Recent Construction Cases

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23 July 2020

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This seminar will examine the following recent cases which touch on topics of interest to those practising in the area of building, construction and engineering disputes:

1. *A Company v X, Y, Z* [2020] EWHC 809 (TCC): expert witnesses may sometimes owe a fiduciary duty to their clients.
2. *Brolton Group Pty Ltd v Hanson Construction Materials Pty Ltd* [2020] NSWCA 63: adjudicator determined entitlement to payment claim by reference to an unavailable reference date.
3. *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 118: security of payment legislation, stay of execution of judgment debt on the basis that the principal (not the builder) was insolvent.
4. *Ricardo Leiman v Noble Resources Ltd* [2020] SGCA 52: penalties - primary versus secondary obligations.
5. *127 Hobson Street Limited v Honey Bees Preschool Limited* [2020] NZSC 53: penalties - protection of a business' legitimate interests.
6. *The Illawarra Community Housing Trust Limited v MP Park Lane Pty Ltd* [2020] NSWSC 751: expert determination clause.
7. *Manor Central Nominees Pty Ltd & Anor v Wyndham City Council (No 2)* [2020] VSC 271: potential waiver of legal professional privilege in opening submissions.

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1. *A Company v X, Y, Z* [2020] EWHC 809 (TCC)

In this case the England and Wales High Court found that an expert witness had a fiduciary duty to its client.

The claimant was the developer of a petrochemical project. It entered into:

- two EPCM agreements with a third party; and
- two construction facility agreements with a contractor.

The contractor brought a works package arbitration against the claimant, seeking additional costs arising from project delays, including the late issue of for construction drawings by the third party pursuant to the EPCM agreements. The claimant engaged the first defendant to provide delay expert services. The claimant sought to pass on to the third party, any costs it might be ordered to pay.

The third party brought an EPCM arbitration against the claimant, seeking monies owing under the EPCM agreements. The claimant counterclaimed for delay and disruption for the third party failures under the EPCM agreements, and sought to pass on to the third party, any amounts the claimant might be ordered to pay to the contractor. The third party engaged the defendants to provide quantum expert services.

O'Farrell J identified at [52] three general principles from the authorities:

- an expert can be compelled to give expert evidence in arbitral or legal proceedings by any party, even if the expert has provided an opinion to another party (i.e., there is no property in an expert witness);
- expert witnesses have a paramount duty to a court or arbitral tribunal which may require them to give evidence which does not advance their client's case; and
- where a fiduciary duty does not arise, the obligation to preserve confidential information does not prevent an expert witness from acting or giving evidence for another party.

She said none of those principles precluded expert witnesses from owing a fiduciary duty of loyalty to their clients. She concluded at [53] that as a matter of principle, a relationship of trust and confidence could arise depending on the circumstances of the retainer.

She held at [54] that a clear relationship of trust and confidence arose, giving rise to a fiduciary duty of loyalty, because the first defendant:

- was engaged to provide expert services to the claimant in relation to the works package arbitration;
- was instructed to provide an independent report and comply with the duties set out in the CIArb Expert Witness Protocol; and
- was engaged to provide extensive advice and support to the claimant throughout the arbitration proceedings.

O'Farrell J also found at [55] - [57] that the duty of loyalty was owed not only by the first defendant, but by the whole of the defendant group. This was because the defendant group shared profits and hence had a financial interest in each member, the defendant group was managed and marketed as one global firm, and there was a common approach to identify and manage any conflicts.

The defendants relied on physical and ethical screens between members of their group. Her Honour gave little weight to this because, as she explained at [60], the fiduciary duty of loyalty is not satisfied simply with measures to preserve confidentiality and privilege. Instead, the fiduciary must not place himself in a position where his duty and his interest may conflict.

The first defendant advised and assisted the claimant in formulating and presenting its defence to the contractor's claims in the works package arbitration, including the provision of advice as to the cause of project delays. In the EPCM arbitration, the claimant sought to pass on to the third party any claims arising from the late provision for construction drawings by the third party. Hence, the arbitrations were concerned with the same delays and there was a significant overlap in the issues. Her Honour concluded at [61] that there was plainly a conflict of interest for the defendant in acting for the claimant in the works package arbitration, and against the claimant in the EPCM arbitration.

Is a fiduciary duty at odds with an expert's duty to the court in Victoria?

The Victorian Supreme Court Expert Witness Code of Conduct provides that an expert witness "*has an overriding duty to assist the Court impartially on matters relevant to the area of expertise of the witness*" (see the *Supreme Court (General Civil Procedure) Rules 2015* (Vic)).

The decision of the England and Wales High Court suggests that an expert witness' overriding duty to the Court under that code of conduct would not conflict with a fiduciary duty owed by the expert to his or her client. At [53], the High Court stated:

> "*In common with counsel and solicitors, an independent expert owes duties to the court that may not align with the interests of the client. However, as with counsel and solicitors, the paramount duty owed to the court is not inconsistent with an additional duty of loyalty to the client. As explained by Lord Phillips in* Jones v Kaney*, the terms of the expert's appointment will encompass that paramount duty to the court. Therefore, there is no conflict between the duty that the expert owes to his client and the duty that he owes to the court.*" [Emphasis added.]

The *Civil Procedure Act 2010* (Vic) (**CPA**) imposes several overarching obligations on litigants and their legal representatives. Some of those overarching obligations also apply to experts, for example, the overarching obligations to act honesty, to cooperate in the conduct of civil proceedings, not to mislead or deceive, to narrow the issues in dispute, and to minimise delay (sections 10(3), 17, 20, 21, 23 and 25 of the CPA). Section 10(4) of the CPA provides that the overarching obligations that apply to experts are "*in addition to, and not in derogation of, any existing duties applying to expert witnesses*". It remains to be seen what a court would make of a scenario where "*any existing duties…*" included a fiduciary duty.

Practice tips:

- A fiduciary duty is probably unlikely to arise where an expert witness is retained to provide an expert opinion/report for one client in one proceeding.
- The chance of a fiduciary duty arising increase when the circumstances of the retainer start to resemble those in this decision - related litigation between the same parties regarding the same underlying facts and claims, two or more parties sourcing expert witnesses from the one company.
- Experts could consider trying to contract out of any fiduciary duty by providing appropriate disclosure to their clients – but would clients, when fully informed about the nature and scope of the fiduciary duty, be willing to put it to one side?

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2. *Brolton Group Pty Ltd v Hanson Construction Materials Pty Ltd* [2020] NSWCA 63

In this case the New South Wales Court of Appeal found that an adjudication determination was invalid because the adjudicator determined entitlement to a payment claim by reference to an unavailable reference date.

This case concerned the validity of an adjudication determination made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("**the Act**").

Brolton was a contractor under a construction contract (dated 13 September 2017) with Hanson. The contract provided for monthly progress payments with a reference date of the last Tuesday in each month.

Hanson terminated the contract on 3 October 2018. On 28 August 2019, Brolton served a payment claim on Hanson seeking approx. $6,000,000. The payment claim was described as "*Progress claim No: September 2018*" and was expressed to be "*for work completed up to September 2018*" but did not expressly identify a reference date. Hanson served a payment schedule for nil payment.

Brolton sought an adjudication. The adjudication determination was in favour of Brolton for approx. $3,000,000. The adjudicator found that the payment claim was supported by a reference date of 23 October 2018. This was a reference date for which neither party had contended.

Hanson sought judicial review of the adjudication determination. At the trial before the primary judge, Brolton conceded that 23 October 2018 was not an available reference date and that the adjudicator's finding on that matter was in error. The primary judge found that the adjudication determination was void. Brolton appealed that finding.

The Court of Appeal noted at [26] that judicial review of an adjudicator's determination is available but only if the adjudicator has fallen into jurisdictional error (see *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 at [52]). Hence, the issue before the Court of Appeal was whether the adjudicator's error as to the reference date was:

- a jurisdictional error (i.e., the error was one he was not empowered to make under the Act); or
- within jurisdiction (i.e., the error was one he had power to make under the Act).

At [30], the Court of appeal noted that the High Court has held that the existence of a reference date under a construction contract is a precondition to the making of a valid payment claim under section 13(1) of the Act and that service of a valid payment claim is an essential precondition to taking further steps in the Act's adjudication procedure (see *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Constructions Pty Ltd* [2016] HCA 52 at [61] and [62]).

In accordance with that High Court finding, the Court of Appeal concluded at [31] that "*the precondition which enlivens the exercise of the adjudicator's statutory power under s 22 is the existence and service of a "valid" payment claim – namely one made by a person entitled under s 8 of the Act to a progress payment "on and from" the reference date in respect of which the payment claim is made*."

The Court of Appeal identified (see [43] - [48]) the relevant provisions of the Act as being sections 8(1), 13(1) and 22(1) which at the time the contract was made provided:[1]

[1] The Act has since been amended – see [16] of the Court of Appeal's decision.

"***8 Rights to progress payments***

(1) On and from each reference date under a construction contract, a person:

(a) who has undertaken to carry out construction work under the contract, or

(b) who has undertaken to supply related goods and services under the contract,

is entitled to a progress payment."

"***13 Payment claims***

(1) A person referred to in section 8(1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment."

"***22 Adjudicator's determination***

(1) An adjudicator is to determine –

(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the adjudicated amount), and

(b) the date on which any such amount became or becomes payable, and

(c) the rate of interest payable on any such amount."

At [43], the Court of Appeal drew at a distinction between:

- the task that the adjudicator was authorised and required by section 22(1) to undertake; and
- the task that the adjudicator in fact undertook.

Section 22(1) authorised and required the adjudicator to determine the amount of any progress payment to which Brolton was entitled pursuant to its payment claim under section 13(1), that entitlement arising on and from the available reference date in respect of which the payment claim was made.

However, the adjudicator did not carry out that task. Instead, the Court of Appeal found at [46] that he did something else – he determined the progress payment to which Brolton was purportedly entitled on the basis that the payment claim was made in respect of a reference date of 23 October 2018. The Court of Appeal stated at [46], "*[as 23 October 2018] was not an available reference date the payment claim supported on that basis was not a payment claim under the Act and ineffective to trigger the procedure established by Pt 3 [Part 3 of the Act contains sections 13 and 22]*". The fact that there was an available reference date under the contract, being 25 September 2018, was not relevant given that the adjudicator had proceeded on the basis of an unavailable reference date (see [46]).

The Court of Appeal concluded at [47], that "*the adjudicator's error in making a determination by reference to an unavailable reference date, was not the task the adjudicator was required by s 22(1) to undertake.*" As a result, the adjudicator's determination involved jurisdictional error of the kind grounding relief by certiorari and the appeal was dismissed.

Practice tips:

- Note that this case was decided under the Act as it stood just before amendments effective 21 October 2019, which removed the requirement for a reference date for contracts entered into after that date.

3. *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 118

This case involved developers who were ordered to pay the full amount of a payment claim and then sought a stay of execution of the judgment debt. Stays usually follow concerns about builder solvency. However, in this case, the developers sought a stay on the basis that they themselves were insolvent.

The builder (Decon) served a payment claim on developers (TFM Epping and another company). The entire claim became payable as the developers failed to serve a payment schedule within the time required by the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("**the Act**").

On 11 October 2019, judgment was entered for the builder for the entire amount of the payment claim, approx. $6,000,000. The developers appealed the judgment and an interlocutory stay of execution of the judgment was put in place. The appeal was dismissed and the stay of execution expired.

In May 2020, the developers applied for a further stay of execution of the judgment. The primary judge dismissed the developers' application. The primary judge considered it significant, that in a related Technology Construction List proceeding between the same parties relating to the same contract as was the subject of the builder's payment claim, the developers were ordered to file and serve any counterclaim by 2 August 2019, but did not do so until 18 May 2020, some 9 ½ months late (and after the developers had failed to resist the builder's claims in proceedings brought under the Act).

The developers appealed that decision to the Court of Appeal. The developers' position was that they could not pay the judgment debt, would be insolvent if the judgment were not further stayed, and had a counterclaim exceeding the amount of the judgment. The developers did not suggest that there was any risk that the builder would be unable to repay the judgment debt. Indeed, the developers' very reason for seeking a further stay was that they themselves could not pay the judgement debt.

The developers argued that their application for a further stay ought be granted, because the basis on which it was sought, i.e., that they could not pay the judgment debt and had a counterclaim exceeding the judgment debt, was analogous to a "*Grosvenor* stay" (see *Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico* [2004] NSWSC 344 (**Grosvenor**). The developers also argued that failure to grant stay would be contrary to section 32 of the Act.

The Court of Appeal resolved the case by declining leave to appeal, and concluding the developers were not assisted by the *Grosvenor* stay argument or section 32 of the Act.

Threshold question of leave

The Court of Appeal noted at [69] that generally leave is granted in cases that involve issues of principle, questions of public importance, or where it is reasonably clear than an error (beyond what is merely arguable) has occurred that occasions injustice.

The only potential point of principle or question of public importance was the applicability of the *Grosvenor* stay to the present case. However, as explained below, the Court of Appeal concluded that the *Grosvenor* stay had nothing to do with the developers' application for a further stay of execution.

Grosvenor stay

Grosvenor concerned a stay of execution of a judgment debt created pursuant to the Act where there was a counterclaim against the builder, and the builder might be unable to repay the amount of the counterclaim in the event that the counterclaim succeeded. The Court of Appeal referred at [72] to the principles in *Grosvenor* as qualified by *Veolia Water Solutions & Technologies (Australia) Pty Ltd v Kruger Engineering Australia Pty Ltd (No 3)* [2007] NSWSC 459, which include requirements:

- to balance the Act's policy that a successful applicant under the Act be promptly paid, with the irreparable prejudice that may occur where a stay is refused and the relevant counterclaim is rendered worthless (because a builder can't pay it); and
- to look closely at the strength of a builder's counterclaim when carrying out that balancing exercise; and
- that a court should ordinarily grant a stay where failure to do so would have the practical effect of making permanent that which the Act intends be only interim.

At [74], the Court of Appeal concluded however, that nothing in the authorities suggested that those principles apply when a judgment debtor cannot pay a judgment ordered pursuant to the Act, whether following adjudication or the failure to serve a payment schedule.

Grosvenor considered the scenario of a principal's counterclaim becoming worthless because the builder, who was to receive a payment pursuant to its rights under the Act, would, as a result of being placed under external administration, be unable to meet the counterclaim following its judicial determination. The Court of Appeal distinguished this scenario from the developers' position as:

- their position was that because they would become insolvent, their counterclaim may never be litigated; and
- there was no suggestion of any insolvency risk on the part of the builder (whereas, in *Grosvenor*, the risk of a builder not being able to meet a counterclaim against it was a key issue).

Section 32 of the Act

Section 32 of the Act is concerned with preserving the parties' rights under their construction contracts and any civil proceedings arising under those contracts. The developers argued that the practical effect of execution of the judgment against them would be to stultify their ability to vindicate their contractual rights, and hence the failure to grant a stay would be contrary to section 32. This didn't persuade the Court of Appeal which concluded at [84] that section 32 refers only to the legal rights of the parties, not

to the practical effect upon them, and that the operation of section 32 could not depend on whether a developer is in a liquidity crisis or instead has significant cash or liquid asset reserves.

The Court of Appeal's view was that the developers had also failed to demonstrate that:

- the practical effect of the failure to obtain a stay of execution would actually be to prevent the litigation of their counterclaim; and
- the interests of justice required a stay of execution.

This view was based on reasons which included:

- the developers, while claiming to be insolvent, sought to sue the builder while being funded by others – it was relevant to the stay discretion, to have regard to the fact that third parties were funding the developers' counterclaim and hoping to benefit from it, while simultaneously seeking to prevent the execution of the $6,000,000 judgment debt;
- the developers' financial statements were not audited and said nothing about the position of the developers' holding company;
- the developers' financial statements did not include any asset comprising the developers' rights pursuant to the counterclaim; and
- there was no evidence of the preparedness or otherwise of the developers' director or holding company to fund the developers in order to pay the judgment debt.

The Court of Appeal noted at [89] and [90] that despite the Act's purpose of providing cashflow to builders and subcontractors in advance of a final hearing of their disputes, a stay of execution may be granted where the practical effect of the Act is to make permanent that which the legislator intended to be merely interim. This perhaps leaves the door open for a court to grant a stay of execution to a judgment debtor in different circumstances to that of the developers, although courts will be cautious in doing so because such a stay may well detract from the purpose of the Act.

The Court of Appeal was critical of the developers' 9 ½ month delay in filing and serving their counterclaim, noting the delay was difficult to reconcile with the requirement in section 56 of the *Civil Procedure Act 2005* (NSW) to facilitate the just, quick and cheap resolution of disputes, and that the developers had provided no explanation for the delay. Arguably, the developers may have had a better prospect of being granted a further stay of execution if they had filed and served their counterclaim on time (or at least had a reasonable explanation for not having done so).

Practice tips:

- A principal ordered to pay money to a builder under the Act (following adjudication or the failure to serve a payment schedule) is likely to face considerable difficulty obtaining a stay of execution of the judgement against it on the basis that it (not the builder) is or will become insolvent if the judgment is not stayed.
- A principal in this position should focus on establishing by admissible evidence that the failure to grant a stay of execution will result in making permanent that which the Act contemplates ought be only temporary. The principal should also comply with all procedural orders especially those relating to any counterclaim.

4. *Ricardo Leiman v Noble Resources Ltd* [2020] SGCA 52

The Singapore Court of Appeal found that a provision was not a penalty because it was a primary obligation that sought to achieve a legitimate commercial purpose.

A senior executive of Noble Resources Ltd, Mr Leiman, resigned his position. To deal with his departure and to avoid his exit becoming contentious, he and Noble Resources entered into a Settlement Agreement (which was in essence a separation agreement). An issues that arose was whether clause 3(c) of the Settlement Agreement was an unenforceable penalty. It provided:

> "*3. Severance Payments and Benefits*
>
> *…*
>
> *(c) [Mr Leiman] shall be entitled to exercise the outstanding 7,727,272 options he holds in the Noble Group Limited Share Option Schedule 2004 vesting on 2nd April 2012 as well as all options vested to date but unexercised, in each case provided he does so exercise on or prior to 2nd April 2013 and provided that prior to exercise he has not acted in any way to the detriment of Noble and the [R&O Committee] of Noble shall make a final determination in the event of any dispute.*" [Emphases added.]

Noble argued that after his employment came to an end, Mr Leiman acted "*to the detriment of Noble*" (by breaching his non-competition and confidentiality obligations) which meant that his share options were forfeited pursuant to clause 3(c).

Mr Leiman argued that clause 3(c) purported to forfeit his accrued share options (assuming he was found to have acted to Noble's detriment) and was therefore an unenforceable penalty. Noble said that Mr Leiman's unexercised share options lapsed when he resigned on 9 November 2011 (i.e., before the 2 April 2013 exercise date in clause 3(c)), and hence that clause 3(c) conferred additional rights on Mr Leiman that he would not otherwise have had. Noble said that in those circumstances, clause 3(c) was not a penalty.

The Singapore Court of Appeal resolved the issue of when the entitlement to the share options accrued in favour of Mr Leiman, finding at [93] to [95] that the Settlement Agreement had preserved his entitlement to the share options in clause 3(c) (as the parties intended to take all outstanding matters between them out of the scope of their previous contractual arrangements). However, this did not resolve the case and the Court went on to discuss the rule against penalties, and whether clause 3(c) was a primary or secondary obligation.

The rule against penalties in Singapore

The Singapore Court of Appeal explained at [97] that the rule against penalties is embodied in the principles laid down by Lord Dunedin in the House of Lords decision of *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79 (**Dunlop**), including:

- "*It will be held to be [a] penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach*";
- "*It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid*"; and
- "*There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage"*".

The Singapore Court of Appeal concluded at [98] that it need not decide whether the principles in Dunlop continue to apply in light of the decision of the UK Supreme Court in *Cavendish Square Holding BV v Makdessi* [2016] AC 1172 (**Cavendish**). The test in Cavendish is "*whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation*".

The Singapore Court of Appeal nonetheless held that the "*rule against penalties applies only to clauses that impose secondary obligations*" and concluded that clause 3(c) could not be penal as it did not concern a secondary obligation that was "*triggered by Mr Leiman's breach of contract*" (see [98] and [100]).

The Singapore Court of Appeal said at [101] that the task of determining whether a clause imposes a primary or secondary obligation should adopt the approach of looking to "*substance rather than form*" and being guided by:

- "*the overall context in which the bargain in the clause was struck*";
- "*any reasons why the parties agreed to include the clause in the contract*"; and
- "*whether the clause was entered into and contemplated as part of the parties' primary obligations under the contract in order to secure some independent commercial purpose or end, or whether it was, in the round, to hold the affected party* in terrorem *in order thereby to secure his compliance with his primary obligations*".

The question for decision (see [109]) was whether clause 3(c) was:

- a primary obligation that Noble undertook to grant Mr Leiman the right to exercise the share options in that provision on condition that he be a good leaver; or
- a secondary obligation on the part of Mr Leiman to forgo his share options in the event that he breached his primary obligations under the Settlement Agreement.

The Singapore Court of Appeal concluded at [112] that clause 3(c) was a primary obligation requiring Noble to allow Mr Leiman to exercise the share options as long as he was a good leaver. In essence,

clause 3(c) was construed as giving Mr Leiman enhanced rights if he was a good leaver, without seeking to penalise him if he was not a good leaver. This was consistent with the Court's view of the function of the "R&O Committee" (Remuneration and Options Committee) under clause 3(c), which the Court said at [112] was to consider whether Mr Leiman had caused commercial detriment to Noble, not whether Mr Leiman had breached his contractual obligations. Ensuring that Mr Leiman was a good leaver was regarded by the Court as a legitimate commercial purpose. Accordingly, clause 3(c) could not be struck down as a penalty.

Application in Australia

This decision does not represent the law of penalties in Australia but is nonetheless of a degree of interest to Australian legal practitioners. This is because in Australia, the rule against penalties may also be approached by considering whether an allegedly penal provision is a primary or secondary obligation - see *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30 at [10] which states:

> "*In general terms, a stipulation prima facie imposes a penalty on a party ("the first party") if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and in terrorem of the satisfaction of the primary stipulation. If compensation can be made to the second party for the prejudice suffered by failure of the primary stipulation, the collateral stipulation and the penalty are enforced only to the extent of that compensation. The first party is relieved to that degree from liability to satisfy the collateral stipulation.*"

Practice tips:

- It may be possible to argue that a provision impugned as penal is to be properly regarded as a primary obligation and hence is not a penalty.
- In Singapore, courts will approach the task of determining whether a provision is a primary or secondary obligation having regard to the broad commercial context in which the impugned provision was made, including whether there was an independent commercial purpose behind the impugned provision.
- See also "*Liquidated damages and penalties in Singapore*", J Bailey, Dr M Secomb, and T Agoston, 2 July 2020.

5. 127 Hobson Street Limited v Honey Bees Preschool Limited [2020] NZSC 53

The New Zealand Supreme Court considered whether a provision, connected with a lease, which required a landlord to indemnify its tenant for its lease payments if the landlord failed to install a second lift in a building within a specified time, was a penal.

Honey Bees Limited operated a preschool on the fifth floor of a high rise building in Auckland. On 20 December 2013, it entered into a Deed of Lease for this premises with its landlord, 127 Hobson Street Limited.

There was one lift in the building which serviced the preschool, residential apartments and a hotel. The landlord and tenant also entered into a Collateral Deed, a separate document to the Deed of Lease, pursuant to which:

- the landlord agreed to install, at its cost, a second lift to provide enhanced access to the preschool; and
- if the second lift was not installed on or before 31 July 2016, the landlord and its director, Mr Parbhu, would indemnify the tenant for rent and outgoings under the lease.

The second lift was not installed on time and the tenant sought to enforce the indemnity in the New Zealand High Court. The landlord claimed that the indemnity obligation was an unenforceable penalty.

The New Zealand Supreme Court (like New Zealand's High Court and Court of Appeal before it) found at [116] the indemnity was not a penalty.

At [91], the New Zealand Supreme Court summarised the test that applies in New Zealand to determine whether a provision is a penalty:

- a clause stipulating a consequence for breach of a primary obligation will be a penalty if the consequence is out of all proportion to the non breaching party's legitimate interests in performance of the primary obligation – a consequence will be out of all proportion if it can fairly be described as exorbitant when compared with the legitimate interest;
- the assessment of whether a clause is penal is to be undertaken having regard to the circumstances at the time of contract formation;
- a party's legitimate interests may extend beyond the loss caused by a breach as measured by assessment of contractual damages – those interests may extend to the broader interests the party seeks to achieve or protect through the contract;
- deterring breach can be a legitimate objective of a clause stipulating a consequence for breach of a primary obligation (as long as the clause is not a punishment for breach);
- the parties' bargaining power, and whether they were both legally represented at the time the contract was made, will be relevant to assessing the non breaching party's interest in performance of the primary obligation. There is a presumption that commercial parties dealing with each other on equal terms are able to assess the appropriate proportion between legitimate interest in

performance of the primary obligation and the consequences contracted to follow upon the breach of that primary obligation; and

- it is not necessary for a court to assess the damages that would have been awarded at common law for breach, but there may be cases where such a calculation is a measure of the performance interest, such as where the impugned clause purports to provide a pre-estimate of damages.

The landlord argued that the indemnity required it and Mr Parbhu to indemnify the tenant for the term of the Deed of Lease, and that the Deed of Lease defined the final expiry date as 24 years from 19 December 2017, which meant that the term of the indemnity was 24 years from that date - such a significant term indicating that the indemnity was penal.

However, the Supreme Court's view was that the lease term was only 6 years. The Court stated at [93] that this was because the exercise of a right of renewal is normally regarded in law as the grant of a new lease, with clear words being required to displace this presumption, and nothing in the Deed of Lease displaced this presumption. The Court stated at [94] that "*it is commercially absurd to suggest any of the contracting parties had in mind a 22 year indemnity period when they entered into the Collateral Deed*".

The landlord argued that the Collateral Deed, properly construed, should be approached as being unconnected to the Deed of Lease, and that as a result, the Court, when assessing proportionality, ought not take into account the extent of the tenant's interests under the Deed of Lease. The landlord said that the Collateral Deed dealt with something new and additional to the tenant's obligations under the Deed of Lease, and that the only legitimate interest to be weighed when assessing proportionality was anything that could flow from a failure to install a second lift by the due date.

The New Zealand Supreme Court concluded at [101] and [103] that the landlord's approach, in trying to draw a hard distinction between the Deed of Lease and the Collateral Deed, was artificial. This was because:

- the obligations in the Collateral Deed related to access to the premises leased under the Deed of Lease and to payment obligations under the Deed of Lease;
- clause 3 of the Collateral Deed expressly stated that it was collateral to the Deed of Lease;
- it was necessary to have regard to the terms of the Deed of Lease to make sense of the obligations in the Collateral Deed; and
- the evidence supported the finding (made in the lower courts) that the tenant wanted a second lift because having only one lift would limit the preschool's business – the evidence showed that as a result of the preschool operating on the fifth floor of a busy high rise, parents, arriving and departing at concentrated blocks of time, would, without a second lift, be competing with apartment residents and hotel users for the existing lift.

Based on the above matters, the New Zealand Supreme Court concluded at [106] that the tenant was seeking to protect its legitimate interest in operating its business supported by two lifts, and seeking to protect the business' growth prospects.

The fact that Mr Parbhu was not legally advised before entering into the Collateral Deed did not persuade the Supreme Court that there was inequality of bargaining position. This was because Mr Parbhu had been a landlord to 150 commercial tenants since 1981, and as at the hearing date, had 107 tenants over 12 premises – as a result, the Supreme Court regarded him as "*a sophisticated commercial party*" and stated "*[i]f he did not seek legal advice, that was very much his choice*".

The landlord noted that even if it was only one day late in installing the second lift, the full consequence of the indemnity would follow. This it argued, showed that there was no proportionality between the extent of the delay in installing the second lift and the consequence embodied in the indemnity provision. The New Zealand Supreme Court said that the all or nothing nature of the indemnity (there was no attempt to scale the consequences of the length of delay) was relevant to the issue of proportionality. However, it stated at [113] that it was not satisfied the contracted consequence was exorbitant as the landlord had two years and seven months to install the second lift, which the Supreme Court described as being "*ample opportunity*".

Practice tips:

- In New Zealand, a secondary obligation is likely not to be a penalty if it protects a business' legitimate interest.
- New Zealand courts may be inclined to take a broad view of a legitimate interest, and may well regard the protection of a business' growth prospects as a legitimate interest.

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6. *The Illawarra Community Housing Trust Limited v MP Park Lane Pty Ltd* [2020] NSWSC 751

The New South Wales Supreme Court found that a dispute regarding termination and repudiation of a contract was properly referred to expert determination.

The Illawarra Community Housing Trust Limited engaged a developer, MP Park Lane Pty Ltd, to develop low density apartment buildings pursuant to a Project Delivery Agreement ("**PDA**"). The development fell behind schedule. The parties agreed the PDA was no longer on foot, but each claimed the other terminated it.

The developer referred disputes about termination and repudiation for expert determination under clause 21 of the PDA which was an expert determination provision. It provided as follows:

> **"*21 Dispute resolution***
>
> ***21.1 Dispute***
>
> *Any dispute in connection with this agreement must be dealt with by this clause 21.*
>
> ***21.2 Notification of dispute***
>
> *If a party believes that there is a dispute in connection with this agreement (**Dispute**) then:*

*(1) that party must give notice (**Dispute Notice**) in writing to the other party stating that there is a dispute; and*

(2) the notice must outline

(a) what the party believes the dispute to be;

(b) what the party wants to achieve; and

(c) what the party believes will settle the dispute.

21.3 Consultation between the Representatives

(1) Within ten (10) business days of a Dispute Notice the appointed representatives of the parties must meet in order to resolve the Dispute.

(2) If the representatives of the parties cannot resolve the Dispute within fourteen (14) days of the date of the relevant Dispute Notice is served then the following provisions of this clause 21 apply.

21.4 Referral to expert

If the parties cannot resolve the Dispute, then the Dispute may be submitted by either party to an expert agreed between the parties.

21.5 Failure to agree

(1) If the parties cannot agree on an expert within 10 Business Days then either party may request the President of the appropriate institute or association to appoint a member of that institute or association as the expert.

(2) If the parties cannot agree on which institute or association is appropriate in the circumstances (within the same 10 Business Days), either party may refer the selection of the institute or association to the President of the Bar Association of New South Wales to select the most appropriate institute or association.

21.6 Appointment as expert not arbitrator

The person agreed on or appointed is to act as an expert and not as an arbitrator.

21.7 Written submissions on dispute

(1) Both parties may, within 20 Business Days of the date of appointment of the expert, make written submissions to the expert on the matter the subject of the dispute.

(2) If a party makes a written submission to the expert, it must give a copy of the submission to the other party at the same time as it gives the submission to the expert.

21.8 Effect of expert's decision

(1) The expert's decision is final and binding on the parties.

(2) The cost of the expert's decision is to be borne by the parties:

(a) in the shares as the expert determined; or

(b) in the absence of such a determination, equally between the parties.

21.9 Continue to perform

Despite the existence of a dispute, each party must continue to perform its obligations under this agreement (including obligations to pay monies)."

The housing trust's position was that the referral was invalid because clause 21 should be narrowly construed to exclude disputes about termination and repudiation of the PDA. It supported this position with the following points:

- clause 21 didn't survive termination so it could not be used to determine disputes concerning termination and repudiation;
- clause 21 was so uncertain as to be void;
- clause 21 operated only for disputes in the nature of narrow technical matters, not wide ranging disputes of mixed fact and law concerning the termination of a multi-stage multi-million dollar contract for the planning, construction and sale of low density apartment buildings;
- the words "*in connection with this agreement*" in clause 21.1, when read with the PDA as a whole, confine clause 21 to disputes in connection with the performance of the PDA and exclude disputes about termination and repudiation of the PDA;
- there is no provision for swearing oaths, service of lay or expert evidence, cross examination of lay or expert witnesses, document production or reply submissions;
- the use of a single expert suggests that clause 21 was directed to disputes requiring specific technical knowledge, not complex disputes involving questions of mixed fact and law;
- the expert was not required to act judicially;
- the expert's determination is final and binding, largely insulating it from challenge;
- the existence of step in rights for the housing trust in clause 23 indicated that fundamental contractual defaults are outside the scope of clause 21; and
- under clause 30.9, (the governing law and submission to jurisdiction provision), the parties submitted to the exclusive jurisdiction of New South Wales courts in respect of "*any proceedings in connection with agreement*" – this could only sensibly be read as referring to disputes and differences between the parties, meaning that clause 30.9 had no work to do if clause 21 covered any disputes between the parties.

The New South Wales Supreme Court held at [40] that the referral to expert determination was valid. It resolved the case by reference to general principles of contract construction and several important PDA provisions – see below.

Clause 21 is to be construed according to the normal process of construction for commercial agreements. Different processes of construction do not apply to dispute resolution or expert determination provisions (*Inghams Enterprises Pty Ltd v Hannigan* [2020] NSWCA 82 (**Inghams**) at

[54], [64], [65] and [119]). Hence, clause 21 is to be construed objectively by reference to its text, context and purpose.

Constructions which give operation to all provisions and avoid commercial nonsense and commercial inconvenience are to be preferred (*Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46]-[47]). Dispute resolution clauses are to be construed widely, not narrowly (Inghams at [59]).

The Court concluded at [48] that on its plain meaning, clause 21.1 required that if there was a "*dispute*", and it was "*in connection with this agreement [i.e., the PDA]*", then the dispute had to be dealt with under clause 21. This, the Court noted at [49], was supported by the use in that clause of the word "*any*", which is of the widest import (Inghams at [84]).

The Court found at [56] that clause 30.9 (the governing law and submission to jurisdiction provision) was not an alternative avenue to the resolution of disputes in connection with the PDA. It noted that clause 30.9 operated in respect of any proceedings in connection with the PDA, and that an expert determination clause does not oust the jurisdiction of the court, "*which always keeps ultimate supervision of the ambit of the expert's authority under a contractual provision*".

At [58], the Court did not accept the housing trust's argument that an expert appointed pursuant to the PDA was limited to technical disputes, as such a construction would have required the inclusion of words such as "*appropriate for determination by an expert*" (which were not present in the PDA).

The Court stated that an agreement to resolve disputes by expert determination "*does not bring with it an assumed expectation that procedures which are the hallmark of judicial or quasi-judicial proceedings will apply*". Hence, the absence of procedures in the PDA for such things as swearing oaths, lay and expert evidence, cross examination, document production and reply submissions, and the absence of any requirement for the expert to act judicially, did not persuade the Court of the housing trust's position.

The final and binding nature of the expert's determination was, for the Court, no basis to conclude that any particular dispute was excluded from it (see [67]). Instead, the Court viewed the final and binding nature of expert determination under the PDA as being in line with the commercial objective of clause 21 to limit challenges.

As to step in rights, the Court concluded at [69] that these rights did not support a narrow construction of clause 21, and that a dispute in connection with step in rights would fall within the scope of the PDA's expert determination process.

The Court did not accept that clause 21 had no operation where the PDA was terminated. It concluded at [70] that a dispute after or about termination of the PDA is a dispute in connection with it. The Court said that if the parties had intended to have multiple venues for the determination of their disputes, with a different venue for the determination of disputes concerning termination, they would have said so. The Court's view was that the demarcation line urged by the housing trust lacked commercial rationality and would work commercial inconvenience.

The Court did not accept that clause 21 was void for uncertainty even though it did not set out procedural rules for the expert to follow. Rather, the Court viewed the terms of that clause as the parties having agreed to leave it to the expert to proceed as the expert considered fit (see [75]).

The Court's decision is an example of courts upholding expert determination provisions in large scale commercial construction contracts, another example is *Plenary Research Pty Ltd v Biosciences Research Centre Pty Ltd* [2013] VSCA 217.

Practice tips:

- Courts will generally construe expert determination provisions broadly. However, careful drafting of alternative dispute resolution provisions, particularly tiered dispute resolution provisions, is required, as courts may sometimes adopt a technical approach to their interpretation - see for example the arguably technical approach adopted by the majority in Inghams to the construction of "*any monetary amount payable and/or owed by either party to the other under this Agreement*".
- Parties who wish to limit the type of disputes which are to be resolved by expert determination should ensure their contracts expressly say so, and pay careful attention to the associated drafting.

7. Manor Central Nominees Pty Ltd & Anor v Wyndham City Council (No 2) [2020] VSC 271

In this decision, the Victorian Supreme Court found that a party, whose written opening submissions referred to minutes of meeting containing a privileged redaction, had not waived privilege because the redaction did not create any ambiguity in the minutes or render them misleading.

The plaintiffs and the Wyndham City Council feel into dispute about the development of land forming the Manor Lakes Town Centre in Wyndham, Victoria. The first plaintiff owned the land and anticipated transferring it to the second plaintiff.

The council made decisions to serve on the second plaintiff a notice of intention to acquire certain land, described as a "*carriageway easement*", under the *Land Acquisition and Compensation Act 1986* (Vic) (**Act**), and to publish a notice of acquisition in the Government Gazette as required by the Act.

The plaintiffs claimed that the council indicated that the land acquisition was necessary to construct a public road through the development to link to a railway station. The plaintiffs resisted this position. The plaintiff also claimed that the decisions were affected by jurisdictional error and should be quashed as the council acted for an improper purpose when making them.

The council filed and served an affidavit sworn by its Chief Executive Officer exhibiting a redacted version of confidential minutes of a council meeting. The contents of the minutes were largely revealed except for a redaction under the heading "*Urgent need to set aside a section of the site as a carriageway easement*".

The council's subjective intention in making the decisions was a critical issue to proceeding and the parties agreed that the minutes were relevant to that issue. The council argued that the redaction was protected from disclosure because it was privileged pursuant to section 118 of the *Evidence Act 2008* (Vic). The plaintiffs said that the council waived privilege in the redaction by relying on the redacted minutes in its written opening submissions.

The Victorian Supreme Court found that the redaction was privileged on the basis that it contained legal advice (the redaction was limited to a part of the minutes that referred to and apparently summarised legal advice received by the council).

The plaintiffs argued that the council waived privilege over the redaction by acting in a manner inconsistent with the privilege, according to section 122(2) of the *Evidence Act 2008* (Vic), which provides:

> "*[T]his Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119, or 120.*"

The basis of this claim of waiver arose from the following paragraph of the council's written outline of submissions for trial which included a footnote reference to the redacted minutes, stating:

> "*Contrary to the plaintiffs' submissions, there is no basis to conclude that the Council acted for a forbidden or foreign purpose in serving the Notice of Intention or the Notice of Acquisition. Indeed, there is no direct evidence as to the Council's (i.e., the councillors') purpose in acquiring the Interest, and the best evidence is consistent with the Council doing so to facilitate "access" from Ballan Road to the Wyndham Vale railway station. There is also no good evidence that the councillors' "wrongly" thought that by acquiring the easement the Council was thereby acquiring a "public road" within the meaning of the RMA, and the best evidence is consistent with the Council not so misunderstanding.*" [Emphasis added.]

The references to "*the best evidence*" in the extract above are references to the redacted minutes.

The plaintiffs argued that it would be inconsistent with the council maintaining privilege over the redaction, for the council to say that there is no direct evidence of the council's purpose in making the decisions, but then assert that the minutes, in a redacted and therefore incomplete form, offered the best evidence of any purpose the council may have had.

The plaintiffs said that the council had made an assertion about the contents of a privileged communication to substantiate a defence, in a way described by the Full Court of the Federal Court in *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341 at [52]:

> "*[W]here issue or implied waiver is made out, the privilege holder has expressly or impliedly made an assertion about the contents of an otherwise privileged communication for the purpose of mounting a case or substantiating a defence. Where the privilege holder has put the contents*

of the otherwise privileged communication in issue, such an act can be regarded as inconsistent with the confidentiality that would otherwise pertain to the communication."

The council said that it had not made its case in a way that expressly or impliedly made an assertion about the contents of the redaction. Rather, the council said that at trial it intended to submit that the best evidence, including the redacted minutes, would be consistent with the council having acted for a proper purpose. The council also said it was not inconsistent with the maintenance of the privilege to sever privileged communications included in a document and to rely on that document for its non-privileged content.

After reviewing the Victorian Court of Appeal decision in *Viterra Malt Pty Ltd v Cargill Australia Ltd* (2018) 58 VR 333, the Victorian Supreme Court stated at [28]:

- the test to determine whether there had been an issue waiver (as the plaintiffs contended) was the test in section 122 of the *Evidence Act 2008* (Vic), which is an inconsistency test; and
- while some assistance can be gained from previous decisions, there is no settled list of categories of action that give rise to an issue waiver.

The Victorian Supreme Court resolved the case by applying what was said about severability of privileged communications in *Assistant Treasurer and Minister for Competition Policy and Consumer Affairs v Cathay Pacific Airways Ltd* (2009) 179 FCR 323 at [76]:

> "*[W]here legal advice can be severed from the balance of a document, and where that which is disclosed meaningfully informs a reader as to those matters taken into account by a decision-maker, no implied waiver of privileged material occurs....*
>
> *…*
>
> *If it be accepted – as it must – that parts of a document may be withheld on the basis of legal professional privilege, and if the deletion of those parts does not create any ambiguity of render the balance of the document misleading, it is difficult to conclude that the continued preservation of the confidentiality of the privilege is "unfair" …*"

The Court concluded that there was no inconsistency between the council's written submissions and the council maintaining privilege in respect of the redaction because the redaction did not create any ambiguity in the minutes or render them misleading. The Court said that the council had done no more than submit how the Court ought to consider the minutes in the context of trial evidence, especially on the issue of the council's true purpose in making the decisions – which is what the council was entitled to do.

In the Court's view, in making such a submission, the council had not acted in any way inconsistently with redacting the legal advice from the minutes. There was no forensic unfairness arising from maintaining the redaction while presenting the council's submissions based on the non-privileged part of the minutes.

Practice tips:

- Avoid or at least minimise referring to partially privileged materials in submissions, if for no other reason than to reduce the chance of satellite litigation regarding potential waiver of privilege.

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23 July 2020