alleging that AS1657-2013 breached the ACL by engaging in misleading or deceptive conduct in trade or commerce by representing that:

- complying with AS 1657-2013 was more safe and less risky than complying with AS 1657-1992;
- AS 1657-2013 ensured building sites provided the optimal level of safety to users; and
- AS 1657-2013 was intended to reduce the risks to the safety of users,

(together **the representations**).

The question whether these representations were misleading or deceptive was not raised or addressed in the proceeding.

Decision

The court dismissed the applicant's claim because the respondent's conduct was not in trade or commerce.

Murphy J accepted the respondent's submissions that the representations were not made in trade or commerce and so were not in breach of section 18 of the ACL.

The court distinguished between the respondent and SAI Global Limited (**SAI**), the company to which the respondent has granted a worldwide license to publish, distribute and sell Australian standards, an arrangement under which the respondent earns significant income from royalty payments.

Despite the financial arrangements, his Honour found that:

- the representations were not designed to increase sales of Australian standards for the commercial benefit of the respondent or SAI; and
- the respondent operated in a quasi-government role in conjunction with the Commonwealth Government to facilitate the development of Australian standards and to promote the benefits of Australian standards and standardisation in the public interest.

Therefore, in his Honour's view, the representations were not, by their nature, of a trading or commercial character and were not made in trade or commerce.

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New South Wales

AAI Ltd t/as Vero Insurance v Kalnin Corporation Pty Ltd; Kalnin Corporation Pty Ltd v AAI Ltd t/as Vero Insurance [2017] NSWSC 548

Richard Crawford | Carly Roberts | Ashley Murtha

Catchwords

Insurance – *Home Building Act 1989* (NSW) – Home Building Regulation (NSW) – proper construction of indemnity – whether condition precedent to liability established – meaning of 'structural defect' and 'structural element of a building'

Significance

In this case, the court found that an obligation under the terms of an indemnity to give notice of a proposed settlement may require the indemnifying party to be given the opportunity to consider the amount of the proposed settlement and take steps before a settlement is agreed.

The court also considered the meaning of 'structural defect' and 'structural element of a building' as used in the *Home Building Regulation 1997* (NSW) (**Regulation**). Although the Regulation has been repealed, the judgment may assist parties in negotiating contracts that use the phrase 'structural defect'.

Facts

Mr Laurence Kalnin developed a property through Kalnin Corporation Pty Ltd (**developer**). The developer engaged Definite Dimensions Pty Ltd (**builder**) to carry out the development.

The builder sought insurance—as required by the *Home Building Act 1989* (NSW) (**Act**)—from AAI Ltd trading as Vero Insurance (**Vero**). Vero issued an insurance policy on the basis that Mr Kalnin and the developer executed an indemnity (**Indemnity**) in Vero's favour covering all claims, payments, costs and any other expenses, losses and damages resulting from the builder's acts or omissions and a claim by an insured under the policy.

The development was completed in 2004. In 2009 (after the expiry of the two-year period of insurance cover for non-structural defects but within the six-year period of insurance cover for structural defects), the owners corporation of the property (**owners corporation**) made a claim against Vero under the insurance policy in relation to allegedly defective work. By this time, the builder had gone into liquidation. Vero notified Mr Kalnin and the developer of the claim, but did not contact Mr Kalnin again until February 2013, by which time Vero had agreed to settle the owners corporation's claim.

Vero ultimately paid $4.232 million in respect of remedial works and sought to recover that sum from Mr Kalnin and the developer under the Indemnity.

Amongst a number of other issues, the court considered whether Vero had satisfied its obligation under clause 6(b) of the Indemnity to notify Mr Kalnin and the developer *'promptly of the proposed*

settlement' of the owners corporation's claim. Vero accepted (consistent with Victorian and Western Australian case law in respect of identical clauses in other Vero insurance policies) that compliance with clause 6(b) of the Indemnity was a condition precedent to Mr Kalnin's and the developer's liability to indemnify Vero.

Decision

The court found that Vero had failed to satisfy the condition precedent in clause 6(b) of the Indemnity and that this *'of itself, [was] an answer to Vero's claim'*.

Stevenson J held that the purpose of clause 6(b) of the Indemnity was to give Mr Kalnin and the developer the opportunity to consider the amount of the proposed settlement and to take steps (eg debate the amount of the proposed settlement or seek alternative means to resolve the claim) before any settlement was finally struck.

His Honour noted that Mr Kalnin had taken a number of steps in 2009 to arrange for the defective work to be rectified, including engaging Brian Carpenter (a licensed builder and the former principal of the builder) to rectify the defects at no cost. However, Mr Kalnin heard nothing from Vero for over three years between the end of 2009 and February 2013, by which time the settlement with the owners corporation had already been agreed. Vero had therefore failed to comply with clause 6(b) of the Indemnity.

Stevenson J also considered the meaning of 'structural defect' and 'structural element of a building', as used in the Regulation. His Honour found:

- a 'structural defect' must be a defect in a 'structural element of a building'; and
- the phrase 'structural element of a building', when used in the Regulation, refers to load-bearing components of a building that are essential to the building's stability. However, the phrase does not capture elements of a building (eg waterproofing membrane) that are attached to load-bearing components but do not themselves play any role in promoting the structural integrity of the building.

Despite Stevenson J's conclusion that Vero had not complied with the condition precedent in clause 6(b) of the Indemnity, his Honour concluded his judgment by inviting Vero to identify any evidence that proved that the payments it made to the owners corporation were in respect of structural defects in the building which resulted from an act or omission of the builder.

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AAP Industries Pty Ltd v Rehau Pte Ltd [2017] NSWSC 390

Richard Crawford | Carly Roberts | Zara Dwyer

Catchwords

Implied terms – implied term of exclusive dealing – repudiation

Significance

This case is an important reminder that terms not expressly provided for in contracts may be implied, including onerous terms such as a requirement of exclusive dealing. The case also highlights the importance of ensuring that contracts are performed and terminated in accordance with their terms.

Facts

AAP Industries Pty Ltd (AAP) and Rehau Pte Ltd (**Rehau**) entered into a written contract dated 29 September 1999 (**Contract**) under which AAP was obliged to supply Rehau with plumbing articles (**Articles**). The Contract provided (amongst other things):

- clause I: AAP had to reserve production capacity to meet Rehau's requirements and to plan raw material necessary to ensure Rehau's deadlines were met;

- clause III: AAP had to maintain a minimum buffer stock of two months' free of charge;
- clause IV: any failure by AAP to meet a delivery deadline would constitute default of performance, entitling Rehau to withdraw from the Contract; and
- clause XI: the Contract was made for one year upon signing. It was extended by one year each time it was due to expire unless notice of termination was given at least three months before the date of expiry.

From 2010, there were discussions between the parties about the price of the Articles in which Rehau pointed out that it could obtain the Articles for lower prices from Europe or China.

On 6 July 2012, Rehau emailed AAP (**6 July Email**) asking for quotes for possible price reductions, stating *'until we come to a conclusion to this discussion, production of these articles should not continue in the interim*'. Rehau continued to purchase from AAP following the 6 July Email until July 2013, at which time it stopped ordering from AAP.

On 2 June 2014, AAP sent a letter to Rehau (**2 June Letter**) accepting what it said was a repudiation of the Contract by Rehau, being Rehau's failure to order and purchase the Articles from AAP pursuant to the Contract.

Decision

The court found that Rehau had:

- breached an implied term of exclusive supply in the Contract; and
- repudiated the Contract and AAP had terminated by the 2 June Letter.

Implied term of exclusive dealing

Davies J found that a term was implied in the Contract that required Rehau to only order the Articles from AAP and not from any other supplier or from internal resources. The term was implied because:

- a number of express terms of the Contract would have been unnecessary if there was no term of exclusive dealing, including the obligation on AAP to reserve production capacity to meet Rehau's requirements, Rehau's right to withdraw from the Contract if AAP defaulted and the automatic extension of the Contract unless a notice of termination was given; and
- to interpret the Contract as imposing no obligation on Rehau to order from AAP despite the obligation on AAP to keep a two-month supply of the Articles would make a 'commercial nonsense' of the Contract, and no commercial purpose would then be served by the Contract.

Termination

Rehau argued that the 6 July Email was a notice of termination under clause XI of the Contract, and that termination had therefore already occurred by the time of its purported repudiation.

Davies J held that the 6 July Email:

- was not a notice of termination but a request for a temporary pause until a number of matters were resolved; and
- combined with Rehau's failure to order from AAP after 11 July 2013 amounted to a repudiation of the Contract.

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Brooks v Gannon Constructions Pty Ltd [2017] NSWCATCD 12

Richard Crawford | Bonnie Doran

Catchwords

Home Building Act 1989 (NSW) – Home Building Regulations (NSW) – statutory warranties – defects

Significance

The defence available to a contractor under section 18F of the *Home Building Act 1989* (NSW) (**Act**) is the only defence that can successfully rebut a claim in respect of the breach of a statutory warranty under a contract to which the Act applies.

Facts

On 7 February 2013 Mr Christopher Brooks (**homeowner**) contracted with the respondent, Gannon Constructions Pty Ltd (**builder**) to complete residential building work within the meaning of the Act (**contract**).

The homeowner subsequently made an application in the Civil and Administrative Tribunal of New South Wales (**Tribunal**) for defective works which the homeowner alleged amounted to a breach of statutory warranty pursuant to section 18B of the Act.

The builder sought to rely on the terms of the contract which stated that the liability of the builder for a failure to comply with all '*relevant codes, standards and specifications that the work is required to comply with under any law*' may be limited if the failure relates solely to a design or specification prepared by or on behalf of the owner.

The builder did not seek to rely on the defence contained in section 18F of the Act, which states that '*In proceedings for a breach of a statutory warranty, it is a defence for the defendant to prove that the deficiencies of which the plaintiff complains arise from instructions given by the person for whom the work was done contrary to the advice in writing of the defendant or person who did the work*'. The builder submitted that the statutory defence did not limit the builder's right to rely on an alternate contractual defence, and that, properly construed, the words of section 18F of the Act mean that other defences remain available to the builder.

Decision

The Tribunal found that the steel structure provided by the builder was not fit for purpose, in breach of section 18B of the Act, and made a money order of $105,836.57 in favour of the homeowner in accordance with section 48O of the Act.

Considering:

- the explanatory memorandum to the bill in which the defence in section 18F of the Act was first introduced; and
- obiter in the cases of *Pham v Broadview Windows Pty Ltd & Ors* [2009] NSWCTTT 375; *The Craftsmen Restoration and Renovations v Thomas Boland*, *Thomas Boland v The Craftsmen Restoration and Renovations* [2008] NSWSC 660; and *Pastrovic & Co Pty Ltd v Farrington* [2011] NSWDC 94,

the Tribunal found that, in respect of a claim for a breach of statutory warranty, the only defence available to a contractor is that contained in section 18F of the Act. The builder was therefore unable to rely on its contractual defence.

Relevantly, the Tribunal noted that while amendments had been made to the Act since the date that the parties contracted which operate to extend the defence available to contractors who rely on instructions given by a person who is a relevant professional (acting for the person for whom the work was contracted to be done), those amendments were not applicable in this case. However the

Tribunal noted that, while the amendments are not determinative of whether section 18F of the Act is the only defence for a breach of statutory warranty, the expansion of the defence available under section 18F of the Act is consistent with the finding that it was the intention that section 18F of the Act be the only defence for breach of statutory warranty.

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CSR Limited v Adecco (Australia) Pty Limited [2017] NSWCA 121

Richard Crawford | Misha Chaplya

Catchwords

Whether implied contract on same terms as expired contract – expired fixed term labour supply contract – where labour continued to be supplied and paid for — whether reasonable bystander would regard parties' conduct, including silence, as signalling to other party that relationship continued on terms of expired contract – contractual indemnity – claim by worker injured at labour hirer's premises – indemnity claimed by hirer from labour supplier

Significance

An implied contract may be inferred following upon the expiry of an express fixed term contract where parties continue to perform the contract.

Commercial Insights

Parties that continue to perform services under an expired contract may nevertheless be bound by its terms after its expiration unless there has been conduct evidencing the parties' intention not to be bound by the terms of the expired contract.

Facts

CSR Limited and Holcim (Australia) Pty Limited (together **CSR**) entered into a two-year fixed term labour hire agreement with Adecco (Australia) Pty Limited (**Adecco**) for the provision of truck driving services by Mr Frewin (**Agreement**). CSR and Adecco failed to negotiate the terms of a new agreement when the term of the Agreement expired.

Following the expiration of the Agreement, Mr Frewin continued to perform the services for CSR on behalf of Adecco for a further period of two years and CSR continued to pay for those services. After Mr Frewin's services were terminated, he made a personal injury claim against both CSR and Adecco as a consequence of suffering back pain and requiring surgery in the period from the expiry of the fixed term of the Agreement until the termination of Mr Frewin's services. CSR cross-claimed against Adecco in reliance upon an indemnity clause in the Agreement by which Adecco agreed to indemnify CSR against personal injury claims made by its staff while on assignment.

The relevant issue for the purpose of this article was whether the terms of the Agreement continued to apply after the fixed term of the Agreement expired such that Adecco was liable to indemnify CSR in respect of Mr Frewin's personal injury claim.

The second and third issues, which are not examined in this analysis, were whether Mr Frewin's services, on the proper construction of the Agreement, were within the scope of the Agreement and whether the contractual indemnity extended to claims contributed to, or caused by, CSR's fault.

The primary judge held that CSR failed to establish that an indemnity by Adecco in favour of CSR formed part of any agreement during the period when Mr Frewin's cause of action arose. CSR appealed. CSR appealed.

Decision

The court set aside the decision of the primary judge. McColl JA held, with whom Macfarlan JA and Simpson JA agreed, that:

- The question as to whether an implied contract following upon the expiry of an express fixed term contract may be inferred is an evidentiary or factual one, turning on the application of an objective, or 'reasonable bystander' test.
- After canvassing the authorities on implied contracts (including Chitty on Contracts), an inference was drawn from CSR's and Adecco's conduct that the expired Agreement continued its existence on the same terms and conditions (including the indemnity) beyond its agreed expiry until the time when Mr Frewin ceased driving the defective truck, save that the agreement was terminable on reasonable notice. In particular, CSR's and Adecco's course of conduct supported the proposition that the parties continued to act as if they were bound by the Agreement. Nothing in the parties' conduct indicated that they intended to conduct their relationship on a 'more basic footing', as the primary judge had found.

The court's decision was aided by the proposition—which Adecco accepted—that an inference of an implied contract engaging all the terms of the expired Agreement could be drawn if there was no evidence of anyone turning their mind as to whether the Agreement had expired.

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FAL Management Group Pty Limited as Trustee for TF Investment Trust v Denham Constructions Pty Ltd [2017] NSWSC 150

Richard Crawford | Claire Laverick | Jo de Bruyn

Catchwords

Building and Construction Industry Security of Payment Act 1999 (NSW) – stay of proceedings – release of payment made into court

Significance

Claimants who have a strongly arguable case that a judgment obtained by a company under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOPA**) is not payable under the relevant construction contract may be entitled to a permanent stay on those judgments in circumstances where the claimant was insolvent.

The court is entitled to consider any reason advanced for the continuation of a stay of proceedings; consideration is not confined to the circumstances that existed at the time a stay is initially granted.

Facts

In October 2013, FAL Management Group Pty Limited (**FAL**) entered into a design and construct contract (**Contract**) with Denham Constructions Pty Ltd (**Denham**).

After submitting a payment claim in July 2014, Denham obtained an adjudication certificate consequent upon an adjudication determination in respect of that claim and registered it as a judgment debt in the District Court of New South Wales (**District Court judgment**).

Shortly after, FAL was served with a notice of claim (**Notice of Claim**) by a subcontractor, N Moits & Sons (NSW) Pty Ltd (**Moits**), claiming amounts payable by Denham Constructions Project 960 Pty Ltd (**Denham 960**).

An issue arose concerning Moits' entitlement to the amount claimed because of the identity of the entity, Denham 960, with which Moits was contracting. As a consequence, the District Court made orders staying the judgment which Denham had obtained against FAL on two conditions:

- that the amount paid by FAL be paid into the District Court; and
- that FAL commence proceedings seeking a declaration concerning the validity of the Notice of Claim.

FAL duly commenced proceedings. Hammerschlag J subsequently made orders transferring the moneys to the Supreme Court of New South Wales, dismissing the proceedings and continuing the stay on that part of the District Court judgment pending the outcome of the separate proceedings commenced by Moits.

In June 2014, FAL terminated the Contract. Later in June 2014 Denham commenced separate proceedings against FAL in the Supreme Court seeking, among other things, the return of security provided under the Contract (**Denham proceedings**). FAL filed a cross-claim against Denham seeking to recover overpayments made to Denham and filed a substantial amount of evidence which demonstrated the strength of its claim.

Denham was placed in to liquidation in August 2016. Moits has made no claim for the moneys held by the District Court, and, having regard to Denham's liquidation, it may be assumed that the Moits proceedings will never be heard.

FAL and Denham both filed applications seeking payment of the moneys held by the court.

Decision

The court rejected Denham's application and made orders for the money to be paid to FAL and for the District Court judgment to be permanently stayed.

In considering the decision to stay proceedings, Ball J held that the court was not confined to consider the reasons under which the stay was originally granted but instead was entitled to consider any reasons advanced.

His Honour considered the judgment obtained by Denham under the SOPA. First, it is enforceable immediately. Secondly, unlike other judgments, it does not affect a party's rights under the relevant contract, as a party is free to sue to recover amounts the subject of the judgment if the party maintains that the relevant amount is not properly payable under that contract.

When considering whether to stay proceedings, the court will take in to account the following matters, including the:

- strength of the contractual claim;
- likelihood that the contractor will be unable to repay the amount; and
- risk that the contractor will become insolvent if a stay is granted.

Ball J reached the decision to permanently stay proceedings on the following:

- Denham had gone in to liquidation and the lifting of the stay would have the effect of making any payment to Denham permanent.
- FAL had a strongly arguable claim to recover the payment (and more) under the Contract and that consequently Denham was never entitled to the payment under the Contract.
- Payment of the moneys by FAL into court was not intended to affect its rights to recover under the Contract.
- There was nothing preventing Denham's liquidator from suing FAL to recover the moneys if paid out.

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Quasar (Constructions) Commercial Pty Limited v Trilla Group Pty Limited [2017] NSWSC 860

Richard Crawford | Michelle Knight | Jo de Bruyn

Catchwords

Adjudicator determination – material denial of natural justice – application to stay proceeding – money paid to court as price of obtaining interlocutory proceedings paid to the first defendant

Significance

For there to be a material denial of justice, the adjudicator must resolve the dispute on a basis which has not been raised or 'hinted at' in any of the documents in the adjudication. It is not enough that the parties did not make submissions on the specific argument relied on by the adjudicator.

Facts

Quasar (Constructions) Commercial Pty Limited (**respondent**) engaged Trilla Group Pty Ltd (**claimant**) to undertake hydraulic work for Quasar for a development at Forest Lodge (**contract**).

The parties fell into dispute. The claimant served a payment claim on the respondent claiming $861,000 (plus GST). The respondent certified nil in the payment schedule after setting off a claim for liquidated damages.

The dispute was referred to adjudication. The claimant argued that time was at large due to the respondent's acts of prevention in failing to issue a revised construction program and appoint a superintendent to manage the works. The respondent's defence was that the prevention principle had no effect where the contract contained an extension of time (**EOT**) clause.

The adjudicator determined that the claimant was entitled to $462,000 (including GST). The adjudicator decided that the respondent could not set off liquidated damages, because the claimant:

- was unable to assess if the delay had an impact on the critical path because the respondent had not provided an updated construction program; and
- therefore could not request an EOT under the contract.

The respondent applied to the court seeking:

- a declaration that the adjudicator's determination was void for the reason it was decided on a basis for which neither party had contended and as such was a material denial of natural justice; and
- a stay of enforcement of the adjudication determination until such time as the respondent's liquidated damages claim could be heard and determined by the court.

Decision

The court dismissed the respondent's application. The court determined that there was no denial of natural justice and that there were no grounds for ordering a stay of enforcement of the adjudication determination.

Denial of natural justice

The adjudicator's finding that the claimant was not able to determine the critical path and could not request an EOT was not a material denial of natural justice. The respondent put before the adjudicator the defence that the prevention principle had no effect where the contract contained an EOT clause. That issue having been raised, it was incumbent upon the adjudicator to deal with it as best he could on the material provided and within the tight timeframe allowed.

Application to stay proceedings

McDougall J recognised that the court had jurisdiction to grant a stay in circumstances where a claimant is insolvent (or on the edge of insolvency) and where there is a cross-claim.

In the present case, the claimant's financial results for the last four years showed it had operated at a small but reasonably consistent loss. However the evidence also showed that the claimant is still trading, has won four substantial subcontracts, and its present financial position would be reversed if it were paid the adjudicated amount. His Honour therefore declined to grant a stay and ordered that the money paid into court by the respondent be paid out to the claimant.

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The Owners Strata Plan No 66375 v Suncorp Metway Insurance Ltd (No 2) [2017] NSWSC 739

Richard Crawford | Fiona Elliot | Winnie Jobanputra

Catchwords

Whether party entered into contract as agent – whether party acting as undisclosed principal – *Home Building Act 1989* (NSW) – statutory warranties – whether defendants were 'developers' within the meaning of section 3A – whether defendants were person 'on whose behalf' building work was done – whether the defendants were party to the building contract – admissibility of evidence – business records

Significance

The court has held that where an agent purports to enter into a contract on behalf of another, without the consent of the other contracting party, in breach of a contractual restriction on assignment without consent, that purported agency is ineffective.

Facts

Mr David King, the third defendant, and Mrs Gwendoline King, the fourth defendant, (together, **Kings**) owned real estate upon which a mixed residential and commercial development took place. They were also sole directors of the fifth defendant, a developer, Meridian Estates Pty Ltd (**Meridian**). Meridian engaged the second defendant, a builder, Beach Constructions Pty Ltd (in liquidation) (**Builder**) to construct the development. The first defendant, Suncorp Metway Insurance Pty Ltd (**Suncorp**) had provided home warranty insurance under Part 6 of the *Home Building Act 1989* (NSW) (**HBA**) in respect of the development.

The owners corporation of the development (**Owners Corporation**), the immediate successor in title, brought a claim for various defects that exist within the development against Suncorp.

The original dispute between the Owners Corporation and Suncorp was resolved during the proceedings but on terms which meant Suncorp's actual liability depended on the court's findings in respect of a number of defects.

The two questions before the court were therefore:

- whether the Kings are themselves liable for the defects that are the subject of the Owners Corporation's claim on the basis that they were 'developers' within the meaning of section 3A of the HBA; and
- whether, if the Kings are liable for the defects as developers, their liability extends to certain defects that are the subject of the claim (the determination of which will have the effect of fixing the amount for which Suncorp is liable).

Decision

The court held that the Kings were not 'developers' for the purposes of section 3A of the HBA and dismissed the claim against the Kings. However, Ball J also specified which defects the Kings would have been liable for rectifying had his Honour concluded that the claim against the Kings succeeded.

Section 3A of the HBA defines that a developer is *'an individual, a partnership or a corporation on whose behalf residential building work is done in the circumstances set out in subsection (2)'*.

The Owners Corporation argued that it should be inferred from the evidence, predominantly minutes of site meetings, that the Kings signed the Formal Instrument of Agreement and, by doing so, became parties to the building contract or, in the alternative, that Meridian became a party to the building contract as their agent.

The court found that a contract between Meridian and the Builder came into existence at the time the architect (on behalf of Meridian) accepted the Builder's tender in terms agreed between them. The AS2124 conditions of contract that was signed specifically catered for the possibility that there would not be a 'Formal Instrument of Agreement' and the conditions of tender issued by the architect did not state either way whether a Formal Instrument of Agreement was necessary. Therefore there was no need to sign a formal contract that included a Formal Instrument of Agreement.

The subsequent conduct of the parties was consistent with the contracting party being Meridian and not the Kings. From the time it is said the Kings signed the contract, the Builder issued invoices to Meridian, the architect issued payment certificates which named Meridian as 'The Proprietor' and an occupation certificate was issued in the name of Meridian.

The agency argument failed on two grounds:

- First, if the parties intended Meridian to act as agent to the Kings when it engaged the Builder, documents such as the tender documents would have said so, but did not.
- Secondly, if Meridian was acting as agent of the Kings, the agency was not disclosed.

An exception to the principle that an undisclosed principal may sue and be sued on a contract made by the agent on the principal's behalf exists where the relevant contract contains a prohibition against assignment and applies equally where the contract in question merely prevents assignment without consent. The court held that the exception applies equally to undisclosed agencies. The AS2124 contract contains such a prohibition against assignment without consent and the court accepted that Meridian was not acting as agent for the Kings when it engaged the Builder.

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UGL Rail Pty Limited v Trox (Australia) Pty Limited [2017] NSWSC 770

Richard Crawford | Claire Laverick | Ashley Murtha

Catchwords

Assignment – novation – trust – agency – defective works – rectification

Significance

In determining whether equipment complies with a specified 'design life', the absence of specific evidence that it has been designed to achieve the design life is not critical but is a factor that will be taken into account.

The case also reaffirms the principle that the wording of a document must show a clear intention to create a trust; the court will not strain the language of the document to infer such a relationship.

Notices to rectify defects should adequately identify the defects to be rectified. This is particularly important if, at the time of giving notice, the relevant assets are not known to be defective.

Facts

Alstom Australia Pty Limited (**Alstom**) was contracted to design and construct the mechanical ventilation system for the Lane Cove Tunnel Project. Alstom subcontracted the defendant, Trox

(Australia) Pty Limited, (**Trox**) to design the necessary sound attenuators with a minimum 'design life' of 20 years and to supply the same (**Trox Subcontract**).

In June 2005, Alstom sold its business to the plaintiff, UGL Rail Pty Limited, (**UGLR**). The sales agreement required Alstom to assign or novate all 'Contracts' to UGLR or provide the benefit of those Contracts by subcontracting or otherwise (**Sales Agreement**). The Trox Subcontract was not assigned to UGLR until 12 March 2013.

Before the assignment took place, UGLR attempted to enforce Alstom's rights under the Trox Subcontract in respect of defective attenuators.

UGLR asserted that the sound attenuators did not have a design life of 20 years and that it was entitled, by reason of the Sales Agreement, to require Trox to rectify the sound attenuators under the Trox Subcontract. The basis of UGLR's argument was that the Sales Agreement provided that, until the assignment of the Trox Subcontract, UGLR was obliged to perform the obligations of Alstom under the Trox Subcontract, and such a provision gave rise to an agency or implied trust, entitling UGLR to exercise such rights against Trox.

Decision

The court found that, although some of the sound attenuators were defective, UGLR had no rights against Trox regarding rectification, as UGLR was not a party to the Trox Subcontract nor did it have authority to act on Alstom's behalf in relation to it.

Whilst the Sales Agreement gave UGLR limited rights of agency in respect of performing Alstom's obligations under the Trox Subcontract, no agency existed to permit UGLR to exercise Alstom's powers or discretions under the Trox Subcontract. McDougall J was not prepared to imply a trust, as the parties had not used the language of a trust, nor was there any reason based on commercial necessity to do so, particularly as the objective under the Sales Agreement could have been achieved simply by assigning or novating the Trox Subcontract. The parties' error in forgetting to do so was no reason to imply a trust.

Even had his Honour been prepared to find that UGLR did have rights regarding rectification, the defect notices given did not adequately identify the assets which needed to be rectified. A general direction to repair, modify or replace assets cannot trigger an obligation to repair, modify or replace assets if, at the time of giving the notice, the relevant assets are not known to be defective.

Reference to a 'design life' requires the equipment to function reliably for the period of time it is designed for. The absence of any specific evidence that the equipment had been designed to function reliably for 20 years was not critical but was a factor in determining that the equipment had not achieved the minimum design life.

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Northern Territory

INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor [2017] NTSC 45

James Kearney | Lhia-Clare Davis | Rebecca Clafton

Catchwords

Construction Contracts (Security of Payments) Act (NT) – security of payments – natural justice – substantial failure to comply with requirements of – no opportunity to address critical issues not raised by parties – deprived of possibility of a successful outcome – adjudication – determination – judicial review

Significance

The Supreme Court of the Northern Territory has quashed the determination of an adjudicator on the grounds of a denial of natural justice in circumstances where the adjudicator failed to request submissions on the particular point on which his decision was based.

Facts

INPEX Operations Australia Pty Ltd (**respondent**) engaged JKC Australia LNG Pty Ltd (**claimant**) to perform engineering, procurement, supply, construction and commissioning of onshore facilities for in relation to the respondent's gas field development (**Contract**).

On 3 November 2016, the claimant issued two invoices to the respondent – one for US$205,825,452, and a separate invoice for the GST component.

On 24 November 2016, the respondent issued a notice of dispute, disputing US$133,501,780 of the first invoice and US$17,510,093 of the GST claimed.

On 3 January 2017, the claimant made an adjudication application under the *Construction Contracts (Security of Payments) Act* (NT) (**Act**) in relation to US$83,933,837, being a portion of the disputed amount.

The adjudicator alerted the parties by email to an issue that he considered relevant, and invited the parties' submissions as to *'whether the provisions implied into deficient construction contracts by section 20 of the NT Act should or should not be imported into the [Contract]'*. The parties provided submissions to the effect that neither considered section 20 of the Act to apply.

The adjudicator determined that the respondent pay the claimant USD$83,933,837 (**Determination**) on the basis that section 20 of the Act did operate to insert implied terms into the Contract, relevantly, that the respondent ought to have provided a notice of dispute within 14 days. As the respondent in fact issued its notice of dispute 21 days after the invoices were served, the adjudicator determined that the respondent was consequently obliged to pay the whole amount of the invoice.

The respondent sought judicial review of the adjudication determination on the basis, inter alia, that there was a substantial failure to accord natural justice.

Decision

The court held that there had been a substantial denial of natural justice and quashed the determination.

Whilst both parties had disagreed with the adjudicator that section 20 of the Act had any operation upon the Contract, Kelly J noted the real question to be tried was whether the adjudicator afforded the parties reasonable notice of the basis on which he intended to make his decision and an opportunity to address that proposition.

Whilst the adjudicator did alert the parties as to the issue of the application of section 20 of the Act, he did not indicate his view during the adjudication process, or what he considered the consequences of application of section 20 of the Act would be upon the parties.

Further, he did not warn the parties that he was contemplating making his determination on the basis that the respondent had failed to issue its notice of dispute within 14 days.

Whilst the claimant argued this issue was implicit in the question asked, his Honour held that the adjudicator's communication did not fairly put the claimant on notice, and, that, in any event, the terms of the adjudicator's email specifically precluded the respondent from making any submissions about what would be the consequences of implying the terms into the Contract. This amounted to a substantial denial of natural justice, depriving the respondent of the possibility of a successful outcome.

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Victoria

Colonial Range v CES-Queen (BAB4 – Protection Works) [2017] VSC 317; *Colonial Range v CES-Queen (Gantry)* [2017] VSC 256

Owen Cooper | Tom Kearney | Robert Meade

Catchwords

Judicial review – protection works notices under section 84 of the *Building Act 1993* (Vic) – building work precautions – protection of the public

Significance

These decisions confirm that building surveyors and municipal authorities may consider all relevant matters when exercising their discretionary powers under the *Building Act 1993* (Vic) (**Act**) and the *Building Regulations 2006* (Vic) (**Regulations**) respectively.

Facts

CES-Queen (Vic) Pty Ltd (**defendant**) proposed to demolish a building located at 150 Queen Street (**site**). The demolition risked causing damage to adjacent land including properties of Colonial Range Pty Ltd (**plaintiff**) at 140 Queen Street and 21-27 MacKillop Street and a public footpath.

BAB4 – Protection works

The defendant obtained a protection works determination in respect of the plaintiff's properties from a building surveyor, Mr Galanos. When the plaintiff appealed to the Building Appeals Board (**board**), the defendant withdrew Mr Galanos' determination. The defendant made a new application to a second building surveyor, Mr Akritidis, who recommended 'appropriate' protection works and made a protection works determination. The plaintiff unsuccessfully appealed against Mr Akritidis' determination to the board.

Gantry

The defendant proposed to erect a gantry over the footpath in front of 140 Queen Street to protect passing pedestrians. The City of Melbourne (**council**) consented on the condition that the defendant obtained the plaintiff's written approval, as the plaintiff's tenants stood to lose business as a result of the gantry. The defendant appealed to the board, which approved the gantry proposal without the condition.

The plaintiff sought to have the court quash both of the board's determinations for jurisdictional error.

Decision

The court dismissed the plaintiff's claims entirely and confirmed both of the board's determinations.

Digby J found that:

BAB4 – Protection works

The defendant had validly terminated Mr Galanos' determination and accordingly it was entitled to recommence the protection works process as this did not cause unfair prejudice to the plaintiff.

Section 87 of the Act entitles a building surveyor to consider and advise what protection works might be appropriate in the particular circumstances, rather than merely approving or rejecting a protection works proposal. This, his Honour said, furthered the aims of the Act by facilitating the swift resolution of building disputes.

Gantry

The council was entitled to consider public safety as a paramount concern when exercising its discretion to approve safety measures under regulation 604(4) of the Regulations. The board was therefore also entitled on appeal as it 'stands in the shoes' of the council under Part 10 of the Act.

The board's reasons demonstrated it had considered the plaintiff's economic interests but prioritised the safety of the public in the absence of clear evidence regarding the state of the 140 Queen Street's facade which resulted from the plaintiff's:

- objection to the defendant's proposal to conduct non-invasive testing of the site to clarify the extent of the safety risk; and
- failure, in the board's view, to adequately investigate the state of the facade of 140 Queen Street.

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Geotech Pty Ltd v Premier Developments Pty Ltd [2017] VCC 874

Alison Sewell | Tom Kearney | Desiree Chong

Catchwords

Security of payment claim – whether payment claim is valid – default judgment – whether default judgment irregularly entered

Facts

Geotech Pty Ltd (**claimant**) entered into a contract with Premier Developments Pty Ltd (**respondent**) for construction work at 416 Smith Street, Collingwood (**contract**).

On or about 24 March 2017, the claimant issued a payment claim to the respondent for the amount of $215,457.90 under the contract and pursuant to the *Building and Construction Industry Security Payment Act 2002* (Vic) (**Act**). The respondent failed to serve a payment schedule within 10 business days of service, as required by section 15 of the Act. Consequently, the claimant sought to recover the full amount of the payment claim by commencing proceedings under section 16 of the Act.

The claimant considered that the respondent failed to file a notice of appearance within the time required and applied for default judgment on that basis. Deputy Registrar Malone ordered that the respondent pay the full amount of the payment claim, interest and costs. The respondent appealed the decision in the Victorian County Court.

Decision

The court set aside the default judgment because:

- entry of default judgment was premature as the evidence did not establish that delivery and service of the writ was effected at the respondent's address, service was deemed to be effected by post and accordingly the time for filing a notice of appearance had not expired when default judgment was entered; and
- there was a defence on the merits (discussed below).

The court observed that there were two reasons for the requirement in section 14(2)(c) of the Act that a payment claim must identify the construction work/ related goods or services to which it relates:

- to enable the respondent to consider and respond to the payment claim by either accepting it in its entirety or in part or disputing it; and
- to define the issues in dispute if the matter is adjudicated.

Burchell JR ultimately found that, because the payment claim did not provide any breakdown or explanation for the claim for $215,457.90, there was an arguable defence on the merits that the payment claim insufficiently identified the work to which it related. The claimant's submissions—that the respondent, due to background circumstances, was nonetheless able to understand the payment claim—gave rise to triable issues which were not to be determined at an interlocutory stage.

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Imerva Corporation Pty Ltd v Kuna [2017] VSCA 168

Alison Sewell | Tom Kearney | Sarah Kennedy

Catchwords

Domestic Building Contracts Act 1995 (Vic) – schedule of progress payments – major domestic building contract

Significance

The decision demonstrates that if the parties to a major domestic building contract agree to a progress payment regime that departs from the prescribed method in the *Domestic Building Contracts Act 1995* (Vic) (**Act**), they must demonstrate a clear understanding that they are departing from the legal protections in the Act.

Facts

Imerva Corporation Pty Ltd (**builder**) entered into a building contract with Anton and Jaga Kuna (**owners**) to demolish an existing house and build two attached townhouses on the owners' land in Brighton, Victoria. The contract was a major domestic building contract as defined by the Act.

The parties agreed under the contract to use a method of scheduling progress payments which departed from the method set out in section 40 of the Act. However, the owners did not sign the warning required under the Act in the form prescribed by regulation 12 of the *Domestic Building Contracts Regulations 2007* (Vic) (**Regulations**). Rather, they placed their initials at the foot of each page of the contract including on the page that contained the warning. The owner paid the first seven progress claims in accordance with the new method.

In or around October 2013, a dispute arose between the parties due to alleged defects in the works, and the owners failed to pay the next three progress claims and subsequently purported to terminate the contract.

The builder sued to recover the unpaid progress claims and associated amounts while the owners counterclaimed for the return of excess progress payments, additional costs to complete, rectification costs and incomplete works costs.

The builder submitted that the owners were estopped from disputing the method of scheduling progress payments because the builder would attract criminal sanction for receiving amounts in addition to those allowed under the Act.

The builder appealed against the trial judge's findings that:

- the owners' initials placed at the foot of the page failed to comply with the Regulations, meaning that the method of scheduling progress payments set out in section 40 of the Act applied, and not the contractual process; and
- estoppel is not available to prevent owners from relying upon a builder's contravention of the Act.

Decision

The Court of Appeal (Tate, Kyrou and McLeish JJA) unanimously dismissed the appeal.

The court found that the warning required by the Regulations must be signed in a manner that demonstrates clearly that owners understand that the legal protection afforded by the Act regarding the method of scheduling progress payments no longer applied. Whilst this did not require a signature on the dotted line, the place of signing must enable the necessary inference to be confidently drawn.

The court also agreed with the trial judge's conclusion that estoppel is not available.

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