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2019 MTECC NEWS CASENOTES

COCKRAM CONSTRUCTION LIMITED V FULTON HOGAN CONSTRUCTION PTY LTD [2018] NSWCA 107

Newsletter 19.1 published 4 February 2019

CATCHWORDS

BUILDING AND CONSTRUCTION – adjudication of payment claim – review of adjudicator's decision –content of the reasons to be included in determination – where adjudicator concluded that contractual condition precedent to extension of time was not legitimate or workable because it depended on something happening under another contract – whether the determination failed to include the reasons for the determination – whether the adjudicator departed from the statutory function by so concluding

AUTHOR'S CASE NOTE

An adjudicator determined that Cockram, as subcontractor to Fulton Hogan, was entitled to be paid $8,307,337.72 in respect of extensions of time. In defence of the claim, Fulton Hogan relied upon clause 22(1)(e) of the subcontract, which provided as a pre-condition to entitlement to an extension of time, that the contractor (Fulton Hogan) had received an equivalent extension of time under the head contract. The adjudicator held that this was not "a legitimate condition precedent" because it relied upon a contractual relationship to which Cockram was not a party.

Fulton Hogan sought judicial review of the determination on the basis that the adjudicator had departed from her statutory functions by refusing to apply clause 22(1)(e) of the subcontract.

The Primary Judge granted the relief, holding that "it was simply a matter for speculation why the adjudicator thought clause 22(1)(e) did not apply", and that accordingly the adjudicator had failed to give reasons for a critical aspect of her decision, which constituted a failure to comply with the statutory requirement to "include reasons for the determination (per s22(3)(b))", and jurisdictional error.

On appeal by Cockram to the Court of Appeal, Fulton Hogan reshaped its arguments in seeking to support the Primary Judge's decision, first, by submitting that the adjudicator's reasons indicated a refusal by the adjudicator to apply clause 22(1)(e) of the subcontract, and secondly, that if the adjudicator's reasons did not manifest such a refusal, the adjudicator must have had additional and unstated reasons for upholding the extension of time claims, and accordingly failed to comply with the requirement that the adjudicator's determination "include the reasons for the determination".

The Court of Appeal allowed Cockram's appeal, holding that:

a. the requirement to include reasons for the determination does not require the adjudicator to provide a written account of the subjective processes by which the determination was reached. It is sufficient that the adjudicator provide an explanation for the outcome which the adjudicator wishes to present;

b. the determination recorded a complete argument for the conclusion reached by the adjudicator and accordingly there was no basis for the submission that the adjudicator must have had additional unstated reasons for her determination.

Author: Francis Tiernan QC

STRUCTURAL MONITORING SYSTEMS LTD V TULIP BAY PTY LTD [2019] WASCA 16 (29 JANUARY 2019)

Newsletter 19.2 published 19 February 2019

CATCHWORDS

Arbitration - Commercial Arbitration Act 1985 (WA) - Appeal against decision dismissing application to set aside arbitral award on ground of misconduct - Whether denial of procedural fairness - Whether excessive delay in delivery of award - Matter heard and determined by two arbitrators where three arbitrators had been appointed - Majority of the arbitrators heard and determined the matter

AUTHOR'S CASE NOTE

Supreme Court of Western Australia Court of Appeal refuses to set aside an arbitration award made by two arbitrators notwithstanding a finding of misconduct on the part of the third arbitrator by reason of his non-participation in the arbitral process.

In Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd [2019] WASCA 16 (29 January 2019) the Supreme Court of Western Australia Court of Appeal unanimously dismissed an application to set aside an arbitral award on the ground of misconduct based on excessive delays in delivering the award and where the matter was determined by only two of three appointed arbitrators.

Under a Technology Agreement, the parties agreed that all claims arising were to be exclusively settled by arbitration. The agreement provided that where there was more than one arbitrator, all decisions would be made by majority vote of the arbitrators. Three arbitrators were appointed to deal with the dispute. Two of them were barristers, the third, L, was a patent and trademark attorney.

There were delays during the reference. The primary judge observed that it fell well short of an efficient and cost-effective dispute resolution process. More than 16 months elapsed between the lodgement of evidence and submissions (July 2015) and the delivery of reasons by the two arbitrators (November 2016) and a further 18 months elapsed before the third arbitrator, L, indicated his agreement to the decision of the majority (December 2016) [88].

Prior to L indicating his agreement, the appellant had commenced proceedings to set aside the award for misconduct on the basis that the matter had been decided by only two of the three appointed arbitrators. It was only after the proceeding had been commenced that L provided a letter in which he advised that he had read the decision of the two other arbitrators and agreed with their reasons.

The Court of Appeal considered the power to set aside an award for misconduct.[1] Under the Commercial Arbitration Act 1985 (WA), at the time the relevant legislation, "misconduct" was defined inclusively and extended to "corruption, fraud, partiality, bias and a breach of the rules of natural justice". The court observed that in Oil Basins[2],Victorian Court of Appeal observed that the expression "misconduct" as used in relation to arbitration "does not necessarily or indeed often involve moral turpitude on the part of the arbitrator". It amounts to no more than a mishandling of the arbitration that is likely to amount to some substantial miscarriage of justice.

The Court of Appeal disagreed with the primary judge, finding on balance that L had failed to independently consider the evidence and submissions of the parties [114] and that the failure by L to engage in the arbitration, by independently considering the submissions and evidence, constituted misconduct [116]. Nevertheless, in the exercise of its discretion, the Court was not satisfied that there had been a substantial miscarriage of justice or that the appellant had been prejudiced [120]; [127]. Accordingly, the Court refused to exercise its discretion to set aside the award or to remove the arbitrators [128].

However, the Court observed that the provision for a majority decision should not be regarded as a licence to disregard involvement of a minority of the arbitrators [130]. The appeal was accordingly dismissed.

Foonotes:

[1] The application was made under ss42 and 44 of the Commercial Arbitration Act 1985(WA) which has since been repealed and replaced by the Commercial Arbitration Act 2012(WA), s43(2)

[2] Oil Basins Ltd v BHP Billiton Ltd [2007] VSCA 225; (2007) 18 VR 346

Author: Ian Percy

SEYMOUR WHYTE CONSTRUCTIONS PTY LTD V OSTWALD BROS PTY LTD (IN LIQUIDATION) [2019] NSWCA 11 (12 FEBRUARY 2019)

Newsletter 19.3 published 4 March 2019

CATCHWORDS

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

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

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

AUTHOR'S CASE NOTE

'NSW Court of Appeal rejects "Facade"'

Seymour subcontracted Ostwald to perform road works on the Pacific Highway. Ostwald served a progress payment claim for $6,351,066.08 pursuant to the Building and Construction Security of Payment Act 1999 (NSW) (Act). Seymour responded by payment schedule proposing to pay $2,505,237.58. Ostwald made an adjudication application, and the adjudicator determined the amount due to Ostwald was $5,074,218.27.

Seymour commenced proceedings claiming that the Adjudication Determination was invalid because Ostwald made the Application outside the time limit specified by the Act. Ostwald cross-claimed seeking rectification of the Works Contract to alter the dates on which Seymour was required to make progress payments; alternatively, Ostwald claimed the unpaid Scheduled Amount of $2,505,237.58 as a statutory debt pursuant to the Act. After the proceedings commenced, Ostwald was placed into liquidation.

Stephenson J ordered rectification of the contract, and therefore, the Adjudication Determination was valid. Alternatively, if it was invalid, his Honour held that Ostwald could recover the Scheduled Amount as a debt due under the Act because the Act continued to apply notwithstanding the winding up of Ostwald had commenced. His Honour declined to follow the Victorian Court of Appeal's decision in Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd [2016] VSCA 247 on the basis that it was "plainly wrong". Based on the High Court's interpretation of the NSW Act in Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd, his Honour considered that the reference in s.8(1) to a person "who has undertaken" to carry out work is to a contractual undertaking, rather than the physical undertaking of work. Seymour appealed.

The Court of Appeal (Sackville AJA, Leeming, Payne, White JJA and Emmett AJA agreeing) allowed the appeal and held that the primary Judge erred in finding that the parties intended that Seymour should have 30 days from the end of the relevant month in which to pay Ostwald, rather than an earlier date specified in the Works Contract. Accordingly, the Adjudication Application was served out of time and therefore invalid. However, the Court agreed that Ostwald was therefore entitled to seek recovery of the Scheduled Amount pursuant to the Act, as the making of an invalid Adjudication Application did not preclude Ostwald from pursuing the summary statutory alternative. Further, an entitlement to a progress payment under the Act does not depend on the claimant actually continuing to perform work under a contract. Accordingly, notwithstanding the winding up of Ostwald, the Act continued to apply to its claim and it was entitled to pursue its claim for the Scheduled Amount to judgment.

Author: Michael Whitten QC

OWNERS CORPORATION NO.1 OF PS613436T V LU SIMON BUILDERS PTY LTD (BUILDING AND PROPERTY) [2019] VCAT 286

Newsletter 19.3 published 4 March 2019

CATCHWORDS

BUILDING AND CONSTRUCTION – fire at Lacrosse tower on La Trobe St - aluminium composite panels (ACPs) – compliance with the Building Code of Australia (BCA) – construction of the BCA – International Fire Engineering Guidelines (IFEG) – consultant agreements with building professionals – history and use of ACPs – causes of damage by fire – compliance of ACPs with the BCA – construction of BCA clause C1.12(f) "bonded laminated materials" – construction of BCA clause C2.4 of specification C1.1 "attachments to a wall" – breach of warranties under the Domestic Building Contracts Act 1995 (Vic) – role of relevant building surveyor – whether obligations under consultant agreements coextensive with duty to exercise reasonable care – failure by building professionals to exercise reasonable care under construction agreements – whether building surveying a "profession" – Wrongs Act 1958 (Vic) s59 peer professional opinion defence – relevance of D&C Contract to construction of consultant agreements – breach of consultant agreements – construction of specification forming part of D&C Contract – meaning of "indicative to" – role of fire engineer – meaning of "full fire engineering assessment" under IFEG – failure to warn of non-compliant ACP – liability of smoker – role of superintendent – liability of owners in relation to items stored on balconies – causation and remoteness in relation to failures of building surveyor, architect and fire engineer to exercise reasonable care – would a warning have avoided harm – proportionate liability – allocation of responsibility between building surveyor, architect, fire engineer and smoker – quantum – sufficiency of evidence establishing loss – reliance on assessments by insurance adjuster – loss associated with increased insurance premiums

AUTHOR'S CASE NOTE

' "Lacrosse" decision delivered'

The long awaited decision in the first ACP cladding case to go to judgment to date was delivered on 28 February 2019. Judge Woodward allowed the claim by the owners of apartments at Melbourne's Lacrosse tower in Docklands for more than $5.7 million in damages after a fire in November 2014 fuelled by flammable cladding caused significant damage to the building. Each of the remaining respondents were held liable.

The builder (LU Simon) was held to have breached the warranties of suitability of materials, compliance with the law and fitness for purpose in its D&C contract. The building surveyor (Gardner Group and Stasi Galanos) breached its Consultant Agreement by failing to exercise due care and skill in issuing the relevant building permit and thereby approving the specification calling up ACPs "indicative to Alucobond" and failing to notice and query the incomplete description of the cladding systems in the Fire Engineering Report. The architects (Elenberg Fraser) breached its Consultant Agreement by failing to remedy defects in its design (the Alucobond Specification) that caused the design to be non-compliant with the BCA and not fit for purpose, and failing to ensure that the ACP sample (of "Alucobest") provided by LU Simon was compliant with their design intent. The fire engineer (Thomas Nicolas) breached its Consultant Agreement by failing to conduct a full engineering assessment of the Lacrosse tower in accordance with the requisite assessment level

dictated within the IFEG, failing to include the results of that assessment in the fire report, failing to recognise that the ACPs proposed did not comply with the BCA, and failing to warn at least LU Simon (and probably also Gardner Group, Elenberg Fraser and PDS) of that fact.

No adverse finding was made against the occupier of apartment 805 (Kim) in relation to whether the storage of items on the balcony contributed to the ignition of the Alucobest ACPs or subsequent fire spread. One of the persons staying in the apartment (Gubitta) was held to have breached a duty of care to the Owners by failing to ensure that his cigarette was fully extinguished before leaving it in a plastic container, which started the fire.

The claim against the superintendent under the building contract (Property Development Solutions) was settled shortly before the hearing.

His Honour held that ACPs did not satisfy the "Deemed-to-Satisfy" ("DTS") provisions of the BCA by operation of clause C1.12(f) (or on any other basis).

The damages payable by LU Simon to the Owners were apportioned between Gardner Group: 33%, Elenberg Fraser: 25%,Thomas Nicolas: 39% and Mr Gubitta: 3%.

Author: Michael Whitten QC

FULLINFAW V NEIL FLETCHER DESIGN PTY LTD [2019] VSC 142 (12 MARCH 2019)

Newsletter 19.4 published 18 March 2019

CATCHWORDS

DOMESTIC BUILDING CONTRACT – 'No fault' termination of major domestic building contract – Liquidated damages claim – Extension of time claim not proven – Builders entitlement – Effect of cap – Recovery of liquidated damages from builder – Domestic Building Contracts Act 1995 (Vic) ss 8(d), 41, 53.

AUTHOR'S CASE NOTE

'Homeowner Successfully Appeals VCAT Decision'

Background:

The Domestic Building Contracts Act 1995 (Vic) ('Act') allows no fault termination in accordance with section 41 of the Act. On 23 June 2016 the owners validly terminated a building contract entered into on 22 January 2015. The Tribunal ordered that the owners pay the builder $13,916. The owners' claim for liquidated damages was rejected by the Tribunal on the basis that "the owners had no crystallized entitlement to liquidated damages as at the date the contract came to an end".

Submissions on appeal limited to liquidated damages:

The owners argued that the builder failed to lead evidence or prove its extension of time, the Tribunal had uncontroverted evidence supporting their liquidated damages, the Tribunal failed to recognise the claim for liquidated damages was payable independently of any other rights that the owners or the builder may have, liquidated damages are an accrued right once the building period is exceeded and that liquidated damages are recoverable as a debt.

The builders submitted that the owners had to do more than demonstrate that the builder failed to complete the works by 12 December 2015, that is exceeding 1½ times the period allowed to complete the works, in order to sustain their claim for liquidated damages.

Decision on appeal:

His Honour Justice Garde held that:

> *[63]-[64] "the Tribunal appears to have overlooked that the agreed damages under cl 40 accrued weekly and that the owners were entitled to deduct them from the final payment. Their rights stemmed from s 8 of the Act and cl 40 of the contract, and were not affected by any provision in s 41. The owners' claim for liquidated damages should have been upheld by the Tribunal. It is supported by the terms of cl40 and by the owners' unchallenged evidence. The owners had plainly established that they were entitled to liquidated damages in the amount of $14,000.*

The Court granted leave to appeal, allowed the appeal, set aside the Tribunal's Orders allowing the owners the sum of $84.

Author: Jim Stavris

JOHN BEEVER (AUST) PTY LTD V PAPER AUSTRALIA PTY LTD [2019] VSC 126

Newsletter 19.5 published 1 April 2019

CATCHWORDS

BUILDING AND CONSTRUCTION – Whether payment claim identifies the construction work to which the progress payment relates – Whether payment claim states that it is made under the Act – Sections 14(2)(c) and 14(2)(e) of the Building and Construction Industry Security of Payment Act 2002 (Vic)

PRACTICE AND PROCEDURE – Nature of judgment pursuant to s 16(2) and s 17(2) of the Building and Construction Industry Security of Payment Act 2002 (Vic)

PRACTICE AND PROCEDURE – Application for summary judgment – Whether summary judgment appropriate where question of law but no disputed facts.

AUTHOR'S CASE NOTE

This decision of Lyons J appertained to an application in respect of three separate payment claims pursuant to sections 16(2) and 17(2) of the Building and Construction Industry Security of Payment Act 2002 (the "SOPA").

Noting and discussing the summary nature of the applications, and the very limited defences available to the defendant, the Court considered the following two key questions:

1. whether the payment claims properly identified the works they related to pursuant to SOPA section 14(2)(c), and

2. whether a purported payment claim was properly endorsed pursuant to SOPA section 14(2)(e).

As to the first question, two of the payment claims did not identify specific work performed, but instead relied on references to relevant contract details, the period of work and the amount claimed, and details of the work were previously provided to the defendant.

The Court considered a wide range of authorities from multiple jurisdictions as to whether the requirements of SOPA section 14(2)(c) were met, and ultimately determined that the payment claims sufficiently identified the work to which it related. Adopting the test established by Philippides J in T & M Buckley Pty Ltd v 57 Moss Rd Pty Ltd [2010] QCA 381, the Court held that the correct test for the identification requirement was for the payment claim to identify the construction work to enable the respondent in a reasonable way to understand the basis of the claim.

Additionally, the Court applied Gantley Pty Ltd v Phoenix International Group Pty Ltd [2010] VSC 106 (as it considered Protectavale and Nepean), holding that it is appropriate to take into account the background knowledge of the parties derived from their past dealings and exchanges of information. Concluding the point, the Court helpfully distilled a short summary of key principles at paragraph [83].

The Court determined the second of the above questions in the negative. Neither the payment claim itself, nor its covering correspondence (in this case, an email), included the requisite endorsement that the payment claim was made under the SOPA. The plaintiff unsuccessfully sought to rely on the assertion that a previous email, attaching an earlier version of the payment claim which did include the endorsement, satisfied the requirement.

Author: Andrew Blair

GLOBE CHURCH INCORPORATED V ALLIANZ AUSTRALIA INSURANCE LTD [2019] NSWCA 27

Newsletter 19.6 published 16 April 2019

CATCHWORDS

INSURANCE — Claims — Property Damage – Limitation period – whether claim statute barred – interpretation of insurance policy – time at which insured's cause of action for damages for breach of contract under an indemnity policy of property insurance arose – whether cause of action for damages arose at the time of the property damage – existence of an implied term requiring performance within a reasonable time

AUTHOR'S CASE NOTE

'The date of accrual of a cause of action under an insurance policy'

In Globe Church Incorporated v Allianz Australia Insurance Ltd [2019] NSWCA 27, the New South Wales Court of Appeal construed an Industrial Special Risks Insurance Policy to determine when the cause of action for breach of contract had accrued. Globe Church, the insured, had suffered property damage due to rainwater and flooding from 8 June 2007. The damage continued over successive policy periods.

The Facts:

Under the Insuring Clause, the Insurers had agreed to 'indemnify the Insured against Damage occurring to Property Insured during the Period of Insurance.'

The Insurers said that the cause of action for breach of contract for failure to indemnify the Insured for the property damage was complete on the occurrence of the insured event, being the property damage.

The Insured argued that the cause of action for breach of contract was only complete after a reasonable period had elapsed from the insured event. The reasonable period was the period that it would take the Insurers to investigate and assess the putative claim lodged on the occurrence of the insured event. The Insured said that there is a distinction between the promise of an insurer to indemnify and the breach of that promise. It is only when the insurer fails to do what is required of it that a cause of action for damages for breach of contract accrues. The insured argued that the law implies a term into the Policy that the Insurer has a reasonable time to perform its promises.

The Court of Appeal by majority found for the Insurers. The fundamental basis of the finding was old English authority that a cause of action under indemnity insurance accrues upon the happening of the insured event.

The majority said that '[a]bsent a provision in an indemnity insurance policy that makes lodgement of a claim a condition precedent to liability, the concept of a promise to indemnify (to make good the loss or to hold harmless against loss) in the context of a property damage insurance policy is such that the promise is enlivened when the property damage is suffered.'[1] The majority did not accept that there was an implied term requiring the performance of the obligation to investigate and assess a claim within a reasonable time.[2] This conclusion must be correct. It is difficult to see why such a

term would be implied either in fact or in law, in light of the insurer's obligation of utmost good faith and implied duty to co-operate.

Conclusion:

It is intuitively difficult to see how an Insurer can be in breach of the Policy before it has had a chance to review, assess and determine its liability under the Policy and assess the amount properly payable under the Policy. However, the judgment of the majority is constructed upon the foundation of the English authorities that a cause of action under an indemnity policy accrues upon the happening of the insured event. The approach is consistent with the principle that causes of action for breach of contract arise upon breach regardless of whether or not the damages are quantifiable then.

There has been much criticism of the principle that a cause of action under an indemnity policy accrues upon the happening of the insured event. It would be ideal if the High Court has the opportunity to determine whether this principle should be applied in Australia.

Foonotes:

[1][2019] NSWCA 27 at [209] and [213].

[2][2019] NSWCA 27 at [213]

Author: Laina Chan

OWNERS CORPORATION NO.1 OF PS613436T V LU SIMON BUILDERS PTY LTD (NO. 2) (BUILDING AND PROPERTY) [2019] VCAT 468

Newsletter 19.7 published 29 April 2019

CATCHWORDS

PRACTICE AND PROCEDURE – Damages in the nature of interest under s53 the Domestic Building Contracts Act 1995 (Vic) – rate to be applied – relevance of principles applied to s60 of the Supreme Court Act 1986 (Vic) – whether a predisposition for the rate under s2 of the Penalty Interest Rates Act 1983 (Vic) – finding that interest involving a penalty component was not "fair" – costs orders in complex and substantial building disputes – application for indemnity costs – Calderbank offer – offer open ended and conditional on written settlement terms – costs on the standard basis only – whether Supreme Court or County Court scale

AUTHOR'S CASE NOTE

'Taking the Penalty out of the Penalty Interest Rates Act'

In a decision on the interest and costs payable in relation to the Lacrosse ACP-cladding case (Owners Corporation No.1 of PS613436T v Lu Simon Builders Pty Ltd (No. 2) (Building and Property) [2019] VCAT 468), Judge Woodward, sitting as Vice President of the VCAT, has given reasons in relation to the appropriate rate for 'damages in the nature of interest' in domestic building matters.

Section 53(3) of the Domestic Building Contracts Act 1993 (Vic) permits the Tribunal to base the rate of interest for an award of damages in the nature of interest under the Penalty Interest Rates Act 1983 (Vic) (PIR Act) 'or on any lesser rate it thinks appropriate', provided any such rate ordered is 'fair.'

His Honour observed that section 53(3) required considering, first, whether an entitlement to interest was fair, and second, the appropriate rate to be applied. In relation to both enquiries, the best evidence would be of the actual loss suffered by a successful party, such as their actual interest costs, in the absence of which, the Tribunal would infer an appropriate rate. Once an entitlement to interest was established, addressing the second enquiry, the Tribunal will assess the rate of interest under the PIR Act, unless the circumstances of the case dictated a lesser rate was appropriate. Considerations relevant to the appropriate rate include: the relative strengths of the parties' claims, their success relative to amounts claimed, and whether any party was caused delay or acted unfairly.

In the present case, there was no delay or unfair conduct and the only evidence submitted of an appropriate rate was that of commercial interest rates submitted by LU Simon. The Tribunal observed that the rates fixed by the PIR Act – between 9.5% and 10% – would include a significant penal component over the cost of commercial interest rates. Accordingly, the Tribunal selected the mid-point between commercial rates, being 2% per annum, as being the appropriate rate of interest.

Author: James Waters

WENLI SHAO V AG ADVANCED CONSTRUCTION PTY LTD [2019] VSCA 93

Newsletter 19.8 published 13 May 2019

CATCHWORDS

BUILDING AND CONSTRUCTION – Major domestic building contract – Termination by owner under Domestic Building Contracts Act 1995 s 41 – Builder entitled to reasonable price – Defects – Whether termination under s 41 extinguishes damages claim for defective work – Shevill v Builders Licensing Board [1982] HCA 47; (1982) 149 CLR 620; McDonald v Dennys Lascelles Ltd [1933] HCA 25; (1933) 48 CLR 457, applied – Whether costs of rectifying defects to be calculated in builder's reasonable price under s 41(5) – Builder paid more than reasonable price – Whether owner entitled to refund – Domestic Building Contracts Act 1995 s 53(2)(b) and (f).

ADMINISTRATIVE LAW – Appeals – Victorian Civil and Administrative Tribunal Act 1998, s 148 – Appeal allowed – Whether to exercise power of Tribunal to order refund – Whether to remit proceeding to Tribunal – Victorian Civil and Administrative Tribunal Act 1998 s 148(7)(b) and (c).

AUTHOR'S CASE NOTE

Owners terminating major domestic building contracts under section 41 of the Domestic Building Contracts Act 1995 are not thereby precluded from claiming damages for identified defective work

An owner terminated a major domestic building contract under section 41(1)(a)(ii) of the Domestic Building Contracts Act 1995(Vic) ("the Act") because works were not completed within one and half times the period allowed in the contract.

VCAT found that the owner had paid the builder approximately $1,040,000 and that there were defects which would cost approximately $93,000 to rectify. VCAT held that the builder was entitled under section 41(5) of the Act to a reasonable price for the work carried out to the date of termination, which VCAT assessed at approximately $917,000, being a sum assessed by an expert less the cost of defect rectification.

VCAT ordered the builder to pay the owner approximately $93,000 by way of damages for defective work. Even though the builder was paid more than the reasonable price of the work it had completed, the owner did not seek a refund and VCAT did not order one.

The builder appealed asserting that if an owner terminates under section 41 of the Act, the owner is precluded from claiming contractual damages for identified defective works.

The matter eventually came before the Court of Appeal which rejected the builder's assertion. The Court of Appeal noted that the builder's construction of section 41 involved the loss of accrued statutory and common law rights, and hence could only be supported by clear statutory language, which did not exist. This was especially so given that the Act is a consumer protection measure.

The Court of Appeal remitted the question of whether any refund was due to the owner back to VCAT.

Author: Nicholas Gallina

MEARS LTD V (1) COSTPLAN SERVICES (SOUTH EAST) LTD (2) PLYMOUTH (NOTTE STREET) LTDAND (3) J.R. PICKSTOCK LTD [2019] EWCA CIV 502

Newsletter 19.9 published 27 May 2019

AUTHOR'S CASE NOTE

'Practical Completion'

On 29 March 2019 the Court of Appeal in London delivered this interesting decision which reviewed the legal principles associated the with meaning of the term Practical Completion.

The case involved several contracts. A building contract (BC) for the construction of student flats, an engagement of an agent to administer and certify (AC) and a 21 year lease of the buildings by the owner to a property manage (lessor) (AL). The AL included provisions precluding the making of variations. The dates for and thus the definition of practical completion under the BC and AL were linked. The lease was to be executed 5 days after PC.

56 of the flats were more than 3% under the required area in the BC and the AL. The lessor sought declarations that because of the irremediable breaches practical completion had not been achieved, should not be certified as having been reached and accordingly it was not bound to execute the lease. There was no dispute that the flats were undersized, however there was no evidence of consequential loss.

The application failed in the TCC and the appeal was dismissed, the CA judgement was delivered by Coulson LJ who stated:

The 56 separate failures to achieve the 3% tolerance amounted to 56 separate breaches of contract. Whether or not those breaches, either singularly or taken together, were material or substantial such as to justify recission, is a matter of fact and degree, not a matter of the construction of the AL.

Practical points from the decision of the Court of Appeal

- It is clear from this decision that if an owner wishes to specify that a particular failure will constitute a material and substantial breach of the contract, then it is necessary to state as much in the contract wording, leaving no ambiguity.
- As has long been the case, what constitutes Practical Completion will be determined principally by the terms of the contract between the parties, so that at the contract formation stage the wording must reflect will criteria the owner requires.
- When drafting a sequence of related contract documents, the critical terms in each agreement must align. In this case at least neither party argued that there was a difference between the meaning of Practical Completion under the BC to that under AL.

Author: Professor Ian H Bailey AM SC

THE OWNERS - STRATA PLAN 89041 V GALYAN PTY LTD AND ACH CLIFFORD PTY LTD [2019] NSWSC 619

Newsletter 19.10 published 11 June 2019

CATCHWORDS

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

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

AUTHOR'S CASE NOTE

'When is it unreasonable to refuse to allow a Builder back on site to rectify defects?'

This question arises often, but what are the relevant legal principles which need to be applied to answer the question? A useful summary of those principles was recently provided by Stevenson J in The Owners - Strata Plan 89041 v Galyan Pty Ltd and ACH Clifford Pty Ltd[2019] NSWSC 619.[21] as follows:

"(a) [T]he overarching principle is that a plaintiff is not entitled to recover losses attributable to its own unreasonable conduct: The Owners - Strata Plan No 76674 v Di Blasio Constructions Pty Ltd [2014] NSSC 1067 (Di Blasio) at [42], citing Hasell v Bagot, Shakes & Lewis Ltd (1911) 13 CLR 374 at 388; [1911] HCA 62;

(b) in cases involving building contracts, the owner is required to give the builder an opportunity to minimise the damages it must pay by rectifying the defects, except where its refusal to give the builder that opportunity is reasonable or where the builder has repudiated the contract by refusing to conduct any repairs: Di Blasio at [44];

(c) the question of what is reasonable depends on all the circumstances of the particular case - one relevant factor is what attempts the builder has made to repair the defects in the past and whether, in the light of the builder's conduct, the owner has reasonably lost confidence in the willingness and ability of the builder to do the work: Di Blasio at [45];

(d) it is for the defendant to prove that the plaintiff has acted unreasonably - it is not for the plaintiff to prove that it acted reasonably: Di Blasio at [46]; and

(e) once a defendant puts in issue the reasonableness of the plaintiff's conduct, all circumstances relevant to an objective assessment of the plaintiff's position become examinable - the plaintiff is not limited to reliance on facts or circumstances actually known at the time, but may rely on facts which come to its attention afterwards, but which pertain to the defendant's conduct at the relevant time: Owners Strata Plan 78465 v MD Constructions Pty Ltd [2016] NSWSC 162 ... at [30]."

Author: Dr Richard J Manly QC

TRIPLE POINT TECHNOLOGY, INC. V PTT PUBLIC CO LTD [2019] EWCA CIV 230

Newsletter 19.11 published 24 June 2019

AUTHOR'S CASE NOTE

'A liquidated damages clause that did not contemplate the effect of termination'

In Triple Point Technology, Inc. v PTT Public Co Ltd [2019] EWCA Civ 230 the English Court of Appeal considered how to apply a clause imposing liquidated damages in circumstances where the contract was terminated before the contractor achieved completion.

After a review of the case law, Sir Rupert Jackson (giving the judgment of the Court of Appeal) observed that three different approaches have emerged to clauses providing for liquidated damages for delay in cases where a contractor fails to complete the work and a second contractor steps in:

1. The liquidated damages clause does not apply.
2. The clause only applies up until the termination of the contract.
3. The clause continues to apply until the second contractor achieves completion.

The Court noted that although textbooks generally treat category (ii) as the orthodox analysis, that approach is not free from difficulty. If a construction contract is abandoned or terminated, the principal is in new territory for which the liquidated damages clause may not have made provision. Although accrued rights must be protected, it may sometimes be artificial and inconsistent with the parties' agreement to categorise the principal's losses as $x per week up to a specified date and then general damages thereafter. It may be more logical and more consonant with the parties' bargain to assess the principal's total losses flowing from the abandonment or termination, applying the ordinary rules for assessing damages for breach of contract. Ultimately, the question must depend on the terms of the particular liquidated damages clause in issue.

In this case, the relevant clause provided:

> *"If CONTRACTOR fails to deliver work within the time specified and the delay has not been introduced by PTT, CONTRACTOR shall be liable to pay the penalty at the rate of 0.1% (zero point one percent) of undelivered work per day of delay from the due date for delivery up to the date PTT accepts such work…"*

The Court of Appeal interpreted the phrase "up to the date PTT accepts such work" to mean that the clause was premised on eventual acceptance of the work. That is, the clause was not intended to apply where termination occurs and the contractor never hands over completed work. The Court was therefore satisfied that no entitlement to liquidated damages had accrued.

Whilst many Australian Standard form contracts expressly provide for the calculation of liquidated damages up to the date of termination, this appeal exposes the complexity that can arise where termination is not addressed.

Author: Roman Rozenberg

RINEHART V HANCOCK PROSPECTING PTY LTD; RINEHART V RINEHART (2019) 366 ALR 635; [2019] HCA 13

Newsletter 19.12 published 15 July 2019

CATCHWORDS

Contract – Construction – Dispute resolution clause – Arbitration – Where arbitral clause in deeds provided for confidential arbitration in event of any dispute "under this deed" – Where deeds came into existence against background of claims and threats of litigation made publicly by one party to deeds against others – Where deeds contained releases, acknowledgments and covenants not to sue, and promises not to make further claims – Where deeds contained assurances they were entered into without undue influence or duress – Where appellants brought proceedings alleging breaches of equitable and contractual duties against other parties to deeds – Where appellants asserted they were not bound by deeds because their assent procured by misconduct of other parties to deeds ("validity claims") – Where respondents sought orders that matter be referred to arbitration and proceedings be dismissed or permanently stayed – Whether validity claims subject to arbitral clause.

Arbitration – Parties – Where s 8(1) of Commercial Arbitration Act 2010 (NSW) ("NSW Act") provided that court before which action is brought in matter which is subject of arbitration agreement must in certain circumstances refer parties to arbitration – Where s 2(1) of NSW Act defined "party" to include any person claiming "through or under" party to arbitration agreement – Where trustees and beneficiaries party to arbitration agreement – Where beneficiaries alleged breaches of trust against trustees and knowing receipt against third party companies as assignees of trust property – Where third party companies asserted beneficial entitlement of trustees to property as essential element of defence – Where third party companies sought order that claims against them be referred to arbitration pursuant to s 8(1) of NSW Act – Whether third party companies claiming "through or under" party to arbitration agreement.

Words and phrases – "arbitral clause", "arbitration agreement", "claiming through or under a party", "confidential processes of dispute resolution", "context and purpose of deed", "dispute under this deed", "party", "privity of contract".

AUTHOR'S CASE NOTE

'Stay of proceedings for arbitration agreements – the meaning of 'under this deed' and 'a party''

This concerns the dispute between Mrs Rinehart and companies in the Hancock Group on the one side, and two of Mrs Rinehart's children on the other. The children allege in proceedings in the Federal Court that Mrs Rinehart had misused her position as trustee to their disadvantage as beneficiaries under certain trusts, and certain of the respondent companies had knowingly received trust assets. Mrs Rinehart and the respondent companies sought a stay of the proceeding, on the basis that deeds had been entered with the children relating to these allegations and that disputes 'under the deed' would be referred to confidential arbitration. The children alleged in the Federal Court that the deeds were void because they were procured by misconduct (the Validity claims). As such, the Federal Court was asked to determine whether the Validity claims were claims 'under the deed' for the purposes of section 8 of the uniform Commercial Arbitration Act 2010 (NSW) (the CAA) which requires a Court to stay an action which is the subject of an arbitration agreement unless it finds the agreement is null

and void, inoperative or incapable of being performed. If the Validity claims were claims 'under the deed', then they were capable of being determined by an arbitrator and the proceeding had to be stayed.

The primary judge construed the phrase 'under this deed' narrowly and dismissed the stay application. The Full Court disagreed and held that the phrase should be construed liberally, and therefore stayed the proceeding. The High Court agreed with the Full Court. The High Court reiterated the Full Court's conclusion that context will almost always tell one more about the objectively intended reach of such phrases than textual comparison of words of a general relational character. The High Court therefore looked at the background to the deeds for the meaning of the phrase 'under this deed'.

In looking at the background, the High Court noted that the alleged misconduct had been aired previously, and the three deeds the subject of the stay application appeared to have been entered to ensure that such allegations were treated confidentially. Because of this, the High Court held that it was inconceivable that a person entering the deeds would have thought that misconduct allegations going to the validity of the deeds would not be the subject of the confidential dispute resolution processes under those deeds.

The High Court also determined a cross-appeal by three of the respondent companies, which were seeking a stay but which were not parties to the deeds the subject of the arbitration agreements. The CAA defines a party as any person claiming 'through or under' a party to an arbitration agreement. The children alleged in the Federal Court that the three respondent companies were knowing recipients of trust property and therefore held the trust property on trust for them.

The primary judge and Full Court dismissed the stay applications by these companies. The High Court considered that the three respondent companies were saying, by way of defence, that either there was no breach of trust by the parties to the deeds, or that the deeds were entered into by the parties to the deeds so as to absolve them of any alleged breach of trust, and for this reason, those respondent companies were claiming defences 'through or under' the parties to the deeds. As such, the cross appeal was allowed and the proceeding stayed as against the three respondent companies.

Author: Andrew Downie

AYERS ROCK SKYSHIP PTY LTD V VOYAGES INDIGENOUS TOURISM AUSTRALIA PTY LTD [2019] NSWSC 828 (DARKE J)

Newsletter 19.13 published 23 July 2019

CATCHWORDS

CONTRACTS – construction – defendant operates a resort on land near Uluru in the Northern Territory – plaintiff proposed to establish a "Sky Ship" business involving the provision of rides in a gondola of a tethered helium balloon – parties entered into three interrelated agreements being an Operator Agreement and two leases – where the tethered helium balloon was subsequently destroyed by high cross winds – plaintiff unable to continue to operate the balloon – where the defendant issued notices of breach and notices to terminate the three agreements – whether the plaintiff was in breach of cl 4.1 of the Operator Agreement by failing to conduct the Business in accordance with the terms of the Operator Agreement during Normal Business Hours throughout the Term – plaintiff held to be in breach of the Operator Agreement – defendant entitled to terminate the Operator Agreement and the two leases – defendant entitled to declarations that the three agreements have been terminated

EQUITY – equitable remedies – relief against forfeiture – special heads of fraud, accident, mistake or surprise – whether the doctrine of relief against forfeiture applies to the Operator Agreement – whether the destruction of the tethered helium balloon was an "accident" in the relevant sense – where the destruction of the tethered helium balloon was an event within the reasonable contemplation of the parties – where the defendant did not cause or contribute to the breach giving rise to the right to terminate the Operator Agreement – not unconscientious for the defendant to insist upon its strict legal rights

AUTHOR'S CASE NOTE

'Can relief against forfeiture be ordered to nullify a valid termination of contract?'

Voyages, the owner and operator of the Ayers Rock Resort entered into an agreement and two leases with Ayers Rock SkyShip ("ARS") for the construction and operation of a tethered helium balloon Uluru viewing experience at the resort. ARS claimed that the balloon could operate in all but extreme weather conditions. The agreement required ARS to conduct the business during normal business hours (sunrise to sunset) every day and provided that Voyages could terminate the agreement if ARS discontinued the operation of the business for more than two consecutive days without Voyages' written consent or for other breach.

Because of problems with an automated rotation system it was necessary to manually turn the balloon into the wind to avoid damage. Shortly after operations commenced the balloon was destroyed by high winds. Voyages purported to terminate the agreement by reason of ARS's cessation of the business.

Darke J rejected ARS's submission that the termination was invalid because the interruption to the business was caused by exceptional circumstances. His Honour found that subject to the need to suspend operations for reasons of OH&S or extreme weather as contemplated by the agreement, ARS was obliged to operate the business continuously and ARS should be taken to have assumed the

relevant risk. The judge noted that the parties had chosen not to make provision in the agreement for frustration or force majeure.

ARS also sought relief against forfeiture in respect of the termination, arguing that it would be unconscientious for Voyages to insist upon its strict legal right to terminate the agreement and relying on the notion of "accident" as the reason for its inability to conduct the business.

Darke J referred to the decision Mineralogy Pty Ltd v Sino Iron Pty Ltd (No. 6)(2016) 329 ALR 1 in which Edelman J was prepared to proceed on the basis that as a matter of principle, relief against forfeiture was not precluded because the relief sought was not in relation to forfeiture of a proprietary right, as distinct from a contractual right (cited in JPA Finance Pty Ltd v Gordon Nominees Pty Ltd [2019] VSCA 159 at [82]).

His Honour observed that the boundaries of the notion of "accident" are indistinct and held that in the circumstances it was not unconscientious for Voyages to insist upon its legal right to terminate the agreement and it was not appropriate for equity to intervene to reshape the parties' contractual relations. His Honour also rejected ARS's submission that the right to terminate was exercised for an improper purpose. (Voyages had contemplated moving an Uluru dining site, at a cost of approximately $700,000, because the balloon site inhibited the view).

Author: Graeme Hellyer

CORPORATIONS ACT 2001, SS 415D, 434J, 451E

Newsletter 19.14 published 5 August 2019

AUTHOR'S CASE NOTE

'Might termination for insolvency now be a repudiation?'

Many, if not all, construction contracts provide a party a right to terminate for the insolvency of the other party. For example, the right to terminate in AS4000-1995 arises where, in relation to a corporation:

1. notice is given of a meeting of creditors with a view to the corporation entering a deed of company arrangement;
2. the party enters a deed of company arrangement with creditors;
3. a controller or administrator is appointed;
4. an application is made to a court for the winding up of the party and not stayed within 14 days;
5. a winding up order is made in respect of the party;
6. the corporation resolves by special resolution that it be wound up voluntarily (other than for a members'voluntary winding up) and
7. a mortgagee of any property of the party takes possession of that property,

(the Termination Right).

Amendments to the Corporations Act 2001 came into force on 1 July 2018 which have the effect of staying such termination rights for contracts entered into after the date of enactment.

- s. 415D provides that the Termination Right cannot be enforced if it relates to the reason for the making, or possible making, of an application to enter into a scheme or arrangement or compromise pursuant to s. 411;
- s. 434J provides that the Termination Right cannot be enforced if it relates to the reason for the appointment, or possible future appointment of, a managing controller; and
- s. 451E provides that the Termination Right cannot be enforced if it relates to the reason for being under administration, or possible future administration.

The stay on the exercise of the Termination Right is effectively perpetual. The relevant provisions provide that while the stay lifts, for example, at the end of the period of administration, the Termination Right cannot be exercised for the financial position that gave rise to the administration.

The public policy purpose of these amendments is plain. The Explanatory Memorandum states:

> This reform is aimed at enabling businesses to continue to trade in order to recover from an insolvency event instead of these clauses preventing their successful rehabilitation.

As always, parties to contracts, and those advising them, must be very careful in exercising rights of termination. These reforms reinforce that position. A termination for insolvency where a stay operates may risk the terminating party repudiating the contract.

Author: Michael Sharkey

STYLE TIMBER FLOOR PTY LTD V KRIVOSUDSKY [2019] NSWCA 171

Newsletter 19.15 published 19 August 2019

CATCHWORDS

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

AUTHOR'S CASE NOTE

'Is your payment schedule sufficient?'

A recent NSW Court of Appeal decision in Style Timber Floor Pty Ltd v Krivosudsky [2019] NSWCA 171 highlights the need to take care in preparing a document that is intended to be relied upon as a payment schedule for the purposes of Building and Construction Industry Security of Payment legislation in Australia.

In that case the respondent Mr Krivosudsky (contractor) was retained by the appellant Style Timber Floor Pty Ltd (principal) to perform floor finishing works on five different projects. The principal expressed dissatisfaction with the contractor's works and refused to pay some invoices. The contractor then served an emailed payment claim on the principal under s. 13 of the Building and Construction Industry Security of Payment Act 1999 (NSW) (NSW SOP Act).

The principal responded to the payment claim by email asserting that the contractor had caused damage in excess of the value of the contractor's payment claim. Reference was made in the principal's email to, inter alia, "many emails, photos, videos, back charges from builders and other trades, complains (sic) from my clients" that were said to support the principal's position.

The principal asserted that its emailed response read in conjunction with the referenced correspondence satisfied the requirements of s. 14 of the NSW SOP Act and constituted a valid payment schedule.

The contractor was successful in obtaining summary judgment on his payment claim at first instance in the NSW District Court. The principal applied for leave to appeal. The Court of Appeal granted leave to appeal but dismissed the appeal. Central to the Court of Appeal's reasoning were the following matters:

- A payment schedule does not require the degree of formality of a pleading for example but that "is not a licence for informality or an excuse for vague, generalised objections to payment." [per Bell P at para 2]

- While documents can be incorporated into a payment schedule by reference "documents to be so incorporated would need to be identified with sufficient particularity so that the recipient of the schedule knew what was being incorporated."[per Bell P at para 3 and Leeming JA at para 76]
- The generic reference to documents in the principal's response was inadequate [per Bell P at paras 4-7] and there was nothing in the principal's response that was directed towards any particular invoice or project [per Leeming JA at para 71].
- In the absence of sufficient explanation of the reasons why it is asserted that there is no obligation to pay a payment claim it is not enough to simply assert that the principal has set-offs that exceed the value of the payment claim [per Leeming JA at para 75].

Author: Andrew Laird

GLENCORE INTERNATIONAL AG V COMMISSIONER OF TAXATION [2019] HCA 26

Newsletter 19.16 published 2 September 2019

CATCHWORDS

Privilege – Legal professional privilege – Where documents identified by plaintiffs as having been created by law practice for sole or dominant purpose of provision of legal advice to plaintiffs – Where privileged documents stolen from electronic file management system of law practice and disseminated – Where documents obtained by defendants – Where defendants refused to return documents to plaintiffs and provide undertaking not to refer to or rely upon documents – Where plaintiffs sought injunctive relief in equity's auxiliary jurisdiction solely on basis of legal professional privilege – Where plaintiffs did not seek injunctive relief on basis of confidentiality or other area of law – Where defendants demurred on basis that no cause of action disclosed – Whether legal professional privilege operates only as immunity or is also actionable legal right – Whether policy considerations justify creation of new actionable right in respect of documents subject to legal professional privilege.

Words and phrases – "actionable legal right", "basis for relief", "breach of confidence", "cause of action", "common law right", "confidentiality", "development of the law", "immunity", "injunction", "legal professional privilege", "policy of the law", "public interest", "remedy".

AUTHOR'S CASE NOTE

'Paradise Lost - The High Court considers the scope of legal professional privilege in Glencore International AG v Commissioner of Taxation [2019] HCA 26'

In the recently published decision in Glencore, the High Court considered the question of whether the law of legal professional privilege (LPP) operates only as a defensive mechanism to resist compulsory production of documents (ie: a shield), or if it also operates to provide a positive right which entitles the holder of the privilege to a remedy eg: an injunction to restrain the use of the privileged documents (ie: a sword).

The Court unanimously determined LPP is not a legal right enforceable by injunction when confidential documents have entered the public domain, even as a result of theft. The Court confirmed LPP remains a fundamental right. However, LPP only operates as an immunity from complying with compulsory processes which would otherwise require the production of confidential and privileged documents.

Throughout the decision, the Court highlighted the importance of LPP. It said, while there is no dispute the Glencore documents were the subject of LPP, that privilege did not amount to a cause of action which could be enforced by injunctive relief. The Court confirmed at [12] that LPP "is only an immunity from the exercise of powers which would otherwise compel the disclosure of privileged communications."

The Court found against Glencore at [13] on the basis "It seeks to transform the nature of the privilege form an immunity into an ill-defined cause of action which may be brought against anyone with respect to documents which may be in the public domain …"

Notably, Glencore made no claim to recover its documents based on equitable principles concerning breach of confidence. Glencore likely recognised that due to the wording of Section 166 of the Income Tax Assessment Act 1936 (Cth) (ITA Act), such an action would likely fail.

The Court rejected Glencore's application for an injunction and delivery up on the basis it was based on an incorrect premise ie: that LPP is a legal right capable of being enforced. The Court held LPP is only an immunity from the exercise of powers which would otherwise compel the disclosure of privileged communications. The Court found it was not possible to discern from the cases that LPP, while being a fundamental common law right, was an actionable right. LPP is a right to resist compulsory production or disclosure of confidential information.

The rationale for LPP is that the rule promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by lawyers. Public interest in LPP prevails over other matters of public interest eg: the fair conduct of litigation with the benefit of all relevant documents being available. The Court found the public interest behind LPP is sufficiently secured through its operation as an immunity.

Author: Dr Richard Manly QC

DONAU PTY LTD V ASC AWD SHIPBUILDER PTY LTD [2019] NSWCA 185

Newsletter 19.17 published 16 September 2019

CATCHWORDS

CONTRACTS – ship construction – interpretation –contract to come into effect on the earlier of the date set out in a clause and the date on which the parties reached agreement on a particular matter – whether reaching agreement a condition precedent to contract coming into effect – where clause referred to two dates – later date was date on which one party acquired a right to terminate if agreement not reached – whether earlier or later date relevant date for commencement

CONTRACTS – termination – purported termination pursuant to contractual right – whether party had elected to affirm the contract – whether right to terminate exercised within a reasonable time – meaning of reasonable time – point at which reasonable time to be assessed – whether any difference between a reasonable time to exercise a right and a reasonable time to perform an obligation – Ballas v Theophilos (No 2) [1957] HCA 90; (1957) 98 CLR 193 considered

CONTRACTS – ship construction – interpretation –parties entered into an original contract and later into a second contract – where original contract entitled one party to liquidated damages – where second contract contained a release clause – whether, if second contract had been validly terminated, the release in the second contract would still be effective – where clause in second contract set "all" fees until a particular date at a certain rate – whether "all" captured fees from commencement of original contract or second contract

AUTHOR'S CASE NOTE

'Air warfare over termination: What is a reasonable time within which to elect to terminate?'

This was one issue in Donau Pty Ltd v ASC AWD Shipbuilder Pty Ltd [2019] NSWCA 185

ASC had a Contract with the Commonwealth for the procurement of air warfare services. ASC entered into a Subcontract with Donau Pty Ltd (formerly Forgacs Engineering Pty Ltd).

A second Heads of Agreement (2HA) of 26 October 2012 - which was the "Effective Date" of the 2HA to promote cost and performance efficiencies - provided that key provisions of the 2HA were only to come into effect on the "Transition Date" which was said to be the earlier date set out in clause 4.1 and the date upon which the parties agreed "Baseline True Up".

Clause 4.1 made reference to two dates: it imposed upon the parties a reasonable endeavours obligation to complete Baseline True Up by 14 December 2012, and provided to ASC a right to terminate the 2HA if Baseline True Up was not agreed by 28 February 2013.

The Baseline True Up was not agreed by 14 December 2012, nor by 28 February 2013. The parties continued to negotiate Baseline True Up in good faith through to early June 2013, but never reached agreement. On 7 June 2013 ASC purported to exercise its right to terminate.

The issue was stated to be whether ASC validly exercised its right to terminate or whether ASC:

a. had elected to affirm the 2HA; or

b. did not terminate the 2HA within a reasonable time.

As to 'a', Bell P, Basten JA and Emmett AJA stated ASC did not lose its right to terminate by election. They said the fact that the parties continued to seek to agree Baseline True Up after 28 February 2013 and that ASC had a reasonable time after that date within which to terminate the 2HA, served to render ASC's conduct equivocal. This was particularly so considering the imprecise nature of what was a reasonable time within which to terminate and the parties' tendency to operate outside the precise terms of the contractual arrangements.

As to 'b', ASC failed to exercise its right to terminate within a reasonable time. The Court noted the right to terminate was not dependent upon the receipt by ASC of any further information. Further, it was found that it was not apparent from the continued Baseline True Up negotiations that ASC was reserving its right to terminate.

The Court further observed the legal meaning of what is a reasonable time within which to exercise a right or perform an obligation, is to be ascertained at the date of the Contract, although what will be reasonable as a matter of fact will inevitably fall to be assessed by reference to circumstances as at the date upon which the right is first capable of being exercised. Further, what is a reasonable time in any given case may be affected by the nature of the obligation to be performed or the right to be exercised. Basten JA considered the decision to terminate should have been acquired and conveyed to Forgacs by no later than end of April 2013.

Thus:

- The law implies where the time for exercise of a right is not specified in the Contract, it is to be performed within a reasonable time.
- A reasonable time is ascertained as at the date of the Contract although what will be reasonable as a matter of fact will be assessed by reference to circumstances as at the date upon which the right is first capable of being exercised.
- A reasonable time can be affected by the nature of the obligation to be performed or of the right to be exercised.
- A reasonable time is likely to be short where:
    - parties are commercial and sophisticated;
    - a party is on notice of a future right in advance of it crystalising so that it has time to consider the implications of exercising the right;
    - no further investigation or receipt of additional information is required;
    - a party has not reserved its ability to exercise the right in the future.

Author: Michael Heaton QC

JOHN BEEVER (AUST) PTY LTD V ROADS CORPORATION [2018] VSC 635

Newsletter 19.18 published 30 September 2019

CATCHWORDS

BUILDING – Reference date for payment claim – Whether jurisdictional fact satisfied – Whether inadequate payment claim documentation precludes finding reference date - Building and Construction Industry Security of Payment Act 2002 (Vic), s 16(2)(a)(i).

BUILDING – Whether payment claim includes excluded amount – Whether variation is claimable variation – Whether variation was requested or directed - Building and Construction Industry Security of Payment Act 2002 (Vic), ss 10(3), 16(2)(a)(i), 16(4).

PRACTICE AND PROCEDURE – Application for summary judgment – Application to strike out pleadings – Whether pleadings disclose cause of action – Whether pleadings address causation – Whether pleadings address loss and damage – Supreme Court (General Civil Procedure) Rules 2015 (Vic), r 23.

PRACTICE AND PROCEDURE – Where proceeding must be commenced by originating motion – Whether judgment is a summary judgment – Applicable approach to and test for judgment – Building and Construction Industry Security of Payment Act 2002 (Vic), s 16(2)(a)(i); Civil Procedure Act 2010 (Vic), s 61; Supreme Court (General Civil Procedure) Rules 2015 (Vic), r 22; Supreme Court (Chapter 1 Summary Judgment Amendment) Rules 2015 (Vic).

AUTHOR'S CASE NOTE

'A bridge too far - Application for summary judgment rejected in John Beever (Aust) Pty Ltd v Roads Corporation [2018] VSC 635'

Facts:

John Beever (Aust) Pty Ltd (Beever) and Roads Corporation (VicRoads) entered a construction contract in respect of strengthening works to the Wallen Road Bridge in Hawthorn. On 11 April 2017, Roads Corp certified that practical completion of the works had been achieved on 22 March 2017. At the earliest, the Defects Liability Period (DLP) under the construction contract expired in March 2018. On 28 September, a representative of Beever sent a payment claim (PC 16) under the Building and Construction Industry Security of Payment Act 2002 (Vic) ('SOP Act') to VicRoads seeking a progress payment of $290,146.61. VicRoads did not serve a payment schedule in response to PC 16.

Beever made a summary judgment application (on the basis that VicRoads did not serve a payment schedule) in the sum of the progress payment as a debt due recoverable under the SOP Act s 16(2)(a)(i).

Issues:

The questions arising for determination on Beever's summary judgment application were whether VicRoads had any real prospect of success in arguing that PC 16:

1. Was not supported by a reference date;

2. Did not satisfy the formal requirements of the SOP Act; and

3. Included an amount which was an 'excluded amount' under the SOP Act.

Held:

Digby J found that VicRoads had a real prospect of success against Beever's claim, which meant that it was not appropriate for summary judgment. His Honour found that:

- VicRoads had 'raised and rendered a number of viable arguments for impugning the validity of PC 16 for want of a reference date'.
- Two components (namely the amount of $52,149.14 and the item 'Provision of As-Constructed Drawings') in Beever's PC 16 payment claim were non-compliant with s 14(2) of the SOP Act. The relevant question was whether PC 16 evinced 'a degree of "precision and particularity" that is "reasonably sufficient to appraise the parties of the real issues in the dispute"'.
- Digby J was not persuaded that VicRoads had no real prospect of success in establishing that PC 16 progress claim induces an amount excluded under the SOP Act, finding that VicRoads' arguments were 'cogent and viable'.

Author: Martin Scott QC

MANN V PATERSON CONSTRUCTIONS PTY LTD [2019] HCA 32

Newsletter 19.19 published 14 October 2019

CATCHWORDS

Restitution – Unjust enrichment – Work and labour done – Where land owners and builder entered into contract to which Domestic Building Contracts Act 1995 (Vic) applied – Where contract provided for progress payments at completion of stages – Where owners requested, and builder carried out, variations to plans and specifications in contract without giving written notice as required by s 38 of Act – Where owners repudiated contract after builder raised invoice claiming for variations – Where contract terminated by builder's acceptance of owners' repudiation – Whether s 38 of Act applied to limit amount recoverable by builder for variations – Whether builder entitled to recover in restitution as alternative to claim in damages for breach of contract – Whether contract price operated as ceiling on amount recoverable by way of restitution.

Words and phrases – "accrued rights", "alternative restitutionary remedy", "common counts", "completed stage", "contract price ceiling", "contractual incentives", "domestic building contract", "failure of basis", "failure of consideration", "limit on recovery", "measure of restitution", "notice", "primary and secondary obligations", "principle of legality", "protective provisions", "qualifying or vitiating factor", "quantum meruit", "quasi-contractual obligation", "repudiation", "restitution", "subjective devaluation", "unjust enrichment", "variations", "work and labour done".

Domestic Building Contracts Act 1995 (Vic), ss 1, 3, 4, 16, 27, 38, 39, 53, 132.

AUTHOR'S CASE NOTE

'The king (quantum meruit) is dead, long live the king!'

In Mann v Paterson Constructions Pty Ltd [2019] HCA 32, (Mann v Paterson), the respondent builder claimed against the owner an entitlement to recover payments for its work, including variations, upon a quantum meruit (literally, a reasonable sum of money to be paid for services rendered). The respondent's claim was upheld at first instance and on appeal. The appellant challenged the decision in the High Court and the High Court allowed the appeal.

What is (or was) quantum meruit? This principle provided that an innocent party could, on repudiation by the other party, sue for the reasonable value of work performed as an alternative to damages for breach (i.e. as an alternative to damages calculated in accordance with the contract). This principle meant that, for example, if a builder did work under a contract that entitled the builder to (say) $50,000.00, but the contract was wrongfully terminated by the owner, then the builder could sue instead (on the builder's election) for the actual value of the work performed instead, in substitute for damages under the contract. The actual value of the work might instead be, for example (say) $100,000.00. This meant in effect that the builder could obtain a windfall gain.

In Mann v Paterson the High Court determined that, for the most part, in circumstances where a contract is repudiated (for example, by a building owner), the amount recoverable by the injured party (for example, a builder) is limited to that which has accrued under the contract. However, if part of the works done by the builder comprised works (not being variations) undertaken toward a stage of the works that had not yet been completed at the time of termination, (so that no contract entitlement has crystallised), then the respondent builder is entitled to damages for breach of

contract, or restitution, but the amount payable will ordinarily be limited to the amount payable under the contract.

That is to say, quantum meruit, as an alternative remedy to damages calculated pursuant to the terms of the contract on termination, is, essentially, no longer ordinarily available. In this sense quantum meruit is dead. However, while the minority of the High Court took a pragmatic approach and was prepared to, for the most part, confine quantum meruit to the ash heap of history, the majority took a more principled approach so that the remedy of quantum meruit is still available, albeit its reach and importance is now significantly reduced.

The High Court has now clarified, and limited, this alternative quantum meruit remedy. The majority said at [110]:

For the reasons which follow, insofar as the work and labour done was work and labour done in response to a requested variation within the meaning of s 38 of the Domestic Building Contracts Act 1995 (Vic) ("the DBC Act"), any amount of remuneration must be determined in accordance with ss 38 and 39 of the DBC Act. Insofar as the work and labour done, not being variations, comprised completed stages of the contract as defined in the contract, the amount of remuneration payable is essentially that which is prescribed by the contract for those stages, and any damages for breach of contract are to be calculated accordingly. Insofar, however, as any of the work and labour done, not being variations, comprised part of a stage of the contract that had not been completed at the time of termination, the respondent is entitled, at its option, to damages for breach of contract or restitution, but the amount of restitution should be limited in accordance with the rates prescribed by the contract.

What the decision means is that quantum meruit is now ordinarily available as a remedy only in circumstances where work has been completed under a contract, (not being work for variations, which would be valued in accordance with the contract), but an entitlement to payment for that work has not yet crystallised under the contract at the time of termination. Only in those circumstances will recovery on a quantum meruit basis be available. And furthermore, ordinarily, recovery on a quantum meruit basis will be calculated on the basis of the contract in any event.

This decision is not unexpected and brings this area of the law into line with the usual position that, on termination, accrued rights remain enforceable whereas the parties are absolved from future performance; except that the party in breach will be liable to pay the other party for its loss of the bargain. Quantum meruit will, post Mann v Paterson, only have work to do where the wronged party has undertaken work under the contract but that party's right to damages has not yet accrued. Apart from those circumstances, the wronged party's remedy will be limited to damages for breach of contract.

Author: Adam Rollnik

OWNERS CORPORATION 1 PLAN NO PS 543073S V EASTRISE CONSTRUCTIONS PROPRIETARY LIMITED (BUILDING AND PROPERTY) [2019] VCAT 1639

Newsletter 19.20 published 28 October 2019

CATCHWORDS

Domestic building – Victorian Civil and Administrative Tribunal Act 1998 – s75 – relevant principles - whether application to Domestic Building Dispute Resolution Victoria ('DBDRV') the commencement of a 'building action' – Building Act 1993 – sections 129 and 134

AUTHOR'S CASE NOTE

When is 10 years 10 years? Domestic Building Dispute Resolution Victoria and the 10 year limitation period

In Owners Corporation 1 Plan No PS 543073S v Eastrise Constructions Proprietary Limited (Building and Property) [2019] VCAT 1629 VCAT has clarified the application of the 10-year limitation period in s.134 of the Building Act 1993 (Vic) (Building Act), particularly whether an application to Domestic Building Dispute Resolution Victoria (DBDRV) pursuant to the Domestic Building Contracts Act 1995 (Vic) constitutes a building action for the purposes of s.134.

Section 134 provides a limitation period of 10 years for a building action from the date of issue of the occupancy permit or, if none is issued, from the date of issue of the certificate of final inspection.

Importantly, s.129 of the Building Act defines a building action as:

> *"An action (including a counterclaim) for damages for loss or damage arising out of or concerning defective building work".*

The Tribunal states at paragraph 28:

> *"On a clear reading, a 'building action' is a claim for damages for loss or damage. It is difficult to conceive how an application to DBDRV for dispute resolution could be conceived as a claim for loss or damage. DBDRV's primary role is conciliation of those domestic building work disputes which it deems suitable for conciliation. It does not determine the parties legal rights. Although it has a power to issue 'dispute resolution orders' under s.49 of the Domestic Building Contracts Act these are not enforceable. Section 49B sets out what can be included in a dispute resolution order".*

On this basis, the Tribunal found that an application to the DBDRV is not relevantly an action for damages. Only an application to the Tribunal satisfies this definition.

Practitioners always need to be mindful of limitation periods, particularly now that the Tribunal has clarified the application of s.134 of the Building Act in relation to applications to the DBDRV where a limitation period is about to lapse. It is prudent to issue an application in the Tribunal where it will be stayed pending the issue of a Notice of Conciliation by the DBDRV.

Author: Michael F Sharkey

BH Australia Constructions Pty Ltd V Kapeller [2019] NSWSC 1086

Newsletter 19.21 published 11 November 2019

Catchwords

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

Author's case note

'Who do I sue? Post contractual conduct and identification of contracting parties in BH Australia Constructions Pty Ltd V Kapeller [2019] NSWSC 1086'

The issue for determination in this case was whether evidence of subsequent conduct is admissible in establishing the identity of a contracting party.

Leeming JA held that such evidence was not admissible and cannot be so used in relation to a contract which is wholly written. Where the contract is partly written and partly oral and/or partly to be implied by conduct, such evidence is admissible and can be so used.

This case involved a married couple ("the Owners"), who entered into a standard form building contract for the construction of their home. The issue in dispute was whether they entered into a contract with Blissful Constructions Pty Ltd ("Constructions") or with Blissful Developments Pty Ltd ("Developments").

Confusion as to the identity of the builder was brought about by the following inconsistencies and errors in the contract document - the "Builder" was stated to be "Developments" and its Builder's Licence Number and HIA Insurance details were stated. However Developments had never been licensed or insured and the number and insurance details were in fact those of "Constructions", not "Developments".

The execution clause in the contract was incomplete. It was signed by "D. Alathi" who was the sole director and secretary of Constructions. Beneath that signature there was very small typeface stating "signed for and on behalf of Blissful Developments Pty Ltd".

The post-contractual documents included three invoices in the name of Developments sent to the Owners; a statement of insurance cover which identified Constructions as the builder; a certificate concerning a framework inspection which was expressed to have been requested by Constructions;

a letter by the Owners' solicitors after the parties fell into dispute addressed to Developments and referring to Developments as the builder, and noting that it was not licensed or insured; and finally, the response letter by the director of Constructions offering to assign and novate the contract over to Developments which was licensed and insured.

Leeming JA provided a detailed summary of the relevant authorities (refer to paragraphs [51] - [86]). He referred to a number of decisions in which the Court had ruled that evidence of subsequent conduct was admissible and could be used to identify the contracting parties (refer in particular to the Victorian Court of Appeal decision in Lederberger v Mediterranean Olives Financial Pty Ltd (2012) 38 VR 509; [2012] VSCA 262; Nurisvan Investment Limited v Anyoption Holdings Limited [2017] VSCA 141; and Damien v JKAM Investments [2015] NSWCA 368). With respect to these decisions he either distinguished them on the basis that they did not involve contracts which were wholly written, or chose not to follow them on the basis that the statements made therein were mere dicta.

Leeming JA concluded that post-contractual evidence may not be used directly to determine the identity of a contracting party (refer in particular to paragraphs [90] and [101]).

But he hastened to point out that there are situations in which, either as a matter of pure construction, or by the admission of evidence extraneous to the written contract, Courts were not limited to construing written contracts solely on the basis of the words in the contract.

These include:

a. evidence adduced of mutually known facts to identify the meaning of a descriptive term in a written contract (refer paragraphs [94] and [95]); and

b. evidence adduced to demonstrate "misnomer", enabling the Court to correct an obvious error by supplying, omitting or correcting words in the contract (refer paragraphs [96] and [105]-[108]).

Leeming JA decided (paragraphs [104]-[118]), in the present case that the parties must have intended that Constructions was the builder contracting party. He said that there was unquestionably "an obvious mistake" on the face of the contract. Whereas Blissful Developments Pty Ltd was stated to be the builder, the parties must have intended that Blissful Constructions Pty Ltd was the builder party to the contract. The builder licence number and homeowners warranty insurance number stated on the face of the contract, belonged to Constructions. Developments was neither licensed nor insured. The Court held that neither party could reasonably have intended to enter into a contract under which the builder was both unlicensed and uninsured.

Author: Francis Tiernan QC

VISUAL BUILDING CONSTRUCTION PTY LTD V ARMISTEAD (NO 2) [2019] NSWCA 280

Newsletter 19.22 published 25 November 2019

CATCHWORDS

CONTRACTS – termination – whether building contract validly terminated – whether in the circumstances, 10 business days notice giving opportunity to remedy default needed to be given prior to termination – alternative bases for termination – Shepherd v Felt & Textiles of Australia Ltd

AUTHOR'S CASE NOTE

'When is notice not required? Contractual termination by owners upheld in Visual Building Constructions Pty Ltd v Armistead'

In Visual Building Construction Pty Ltd v Armistead (No 2) [2019] NSWCA 280, the appellant (builder) had entered into a contract with the respondents to build a duplex building on land owned by the respondents for $400,000. In breach of the contract, the builder had not obtained a Construction Certificate before it commenced work. In early June 2015, the Penrith Local Council issued a notice of intention to serve an order pursuant to s 121B of the Environmental Planning and Assessment Act 1979 requiring the builder to immediately cease work, obtain a Building Certificate for the unauthorized work (which would have prevented the Council from obtaining a demolition order for the unauthorised works) and to obtain a Construction Certificate to complete the development work. The Council then issued stop work orders. Despite this, no steps were taken by or on behalf of the builder to obtain a Building Certificate or a Construction Certificate. The owners terminated the contract in July 2015. In early 2018, the Council made an order requiring that the entire works be demolished.

The builder appealed the finding of the District Court of New South Wales that the building contract had been validly terminated even though the owners had not complied with Clause 15 of the contract, which provided:

If the Project Supervisor:

- *Is unable or unwilling to complete the work or abandons the work;*
- *Suspends the work before completion without reasonable cause;*
- *Fails to proceed diligently with the work;*
- *Fails to remedy defective work;*
- *Without reasonable cause, fails to comply with an order or direction of a public authority with respect to defective or incomplete work, which would substantially affect the quality and/or progress of the work,*

> *the owner may, if such default can be remedied, notify the Project Supervisor in writing that unless the default is remedied within 10 business days, the owner will terminate the contract.*
>
> *If the default cannot be remedied, the owner may terminate the contract by giving written notice to this effect to the Project Supervisor… (emphasis added).*

The Court of Appeal dismissed the appeal and held that the owners did not have to comply with clause 15 of the contract because the default could not have been remedied within the 10-day time period. The owners were awarded damages for breach of contract being the cost of demolishing and removing the existing works and constructing the dual occupancy dwellings, estimated at $871,537, from which was to be deducted the unpaid contract amount of $220,000, the owners having paid $180,000 of the original contract price of $400,000.

The owners would have been entitled to restitution on the basis of a total failure of consideration and sought a complete refund of the sums paid pursuant to the contract. The author suggests that a clearer example cannot be found of owners also being entitled to seek damages for breach of contract namely the additional cost that they would incur for the cost of demolishing and removing the existing works and the additional cost of constructing the dual occupancy dwellings. The author acknowledges however that the outcome is likely to be the same in dollars terms.

For more on remedies that might be available in restitution and contract law damages for a contractor who terminates a contract upon repudiation by an owner, see the upcoming article by the author and Professor JW Carter in the Building and Construction Law Journal in which the authors will discuss the significance of the recent High Court Decision in Mann v Paterson Constructions Pty Ltd [2019] HCA 32 and its potential ramifications.

Author: Laina Chan

ROYAL AND SUN ALLIANCE INSURANCE V DMS MARITIME [2019] QCA 264

Newsletter 29.23 published 9 December 2019

CATCHWORDS

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the respondent and the Commonwealth entered into a contract for the design, manufacture and supply of Armidale Class Patrol Boats – where one such boat was in dry dock, in the respondent's possession, whilst the respondent undertook routine scheduled repairs and maintenance, in accordance with its contract with the Commonwealth – where an employee of one of the respondent's subcontractors caused a fire destroying the vessel completely – where the primary judge found the appellant was obliged to indemnify the respondent, under contracts of insurance, in respect of a sum the respondent had become liable to pay to the Commonwealth under a deed of settlement – where declaratory and other orders were made in accordance with that finding – where the appellant appeals those orders – whether the primary judge erred in reaching the proper construction of the contract between the respondent and the Commonwealth, the proper construction of the deed of settlement between the respondent and the Commonwealth, the proper construction of the insurance contract between the appellant and the respondent and the quantification of any loss to be indemnified by the appellant

AUTHOR'S CASE NOTE

'Shipwrecked - Assessing loss or damage arising out of contractual indemnities in Royal and Sun Alliance Insurance v DMS Maritime'

The Queensland Court of Appeal has recently handed down its decision in Royal and Sun Alliance Insurance v DMS Maritime [2019] QCA 264, which considered the scope of DMS Maritime's (DMS) obligation to "promptly replace or otherwise make good any loss" pursuant to an indemnity provided to the Commonwealth.

Background:

In 2003, DMS entered into a contract with the Commonwealth for the design, manufacture and supply of Armidale class patrol boats (the DMS Contract). By 2014, the patrol boats were experiencing performance issues. The cause of the performance issues was disputed; however, DMS agreed to remediate the fleet at cost as an ad hoc service pursuant to the DMS Contract.

During remediation works DMS' subcontractor caused a fire which destroyed one patrol boat, the HMAS Bundaberg.

The Commonwealth sought compensation pursuant to the DMS Contract, which required DMS to indemnify the Commonwealth against "any loss or damage to a Patrol Boat" in certain circumstances (which were agreed to have been satisfied) (cl 6.8.1.1) and "promptly replace or otherwise make good any loss of, or repair the damage to, [a Patrol Boat] at its own cost" (cl 8.3.1).

DMS agreed to pay the Commonwealth $31.5 million in settlement of its claim, being the base cost of purchasing two cape-class vessels to replace the HMAS Bundaberg. This was less than the cost of purchasing a new Armidale class patrol boat (which was expected to cost between $40 million - $51 million).

DMS subsequently sought to recover the settlement sum from Royal and Sun Alliance Insurance (RSAI). RSAI had agreed to indemnify DMS "for all sums which [DMS] shall become liable to pay … as ship repairers for … (i) Loss of or damage to any vessel or craft which is in the care, custody or control of [DMS] for the purpose of being worked on".

RSAI's position:

RSAI denied liability. Instead, it argued that cl 8.3.1 of the DMS Contract contemplated that DMS could satisfy its obligations to the Commonwealth by "otherwise mak[ing] good any loss", rather than "replacing" the vessel. RSAI argued that DMS could "otherwise make good" the loss by compensating the Commonwealth for:

- the actual expenditure incurred as a result of the loss of the Bundaberg, which was limited to requiring the Australian Border Force to make available to the Royal Australian Navy a Cape Class vessel for two years, and then leasing two Cape Class vessels for a period of three years; and/or
- the market value of the HMAS Bundaberg, which was nil.

Accordingly, RSAI argued that the settlement was not reasonable, and it could not be made liable to pay DMS the $31.5 million settlement sum agreed with the Commonwealth.

The Court of Appeal's determination:

The Court of Appeal rejected RSAI's construction of the DMS Contract. Instead, applying French CJ, Nettle and Gordon JJ's reasoning in Mount Bruce Mining v Wright Prospecting (2015) 256 CLR 104, it upheld the trial judge's finding that cl 8.3.1 required DMS to either replace the vessel, or provide compensation equivalent to replacement of the vessel. In doing so Boddice J, with whom Fraser and McMurdo JJA agreed, noted that:

> *The fact that a consequence of the agreed promise may result in conferring a benefit on the Commonwealth, in the form of betterment, does not render that construction untenable. Reasonable business people, understanding the context of the agreement reached between the parties, would interpret the obligation in clause 8.3.1 as requiring nothing less. The primary judge rightly concluded that the contract contemplated that the plaintiff had that obligation notwithstanding that it might, in the circumstances, confer a form of betterment on the Commonwealth.*

The Court of Appeal's decision highlights the complexity associated with assessing loss and damage, particularly in circumstances where that loss or damage arises out of the performance of a

contractual obligation. Parties should be careful to consider the language of such clauses, which may require compensation even where it places the innocent party in a better position than it would have been had the breach not occurred.

Author: Bill Stephenson

Compiled by Andrew Downie, chair of MTECC

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