hfw
ON THE TOOLS
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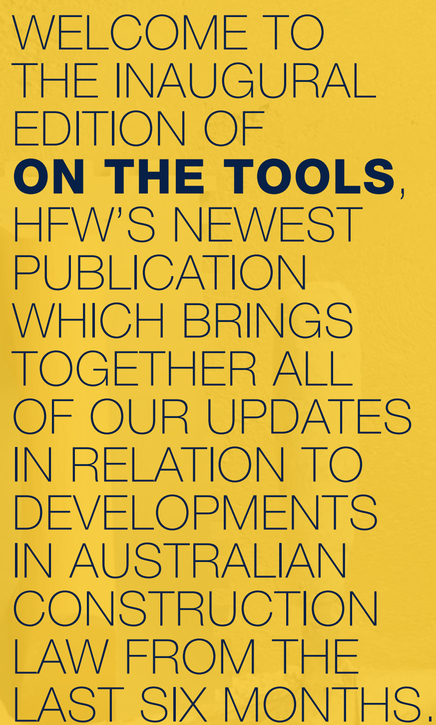

# WELCOME TO THE INAUGURAL EDITION OF **ON THE TOOLS**, HFW'S NEWEST PUBLICATION WHICH BRINGS TOGETHER ALL OF OUR UPDATES IN RELATION TO DEVELOPMENTS IN AUSTRALIAN CONSTRUCTION LAW FROM THE LAST SIX MONTHS.

This document has been prepared by our team of specialist construction and projects lawyers. It is a summary of cases and other developments in the law that are of interest to participants in the property, construction, engineering, infrastructure and resource industries in Australia.

If you have any questions about any of the articles please contact one of the team members listed in the back cover.

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# GENERAL CONSTRUCTION CASES AND DEVELOPMENTS

The first half of 2016 saw the Courts deliver the usual gamut of construction cases: applications for stays of court proceedings pending arbitration, applications to try and prevent calls on performance securities and disputes about expert evidence and straight up contract cases. A selection of which are profiled in the following pages.

The courts continued to enforce arbitration agreements rather than let parties be released from the dispute resolution terms of their bargains.[1] The courts have also continued to enforce arbitral awards without too much difficulty.[2]

Indeed, the emphasis on enforcing contractual terms (where they are clearly drawn) at the expense of other, perhaps more spurious, causes of action, is a theme that applies across all Australian jurisdictions and all types of clauses from warranties to dispute resolution mechanisms.

In the West there has been a rash of unsuccessful attempts to prevent calls on performance securities in relation to downstream disputes arising out of the troubled Roy Hill project.[3] In each case the Court reinforced the importance of the unconditional nature of those documents to business. A consequence of all of those actions appears to be that the "gentleman's agreement" which may have previously existed between contractors about not calling on each others performance bonds is now well and truly broken. It is perhaps an indication of the financial pressures that the sector is under more generally.

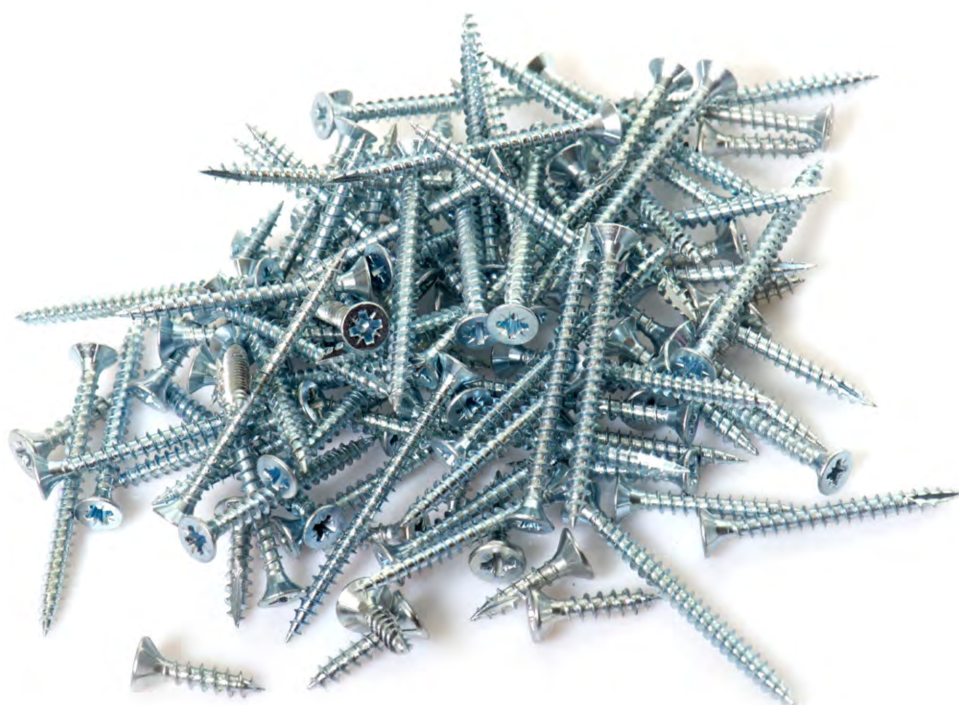
On a more positive note the High Court has recently delivered judgment in the much anticipated *Paciocco v Australia and New Zealand Banking Group Ltd*.[4] In a splintered decision (there were five separate judgments delivered) the court held (by majority, Nettle J dissenting) that the bank fees Mr Paciocco complained about could not be considered as penalties. There will no doubt be nuances in the decisions which means that the debate about the applicability of prohibition on contractual penalties to construction and operation contracts still has some way to go before being settled once and for all. We are working on a note which will go some way to unraveling that debate which will be published in due course.

1 See e.g. *Roy Hill Holdings Pty Ltd v Samsung C&T Corporation* [2015] WASC 458 (4 December 2015); *Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2016] WASC 52 (19 February 2016); *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd* [2016] WASC 193 (28 June 2016).

2 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* (2015) 304 FLR 199.

3 *Best Tech & Engineering Ltd v Samsung C&T Corporation [No. 3]* [2015] WASC 459 (30 November 2015); *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2015] WASC 484 (16 December 2015), *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2016] WASC 119 (15 April 2016); *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2015] WASC 49 (17 February 2016); *Flsmidth Pty Ltd v Duro Felguera Australia Pty Ltd* [2016] WASC 191 (27 June 2016). See also, *Yuanda Australia Pty Ltd v John Holland Pty Ltd* [2015] WASC 453 (25 November 2015); *Fabtech Australia Pty Ltd v Laing O'Rourke Australia Construction Pty Ltd* [2015] FCA 1371 (4 December 2015); *Cf Ottoway Engineering Pty Ltd v Westpac Banking Corporation* [2016] FCA 635 (2 June 2016).

4 [2016] HCA 28 (27 July 2016).



# PITFALLS OF SETTLEMENT AGREEMENTS:

## HOW A WARRANTY KEPT ALIVE LED TO A AU$7 MILLION CLAIM THREE YEARS LATER

*AUSTRALIAN MARITIME SYSTEMS LTD V MCCONNELL DOWELL CONSTRUCTORS (AUST) PTY LTD*

**Entering into a settlement agreement is often good news at the end of a challenged project; a settlement should bring finality and certainty to the parties and an end to a troubled relationship.**

**However, that was not the case for Australian Maritime Systems Ltd (AMS), who received a claim for $7,630,908.59 two years after an agreement was made for "full compensation" under its contract with McConnell Dowell Constructors (Aust) Pty Ltd (McConnell Dowell).[1]**

### Summary

Understanding what an agreement is meant to encapsulate "as a whole" is not sufficient to protect you against carve-out clauses which may create particular liabilities. Any clause in a settlement agreement that seeks to preserve the existing rights and liabilities of the parties must be carefully considered.

### Relevant facts

On 11 September 2012, AMS and McConnell Dowell entered into a contract in which AMS agreed to design, supply and install navigation aids at the Cape Lambert Tug Harbour (the Contract). The original contract sum was $2,162,481.50.[2]

Disputes arose in relation to the Contract and the parties executed a Supplemental Agreement[3] to resolve these disputes on 2 September 2013.

In clause 6 of the Supplemental Agreement, amongst other things, McConnell Dowell waived all rights to recover damages or costs under the Contract and it was agreed that AMS would be discharged from all obligations and liabilities to McConnell Dowell. It was agreed that McConnell Dowell would have no claim, in contract or otherwise, "now or in the future… under or arising out of" the Contract."

However, the Supplemental Agreement also included clause 6(e) which read:

*"Notwithstanding the foregoing, all warranties and indemnities given by [AMS] in respect of the Supply and [AMS's] liabilities for the Supply shall remain in force".*

Despite that agreement, by letter dated 12 August 2015, McConnell Dowell claimed payment of $7,630,908.59 in respect of a claimed breach of warranty.[4] The matter came before the Western Australia Supreme Court on the application of AMS seeking a declaration that the Supplemental Agreement was a full and final release and that it ought to have no liability to pay the warranty claim.[5]

McConnell Dowell brought a cross application seeking orders that the proceeding be stayed and referred to arbitration under the arbitration agreement in the Contract.[6]

### Decision

In the event, the court ordered that the dispute be referred to arbitration on the basis that the arbitration agreement in the Contract was expressly incorporated into the Supplemental Agreement and therefore the substance of AMS's complaint, regardless of whether it was framed as a controversy under the Supplemental Agreement or a dispute under the Contract, must be resolved by arbitration, not judicial intervention.[7] This ought to have been the start and end of the matter before the court. However, in coming to that conclusion the court embarked upon an exercise in constructing the very provision that AMS complained about, namely clause 6(e) of the Supplemental Agreement and, arguably impermissibly given the earlier conclusions about the continuing operation of the arbitration agreement, offered a view on the substance of the underlying dispute. It is that view which, although strictly *obiter*, is a salutary reminder about the importance of being clear when writing settlement agreements.

The court held that if McConnell Dowell had a valid breach of warranty claim, it would be entitled to bring it under clause 6(e). The court held that the plain meaning of the words of a clause will be adopted as long as:

- They do not contradict the rest of the agreement read as a whole.
- There was no extrinsic evidence that directly contradicted the plain meaning of the clause.[8]

In this case, construing the relevant clause and the Supplemental Agreement was not difficult and the court held that "clause 6(e) clearly

1 *Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2016] WASC 52 (19 February 2016), at [3].
2 *Ibid*, [17].
3 *Ibid*, Appendix.
4 *Ibid,* [3].
5 *Ibid,* [4].
6 *Ibid,* [5].
7 *Ibid,* [11]; [59]; [71].
8 *Ibid,* [76]; [78].

indicates that the release of [AMS] from obligations and liabilities is not absolute" and reading the clause as such as not inconsistent with the rest of the Supplemental Agreement which could be construed "harmoniously" as extinguishing any right of claim pursuant to the Contract, while "preserving the operation of warranties and indemnities" otherwise.[9]

**HFW perspective**

Settlement agreements are often wrought out of long drawn negotiations and may feel like the conclusion of a hard fought battle. Nonetheless, it is important to carefully consider each of the clauses in the agreement to ensure that it does not compromise the "global" or "holistic" agreement which may have appeared to be the understanding.

If the intention is that the settlement agreement puts to rest all proceedings and claims whatsoever in respect of a particular dispute, ensure that there are no "carve-out" clauses in the agreement that keeps particular liabilities alive.

When negotiating these types of documents it is important that the drafting of the particular agreement capture the parties' mutual intentions plainly and unambiguously. Relying on the process of negotiations, correspondence between the parties, the context in which the agreement came about, or presumptions that may come from industry practice which may shape a party's understanding of the agreement will never replace a clearly written document which captures the true agreement.

That said, settlement agreements do not need to be complicated. In most cases, a short agreement setting out the dispute and that terms on which the parties wish to settle the relevant dispute is sufficient. A simple checklist for your next settlement agreement might be as follows:

- Ensure that there are no clauses which keep liabilities, such as warranties or indemnities, alive.
- Obtain a mutual releases from any claim or proceeding which may arise in respect of the contract or transaction which gave rise to the dispute.
- Avoid granting a full release from making future claims if the other party does not provide the same.
- Finally, be sure that the settlement agreement includes a clause permitting the parties to plead the agreement as a complete defence to any claim in relation to the matters that have been released.

While these matters seem straightforward the fact that the Supplemental Agreement didn't adhere to these simple rules means that the parties are now entrenched in arbitration proceedings three years after the settlement agreement was made in relation to a sum that is nearly four times greater than the original contract sum!

9 *Ibid,* [75]-[76].

# TELLING THE TRUTH IS STILL THE BEST POLICY

*LAING O'ROURKE AUSTRALIA CONSTRUCTION PTY LTD V SAMSUNG C&T CORPORATION*

**The most recent instalment of the ongoing dispute between Laing O'Rourke Australian Construction Pty Ltd (LORAC) and Samsung C&T Corporation (Samsung)[1] is of interest to lawyers in the construction industry as it shows that a court will need very convincing evidence before stopping a party from making a demand on a performance bond on the basis that the demand was not, in the language of the relevant contract, "bona fide" or in good faith.**

### Relevant facts

The action arose out of the troubled Roy Hill project. LORAC was engaged by Samsung in 2014 under a modified form of the standard form AS4902[2] (subcontract) to construct structural steel and associated mechanical piping, electrical and instrumentation works in the port landside package. The subcontract sum was approximately AU$200 million. LORAC was required to provide security for an amount equal to 10% of the subcontract sum. It duly did so.[3]

Less than a year later Samsung terminated the subcontract with LORAC for convenience.[4] In the aftermath of the termination LORAC and Samsung entered into an interim deed (interim deed) which imposed certain rights and obligations on the parties following the termination. Amongst other things, the interim deed provided for the performance securities under the subcontract to be replaced and reduced in value. LORAC complied with that obligation. The replacement security was stated to expire on 20 February 2016.[5]

It is no secret that LORAC and Samsung are well advanced down the path to dispute.[6] During 2015 the parties engaged in some preliminary skirmishes in the Supreme Court of Western Australia.[7] Summed up briefly LORAC claims Samsung owes it over AU$90 million while Samsung claims LORAC owes it AU$55 million.[8] On any view it is a significant dispute and to prosecute it properly will place substantial financial pressures on the parties.

On 22 January 2016 Samsung gave LORAC notice, as it was required under the clause 7.3 of the interim deed[9], that it intended to call upon the replacement security.[10] Three days later LORAC commenced proceedings seeking an injunction to stop Samsung from taking that step.[11]

### Decision

LORAC raised a number of grounds in support of its argument for the injunction. The most interesting of these was LORAC's argument that the conditions in which a call on the replacement security could be made had not been satisfied.

The court did not accept that contention, nor any of the other, more spurious, grounds advanced by LORAC[12], and accordingly declined to grant the injunction.

Samsung's right to call on the replacement security was governed by clauses in both the subcontract and the interim deed, relevantly, clause 5.2 of the subcontract stated that Samsung could call on the replacement security where it *"considers, acting bona fide, that it is or will be entitled to recover the relevant amount from [LORAC] under or in respect of the subcontract"*.[13] The interim deed provided (at clause 7.3) that Samsung was obliged to give LORAC 48 hours notice of an intention to call on the replacement security.[14]

Tottle J considered that the effect of clause 5.2 was to create a negative stipulation on Samsung's right to call on the replacement security, namely that Samsung must *"consider, acting bona fide, that it is or will be entitled to recover the amount sought to be realised from LORAC, in this instance, AU$7.5 million."*[15]

LORAC contended there were ten matters which, when considered together, gave rise to the inference that Samsung were not acting bona fide. However, the general thrust of LORAC's submission was that:

- The valuations of the various claims and counter-claims had changed, in some cases dramatically, as the dispute matured.
- The basis upon which Samsung had made its assessments could not easily be divined from the correspondence.[16]

LORAC also attacked Samsung's evidence arguing it was *"vague and convulsionary"*[17] and invited the court to draw an adverse inference[18] against

1 *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASC 49 (17 February 2016) (*LORAC v Samsung*).

2 *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2015] WASC 237 (3 July 2015) [37].

3 Supra 1, at [3]-[4].

4 Ibid, [5].

5 Ibid, [6]-[7].

6 Ibid, [10].

7 Supra, 2 and *Samsung C&T Corporation v Laing O'Rourke Australia Construction Pty Ltd* [2015] WASC 83 (9 March 2015).

8 Supra 1, at [10].

9 Ibid, [107].

10 Ibid, [11].

11 Ibid, [14].

12 Ibid, [17], [50]-[54] [55]-[56].

13 Ibid, [105].

14 Ibid, [107].

15 Ibid, [108].

16 Ibid, [123].

17 Ibid, [124].

18 Relying on *Jones v Dunkel* (1959) 101 CLR 298.

Samsung because Samsung didn't call evidence of the bona fides of its claims from the subcontract manager responsible for the LORAC subcontract but, instead, relied on evidence from a commercial manager *"up the line"* from the subcontract manager.[19]

Despite these attacks, Tottle J was not persuaded that LORAC had *"established to the requisite standard that Samsung [had] not acted bona fide."*[20] He examined the evidence in detail in order to come to that conclusion.[21] However, in coming to that judgment made two general observations which are of broader application:

*[First,] a provisional conclusion as to a lack of bona fides can only be made on the basis of persuasive evidence. In assessing the allegation of a breach of bona fides, a court will look for undisputed facts and facts not surrounded by controversy from which to draw inferences. In this case, many of the matters relied upon by LORAC are so bound up in the controversies involved in the underlying dispute that it is difficult to draw the inference of a lack of bona fides for which LORAC contends.*

*[Second,] the effect of granting the relief sought by LORAC will be to deprive Samsung of the benefit of the bargain for which it contracted… The injunction will not preserve the status quo but will change it. … LORAC must demonstrate a prima facie case of sufficient strength to engender confidence that it would succeed if the matter went to trial. LORAC has raised a serious question but its prima facie case is not sufficiently strong. Put another way, LORAC's case is not sufficiently strong to tilt the balance of the risk of an injustice in its favour*.[22]

**HFW perspective**

This decision is an interlocutory application meaning that it is attended by the usual procedural limitations of such decisions.[23] However, that is also the reason why it is interesting.

The inclusion of the negative stipulation in clause 5.2 is a departure from the standard form. The inclusion of the term "bona fide" was likely intended to be a means of giving LORAC comfort about the circumstances in which its security would be at risk. It is not unusual for contractors to seek this sort of protection when negotiating these types of clauses.

Nonetheless, this decision appears to stand for the proposition that it will usually be straightforward for a construction principal to establish that they have acted on a bona fide basis. That is particularly so given that the issue will usually only arise in an interlocutory setting, such as an injunction application, where, as Tottle J stated, there are procedural limitations and evidence is not usually tested by cross examination.

An initial view of the decision might be that the requirement for demands on security to be made on a bona fides basis offers no protection to contractors given the relative ease by which Samsung appeared to jump the hurdle.

However, there is another way of looking at the case.

When coupled with a notification period, as was the case here, the inclusion of a requirement that the principal to act reasonably (or bona fides) will, in most circumstances, permit a contractor to argue that they are not. Thus, there will almost always be an opportunity for a contractor to bring an injunction application and thereby force the principal to prove its bona fides.

While that application might not always succeed, indeed, this decision suggests it will usually fail if that is the only argument, the mere ability to legitimately make the argument will usually have an added collateral benefit of buying the parties more time to continue to negotiate. It might even give a contractor who was in a weak negotiating position a stronger position while the principal diverts resources into defending the injunction application.

In parallel, the time taken for the application to make its way through the court process might give the contractor time to negotiate with its bankers so that even if a call on the security is made there are alternative financing arrangements in place to soften the blow of such a call.

So, while it might be easy for a principal to establish its bona fides, forcing it to do so could just be a lifesaver for the contractor!

19 Supra 17.

20 Ibid, [133].

21 Ibid, [136]-[148].

22 Ibid, [134]--[135].

23 Ibid, [134].

# STICK TO THE PROCESS

## *SANTOS LTD V FLUOR AUSTRALIA PTY LTD*

**Santos Limited (Santos) and Fluor Australia Pty Ltd (Fluor) entered into an EPC contract (EPC Contract) for the engineering, procurement and construction of the Gladstone LNG project in Queensland.[1]**

### Relevant facts

The payment regime under the EPC Contract required Santos to pay Fluor an amount consisting of Fluor's "actual costs", a fee of AU$210 million and incentives as agreed. The target budget estimate was about AU$3.567 billion. In fact, Fluor claimed, and was paid, about AU$5.43 billion, an overrun to the target budget estimate of about AU$1.854 billion.[2] Given the overrun, Santos sought (by letter dated 18 December 2015) to exercise its audit rights under the EPC Contract to assess the "actual costs" components of Flour's payment claims.[3] Fluor resisted Santos' request for access to its project accounts on the basis that it had already provided the information it was obliged to provide under the EPC Contract.[4]

Despite corresponding in relation to the request over a number of months, Fluor continued to resist production of the material. Accordingly, on 13 May 2016 Santos filed an application in the Queensland Supreme Court seeking an order that Fluor provide it with access to the materials requested.[5] Fluor filed a counter application seeking a stay of Santos's application pending the parties' compliance with the dispute resolution process set out in the EPC contract.[6] Relevantly, the dispute resolution process required the service of dispute notices and responses, and a number of meetings between increasingly senior representatives of each party.[7]

Santos defended the application on the basis that enforcement of the dispute resolution process would be impractical or useless.[8] It relied on evidence of two similar previous disputes between the parties where there was no substantive progress towards resolution until Santos initiated court proceedings.[9] Santos argued that, even though there had been no compliance with the contractual procedure,[10] a Court-based process would be more efficient in resolving the dispute.[11] Especially so, given that the dispute was essentially a legal debate about proper construction of the audit regime in the EPC Contract. Santos argued that such a dispute would be better suited, and more efficiently determined, in Court.[12]

Fluor submitted despite these facts that there was utility in the parties undertaking the contractual process. For example, in previous disputes, the contractual process had narrowed the issues to be determined by the Court, influenced the terms of settlement and encouraged both companies to reach a compromise.[13]

### Decision

The Court was not persuaded by any of the arguments put forward by Santos and accordingly, upheld Fluor's application for a stay pending compliance with the contractual dispute resolution process.[14] The Court's decision was in keeping with a well established line of authority about the importance of parties adhering to the contractual dispute resolution process.[15]

### HFW perspective

The case highlights the Court's reluctance to re-write the parties' bargain unless there are very good reasons to do so. Here, there were none. It is also a reminder of the utility of such processes. As Fluor argued, there is often utility to undertaking the contractual process. Even if it doesn't result in resolution it will undoubtedly give the parties an opportunity to learn about each other's case and to narrow the true issues in dispute, which is essential to the efficient resolution of disputes.

1 *Santos Limited v Fluor Australia Pty Ltd* [2016] QSC 129 (13 June 2016) [5].

2 Ibid, [6].

3 Ibid, [10].

4 Ibid, [11]-[13].

5 Ibid, [1].

6 Ibid.

7 Ibid, [3].

8 Ibid, [4].

9 Ibid, [14].

10 Ibid, [21].

11 Ibid, [22].

12 Ibid, [17].

13 Ibid, [15] - [16]

14 Ibid, [18].

15 See, e.g. *United Group Rail Services Ltd v Rail Corporation NSW* (2009) 74 NSWLE 618, 638 [73] (Allsop P); *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd R 563, 569 [21] (Chesterman J); *Welker and Ors v Rinehart* (No 2) [2011] NSWSC 1238 (7 October 2011) [8]; *Mr D Ltd v Dirty Dancing Investments Pty Ltd* [2009] NSWSC 332 (1 May 2009) [53]; *Cable & Wireless plc v IBM UK Ltd* [2002] EWHC 2059 (Comm) (11 October 2002); *Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd* [2012] QSC 290 (26 September 2012), [29].

# THE OBLIGATIONS OF A PROFESSIONAL CONTRACTOR – DOES IT SUFFICE TO ACT IN A MANNER WIDELY ACCEPTED BY INDUSTRY PRACTICE?

*THEISS PTY LTD AND JOHN HOLLAND PTY LTD V PARSONS BRINCKERHOFF AUSTRALIA PTY LTD*

**On 2 November 2005 at approximately 1:40am a roof section of the Lane Cove Tunnel Construction Project (the Project) in Sydney collapsed, causing significant loss of property and property damage.[1]**

## Relevant facts

A joint venture between Thiess Pty Ltd and John Holland Pty Ltd (Thiess-JH) was responsible for the design and construction of the Project. The design of the works was the responsibility of Parsons Brinckerhoff Australia Pty Ltd (PB). Pells Sullivan Meynink Ltd (PSM) was engaged as geotechnical engineers to monitor ground conditions in the excavated tunnels and to, among other things, liaise with PB to tailor the design of the works to the ground conditions experienced. URS Australia Pty Ltd (URS) were engaged as independent verifiers on the Project.[2]

Following the collapse, Thiess-JH alleged that one or more of PB, PSM or URS was responsible for the collapse. Each denied liability and alleged that Thiess-JH bore the whole (or at least some) liability for the collapse.[3] During the course of the hearing Thiess-JH settled their claims against all the defendants except for PSM. Accordingly, the judgement is as confined as it can be to the issues in dispute between Thiess-JH and PSM. Given that PSM raised apportionment issues under the Civil Liability Act 2002 (NSW) the judgement necessarily concerned some of the issues between Thiess-JH and each of PB and URS.[4]

## PB and PSM found liable for breach of contract

The Court held that URS was not in breach of its contractual obligations regarding verification as URS had (in the absence of evidence to the contrary) exercised reasonable care in carrying out its task.[5]

Accordingly, liability was apportioned between PB and PSM as each of these parties had “departed in a very significant way from the standard imposed upon it by its contract with Thiess-JH”.[6] In PB’s case, the design that it had produced did not reflect the design philosophy that it had itself propounded. In PSM’s case, its failure was to continually assess the ongoing suitability of PB’s design and to ensure that PB’s design remained suitable in light of the ground conditions reported as the project progressed.[7]

## PSM’s defence that it had acted in a manner widely accepted by industry practice

PSM argued that its obligation was to assist PB in preparing the designs but that it was not required to check and ensure the adequacy of those designs once they had been finalised by PB.[8] In short, PSM argued that the reliability of PB’s design was solely PB’s responsibility.

PSM also sought to invoke section 50 of the Civil Liability Act 2002 (NSW) arguing that it should not be found to be negligent since it had acted in a manner that is “widely accepted in Australia by peer professional opinion as competent professional practice”.[9] In making that argument PSM called expert evidence that it had acted in a manner that widely accepted professional opinion would deem competent in light of PSM’s obligations pursuant to its contract with Thiess-JH and PSM.[10]

## Industry practice must be construed by reference to the specific obligations of the contract

The Court held that it would not be acceptable to merely comply with and rely on industry practice if the contract and obligations undertaken were complex and went beyond the scope of a usual straight-forward contract. The specific obligations undertaken must always be considered. In this case, the Court found that the obligations that PSM undertook were very carefully designed to reflect the particular demands a complex project.[11]

By considering the contract, related documents and the surrounding events, the Court found that an essential feature of the Project was an “observational approach to design”.[12] PSM was obliged to monitor ground conditions and to continually reassess the adequacy of PB’s designs in light of the ground conditions encountered even after PB had submitted its design.[13] At any stage where it considered that PB’s design might not be appropriate, it was obliged to communicate the same to PB so that PB could revise the design to ensure that it was adequate.[14] The intention of this approach was to ensure that

1 *Thiess Pty Ltd and John Holland Pty Ltd v Parsons Brinckerhoff Australia Pty Ltd* [2016] NSWSC 173(4 March 2016) [2] (McDougall J).

2 Ibid, [3].

3 Ibid, [4].

4 Ibid, [5].

5 Ibid, [461] - [465].

6 Ibid, [510], [512].

7 Ibid.

8 Ibid, [439], [443].

9 Ibid, [476], [477].

10 Ibid, [482].

11 Ibid, [486].

12 Ibid, [517].

13 Ibid, [443].

14 Ibid, [513], [516].

the chosen design was suitable for the Project and appropriate to the changing ground conditions so as to guard against what happened in this case.[15]

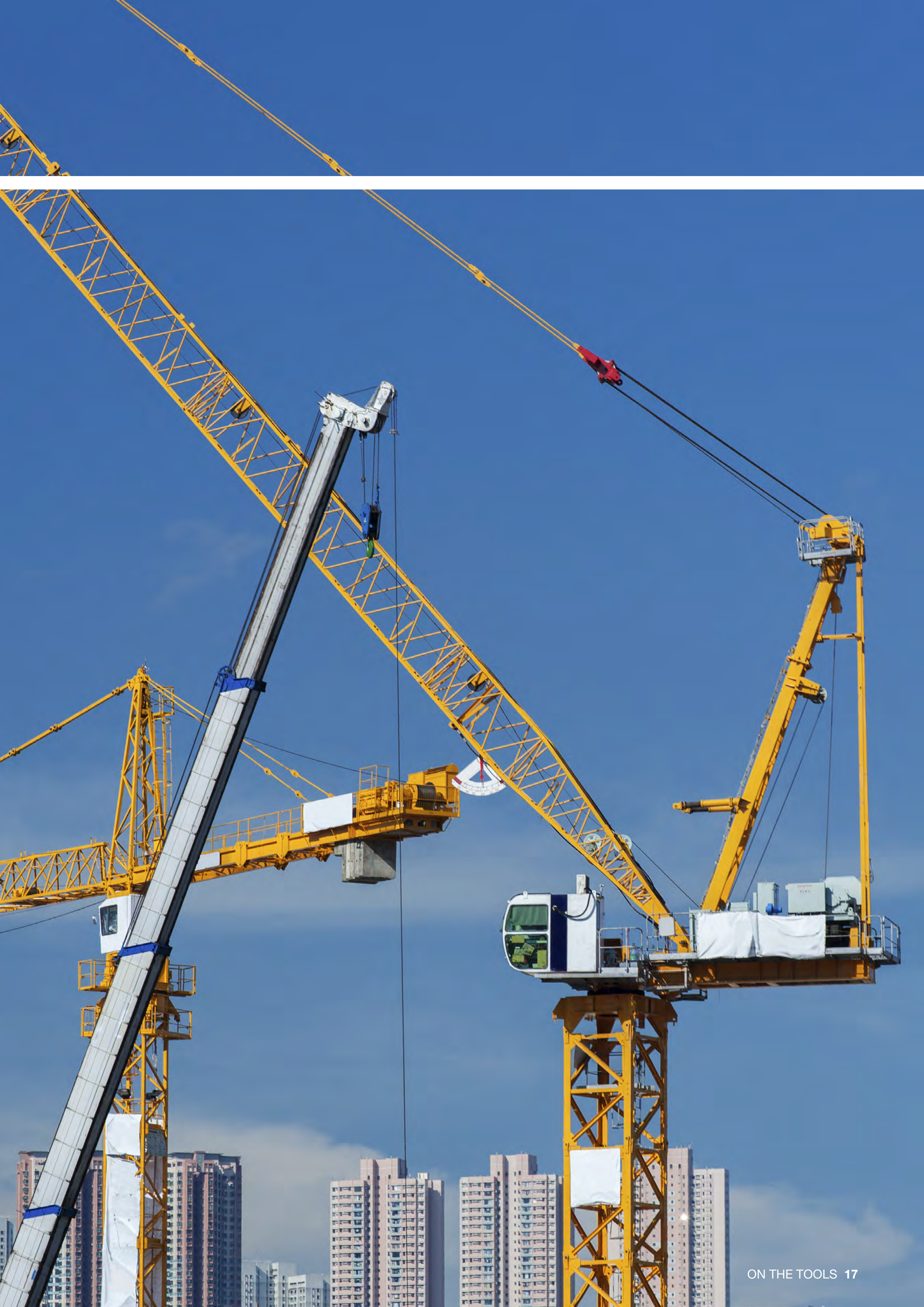
Accordingly, PSM failed to make out its defence on the basis of s 50 of the Civil Liability Act 2002 (NSW).

**HFW perspective**

It is easy to fall into the trap of thinking that liabilities are unlikely to arise as long as professional services have been delivered to a standard that is usually attained by the industry. However, while industry standards are a useful benchmark to use in ascertaining the level of performance required, this case stands for the proposition that close attention needs to be paid to exactly what the contract obliges a person to do.

Do not assume that a construction contract expects the usual professional standard of care or that obligations imposed are the same as those in other projects that your company has successfully completed. In the case of professional services, each individual should understand the scope of the services and, if there are uncertainties or grey areas, discuss and clarify them with the client.

15 Ibid, [517].



# EXPECT EVIDENCE: TO COMPLY OR NOT TO COMPLY – THERE IS NO QUESTION

*ARMSTRONG STRATEGIC MANAGEMENT AND MARKETING PTY LIMITED V EXPENSE REDUCTION ANALYSTS GROUP PTY LTD (NO 8)*

**Expert evidence is an invariable feature of construction disputes. Where claims relate to delay and disruption, an additional element of complexity is introduced because forensic analysts are required to make assumptions about the many factual variables involved. These may relate to the availability of resources, concurrency and the planned construction sequence. Although necessary, the veracity of the underlying assumptions may become the focus of criticism, and in some cases, undermine the integrity of the expert analysis. A recent decision of the New South Wales Supreme Court highlights the importance of ensuring that, as well as applying her or his expertise to the analytical exercise, an expert's obligations to the Court require her or him to probe and test the assumptions they are asked to make to support the opinions.**

### Relevant facts

*Armstrong Strategic Management and Marketing Pty Limited v Expense Reduction Analysts Group Pty Ltd (No 8)*[1] concerned litigation where the plaintiffs (Armstrong Parties) claimed for lost earnings allegedly suffered as a result of the defendants' (ERA) repudiation of their agreement with the Armstrong Parties. In order to prove their loss, the Armstrong Parties sought to admit into evidence an expert report prepared by an accountant, Mr Willis.

Mr Willis had been asked to express opinions on the earnings before interest, tax, depreciation and amortization the various companies within the Armstrong Parties would have made had the agreement not been repudiated by the defendant, ERA. Before preparing his report, Mr Willis met with Mr Armstrong and his lawyer and informed them that the information that would be most relevant for him to review in order to form his opinion would be the financial statements of the various companies within the Armstrong Parties. Mr Willis was instructed that these documents were not available. Instead, he was given other information such as trial balances and databases containing details of projects relating to each company's business. He was also given a partially completed template spreadsheet designed to record the status and total expected income for each company, and a draft list of assumptions.[2]

Mr Willis reformatted and completed the template spreadsheet on the basis of information obtained from the documents provided to him. He also made comments on the draft assumptions that were given to him and suggested some additional assumptions he should be asked to make. In respect of some, but not all, assumptions, he formed a view on whether the particular assumption was reasonable.[3]

Shortly before completing his report, Mr Willis was given a letter of instructions which set out the assumptions that he was asked to make. These were lengthy, and related to issues such as the accuracy of the information in the databases, how the databases were to be used, and the amount of expenses incurred by each of the companies in given periods.[4] Mr Willis gave oral evidence that he also assumed the databases recorded the revenue that was earned for each of the projects, although his report did not record that he had made this assumption or formed such an opinion.[5]

The conclusions made by Mr Willis in his report appeared to be dictated almost entirely by the assumptions he was asked to make, together with his unexpressed assumption that the databases recorded revenue earned. Moreover, it appeared that all Mr Willis did was to perform some relatively simple calculations based on the assumptions in order to arrive at his conclusions. He gave no indication in his report that he had considered whether some of the assumptions he was asked to make were reasonable.[6]

### Decision

ERA objected to Mr Willis' report being admitted as evidence for three reasons.[7] First, Mr Willis was not provided with, and did not state in his report that he had complied with, the expert witness code of conduct.[8] Second, the report did not comply with the relevant rules of evidence regarding expert opinion.[9] Third, in any event, the report's probative value was substantially outweighed by the danger of unfair prejudice to ERA such that it should be excluded.[10]

1 [2016] NSWSC 384 (6 April 2016) (Ball J).

2 Ibid, [7]

3 Ibid, [8]

4 Ibid, [9]-[12].

5 Ibid, [9].

6 Ibid, [13].

7 Ibid, [14].

8 Uniform Civil Procedure Rules 2005 (NSW) r 31.23.

9 See e.g. *Evidence Act 1995 (NSW), s 79(1); Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, [32] (French CJ, Gummow, Hayne, Crennan, Kiefel And Bell JJ).

10 Evidence Act 1995 (NSW), s 135.

The Armstrong Parties resisted each of these contentions.[11] They asserted that the failure to provide the expert witness code of conduct at the time Mr Willis was engaged was remedied by later providing an affidavit by Mr Willis stating that he agreed to be bound by the code, and that, having reviewed his report, considered that the report did not require amendment.[12] They also sought to rely on earlier orders allowing expert evidence to be served out of time,[13] and the Court's general preference to eschew technical objections to evidence raised at trial.[14]

### Failure to provide code of conduct

The Court acknowledged that it may grant leave to admit the evidence, notwithstanding that it did not comply with UCPR r 31.23, if the interests of justice would be best served.[15]

However, the Court was not satisfied that the Armstrong Parties could establish that non-compliance with the rule did not detract from its objective.[16] Although Mr Willis provided the retrospective affidavit stating that his report complied with the code of conduct, the Court held that it was not clear how he could have formed such a view.[17] He had stated in his report that he was expressing an accounting opinion on the amount the companies should have earned, and not simply engaging in an arithmetic exercise. But he did not explain whether he had considered whether the assumptions he was asked to make were reasonable, and appeared to have made additional assumptions that were not mentioned in his report. In these circumstances, the Court was not satisfied that Mr Willis understood the nature of the task he was meant to undertake, and his subsequent affidavit did not dispel that impression, so on that basis alone, concluded that the report ought to be excluded from evidence.[18]

### Failure to comply with s 79(1)

Furthermore, the Court considered that Mr Willis' report was also inadmissible by reason of non-compliance with the relevant legal principles regarding expert opinion. Relevantly, how the expert's specialised knowledge, on which the opinion is wholly or substantially based, applies to the facts assumed or observed so as to produce the opinion. The Court did not consider that Mr Willis' report met these requirements because it could not be said that the opinions expressed in the report were based, wholly or substantially, on Mr Willis' specialised knowledge. Rather, the conclusions in the report were based wholly or substantially on the assumptions he was asked to make. The actual calculations performed did not require any particular expertise, and although an accountant would be likely to have specialised knowledge which would enable them to express opinions on the reasonableness of many of the assumptions Mr Willis was asked to make, Mr Willis did not say in his report that he undertook that task. Nor did he identify the assumptions he thought were reasonable or give any reasons for his conclusions.[19]

On that basis, the Court held that the report was inadmissible.[20]

### Section 135 of the Evidence Act

In the circumstances, the Court also concluded that the probative value of the report was substantially outweighed by the danger that the evidence might be unfairly prejudicial to ERA and might cause or result in an undue waste of time.[21]

### HFW perspective

Although the conclusions made by Ball J were specific to the facts of this case, he did provide some indication of the standard expected of experts when they rely on assumptions in opinions. He considered that *"[ERA] could have expected Mr Willis's report to explain which assumptions he regarded as reasonable and to give at least brief reasons for those opinions".*[22]

Expert evidence attracts certain privileges over non-expert evidence in that an opinion may be permitted to be admitted into evidence. However, in order to take advantage of this privilege, it is critical that parties ensure that the expert witness adheres with the expert witness code of conduct (in jurisdictions where one exists), and that it is clear from the report that the expert's conclusions are based on the expert's own expertise or made on the basis of assumptions the expert considers to be reasonable (having applied his or her own expertise to the task of determining the reasonableness of those assumptions). This will be particularly applicable to forensic planners whose fields of expertise including construction programming and methodologies and (as a consequence) are well placed to assess the reasonableness of factual assumptions.

11 Ibid, [15].
12 Ibid, [27]
13 Ibid, [15].
14 *Hodder Rook & Associates Pty Ltd v Genworth Financial Mortgage Insurance Pty Ltd* [2011] NSWCA 279, at [50]
15 Supra 67, at [26]
16 Ibid, [26].
17 Ibid, [27].
18 Ibid.
19 Ibid, 32].
20 Ibid, [30].
21 Ibid, [33].
22 Ibid.

# A KNOCK DOWN JOB – THE ASSESSMENT OF DAMAGES IN CASES OF SEVERE STRUCTURAL DEFECTS

*METRICON HOMES PTY LTD V SOFTLEY*

**In a recent Victorian Court of Appeal decision,[1] Robson AJA (with whom the balance of the Court agreed) upheld the decision of the Victorian Civil and Administrative Tribunal (the Tribunal) that the correct measure of damages in cases of defective building works can amount to demolition and reconstruction if the defective works are sufficiently serious for that to be, as a matter of fact, necessary and reasonable. In doing so the Court has confirmed that there is, in practice, no "acceptable level of risk" when it comes to the structural stability of a person's home.**

## Relevant facts

In February 2009, Mr and Mrs Softley entered into a Domestic Building Contract with Metricon to construct, on a vacant allotment in the western suburbs of Melbourne, their first home.[2] The house was completed and the Softleys had moved in by March 2010.[3] Just four months later, in July 2010, the Softleys began to notice cracks in the plasterboard, skirting board and cornices of the house.[4] These problems were exacerbated following torrential, drought-breaking, rainfall in November 2010 when the Softleys noticed cracks through the bricks and mortar on the exterior of the house.[5] On any view the cracking was severe. The Softleys informed Metricon of the problems. However, despite correspondence with Metricon and a number of attendances at the property by various professionals and tradesmen, the cracking was not fixed.[6] The Tribunal found that the concrete slab on which the house was constructed had not, and was not at the time of hearing, performing in accordance with the relevant Australian Standard and that the structure of the house remained in a state of serious distress.[7]

In December 2012, the Softleys commenced proceedings in VCAT against Metricon alleging breaches of the contract leading to the cracking. The Tribunal found for the Softleys (finding that Metricon had failed to prevent water from gathering under the concrete floor slab during construction) and awarded damages by calculating the cost of demolishing and rebuilding the house.[8]

## Decision

On appeal Metricon did not dispute the Tribunals findings as to liability. The substantive issue on appeal was the Tribunal's assessment of damages. In particular, Metricon argued that the Tribunal had wrongly applied the established principles of law and that that error had been compounded by the Tribunal's failure to provide proper reasons and disclose its path of reasoning.[9]

It is the first of these two arguments which is of interest to participants in the construction industry.

Metricon argued (without opposition) that starting point was the test given by the High Court in *Bellgrove v Eldridge.*[10] In that case the High Court held (adopting a formulation from Hudson's Building Contracts) that in cases of defective building work the appropriate measure of damages was the:

*difference between the contract price of the work or building contracted for and the cost of making the work or building conform to the contract, with the addition, in most cases, of the amount of profits or earnings lost by the breach.*[11]

In adopting that test, the High Court explicitly recognised the possibility that the work required to achieve conformity would require demolition of some (or all) of the building in question and that the cost of such demolition should be included in the assessment of damages. Accordingly, they held that the rule stated above should be qualified so that, when assessing the damages flowing from defective work not only should the remedial work be required to achieve conformity, it must also "be a reasonable course to adopt."[12] This will, of course, be a question of fact in any particular case but nonetheless the Court should be concerned to avoid giving 'doubtful' remedies, for example by reference to piecemeal or uncertain remedial works.[13]

Where footings of residential houses are concerned the test of whether demolition and replacement is reasonable seems to turn on an examination of the likelihood of damage continuing to occur. As a consequence, in the Queensland case of *Kirkby v Coote*[14] the Court of Appeal

1 Metricon Homes Pty Ltd v Softley [2016] VSCA 60 (6 April 2016) ('Metricon').

2 Ibid, [80].

3 Ibid, [82].

4 Ibid, [83].

5 Ibid, [84].

6 Ibid, [86]-[101].

7 Ibid, [231]-[232].

8 Ibid, [75]-[77].

9 Ibid, [158], [285]. Warren CJ's judgment deals extensively with issues surrounding leave to appeal from a decision of VCAT, none of which are relevant for this note

10 (1954) 90 CLR 613 ('Bellgrove').

11 Ibid, 617-8.

12 Ibid, 618.

13 Ibid, 619.

14 [2006] QCA 61 (10 March 2006) ('Kirkby').

held that it was reasonable to order damages quantified by reference to demolition and reconstruction because there was a 'real' risk of damage continuing to occur despite that risk not being 'grave' in the sense of obvious or immediate.[15] In that case Keane JA stated that:

*the courts will be slow to characterise as unreasonable the position of a plaintiff who is unwilling to "live with" the risk of the serious consequences which may result from substandard work which affects the stability of a structure. There is no support in principle or authority for the proposition that a court will determine a level of risk of instability which it is "reasonable" for a plaintiff to be required to endure when the plaintiff has bargained for a level of stability which is, for all practical purposes, risk free.*[16]

Against that background, Metricon's argument that the Tribunal had wrongly applied the rule in Bellgrove, in particular, the finding that demolition and replacement of the whole of the Softley's house was a reasonable course to adopt, was always going to face challenges.

Metricon's position appears to have been driven by the Tribunal's finding that the worst was not over and "it was not satisfied that unacceptable damage and distress to the building would not happen again."[17] On appeal Metricon argued that this did not amount to a finding that the slab would suffer damage again and, as a consequence, the finding that there was a "real risk" of future damage was in error. Robson AJA rejected that argument and held that although the Tribunal's finding as to future performance was descriptive rather than quantitative (i.e. the worst was not over) it nonetheless amounted to a finding that there was a real risk of future movement and damage outside acceptable tolerances. In turn, this led the Tribunal to a finding that to award lesser damages would be to give the Softleys a 'doubtful' remedy.[18]

**HFW perspective**

Although the case represents a reasonably orthodox application of the rule in Bellgrove it does highlight the conceptual difficulties associated with trying to reduce qualitative notions such as "reasonableness" into some sort of quantitative risk analysis and management framework.

It is well accepted that when carrying out a risk analysis it is necessary to evaluate both the likelihood of the specified risk occurring, as well as the consequences if it does.[19] Very often that is a quantitative analysis which then informs the risk management procedures adopted.

Although Metricon did not put its argument on a quantitative footing it could be characterised in that way. In essence, Metricon argued that the likelihood of further movement in the slab was so small that it was unreasonable for Metricon to be liable for the cost of demolition and reconstruction. Conversely, the Softleys argued that even though the likelihood of further movement was small the consequences of further movement were so great that full demolition and reconstruction was reasonable and that to award a lesser sum would be to provide a doubtful remedy.

That the Court found for the Softleys reveals a value judgement made by the Court. One can imagine that if the subject property was a commercial building (for example a warehouse or an office building) then the result may have been different as the acceptable level of risk may have been higher. It is, of course a nonsense to say that the Softleys contracted for a slab which would never crack or move; to guarantee such a thing is impossible.[20] However, it is reasonable that a person's home be stable and free from major distress and cracking.

Thus, we think that although the case makes no new law it is a salutary reminder of the subjectivity associated with the thorny problem of complete demolition as a means of remedying substantial defects, and the difficulty in discerning the bright line of "a reasonable course" in such situations.

15 Ibid, [50].

16 Ibid, [53].

17 Supra 89, [244] (Robson AJA).

18 Ibid, [255].

19 Standards Australia, AS/NZS ISO 31000:2009 Risk Management—Principles and guidelines (SAI Global, 2009), 18 [5.4.3].

20 See eg, Mt Højgaard A/S v E.On Climate and Renewables UK Robin Rigg East Ltd [2015] EWCA Civ 407 (30 April 2015) [17].

# INSOLVENCY LAW REFORM

*IMPLICATIONS FOR PARTIES TO CONSTRUCTION CONTRACTS*

**Insolvency in the construction industry is a major issue. When a party to a project is in distress, all levels of the supply chain suffer. If the company cannot be saved, the consequences can be catastrophic, adding delays and cost overruns to projects. For this reason, early action is critical in order to mitigate losses. In the past, construction counterparties have been able to rely on contractual rights to terminate under insolvency conditions. However, this may be about to change.**

On 29 April 2016, the Australian Government released a proposal paper for insolvency law reform,[1] which includes three significant reforms for bankruptcy and insolvency laws. One of the reforms is that contractual provisions permitting a party to terminate on the insolvency of the counterparty (known as 'ipso facto' clauses) will become unenforceable. The other significant reforms are the introduction of a 'safe harbour' for directors from personal liability for insolvent trading (providing they satisfy certain criteria)[2] and a reduction in the current bankruptcy default period from three years to one. Aimed at relieving some of the pressure on distressed companies and facilitating restructuring, the proposed reforms were released as part of the National Science and Innovation Agenda reforms announced by the Turnbull Government last year. Although the Government has committed to the reforms, the details are still to be finalised.

Under the new proposals

*any term of a contract or agreement which terminates or amends any contract or agreement (or any term of any contract or agreement), by reason only that an 'insolvency event' has occurred would be void.*[3]

Furthermore,

*Any provision in an agreement that has the effect of providing for, or permitting, anything that in substance is contrary to the above provision would be of no force or effect.*

Therefore, not only will ipso facto clauses become void, but any term which seeks to circumvent the anti-ipso facto regime will also be void.

The rationale for the proposed reform to ipso facto clauses is obvious. In many cases administrators appointed to companies in distress seek to trade out of difficulties by retaining profitable contracts, and disclaiming unprofitable contracts. In such circumstances, losing a major contract can be the death blow to the struggling company, rendering any attempt to trade out futile. Although the Corporations Act 2001 (Cth) already embodies certain safeguards that aim to give companies a fighting chance when in distress,[4] (such as the moratorium on commencing or continuing proceedings against the company) the proposed reforms go much further.

Ipso facto provisions are contractual creations; there is no right to terminate at common law if an event of insolvency occurs. The proposed reforms will therefore impose on the bargain struck between the parties, and will create a disparity because although the right of the non-insolvent party to terminate is lost, the insolvent party (or administrator/receiver) does not lose the right to continue to perform under the contract under these provisions, if it so elects.

As a result, if a company enters administration, a process which can take many months, the counterparty may be rendered helpless to take any steps to control its own destiny.

### Effect on construction contracts

Ipso facto clauses are common to construction contracts, usually allowing the principal to terminate if an "event of insolvency" occurs.[5] Their utility, of course, is that, if insolvency occurs and a party is no longer able to perform its obligations under the contract, the sooner the counterparty it is able to take early action in terminating the contract and substitute an alternate contractor, the less the insolvency will impact the overall project.

The effect of the proposed reforms on other contractual provisions is still unclear. The anti-avoidance provisions described in the proposal are quite broad in their scope, although they do state that the reforms will not extend the operation beyond ipso facto clauses, and that the *"counterparties will maintain the right to terminate, amend, accelerate or vary an agreement with the debtor company for any other reason, such as for the breach involving non-payment or non-performance"*. Accordingly, it may be possible to increase the reporting requirements of a contractor or vary the scope of work so that equipment is not held by a contractor in financial difficulty.

### HFW perspective

The proposed reforms raise some important considerations for parties to construction contracts, particularly principals. It remains to be seen, the extent to which these reforms will impact construction contracts.

The reforms are scheduled for implementation in mid-2017.

1 The Improving Bankruptcy and Insolvency Laws Proposal Paper.

2 The proposal includes two different 'safe harbour' models.

3 An "event of insolvency" includes the appointment of an administrator or receiver or controller, or the company undertaking a scheme of arrangement or deed of company arrangement.

4 s 440

5 Common standard form contracts AS2124 and AS4000 provide for termination in the event of insolvency of a principal, but no equivalent rights for contractor insolvency.

# ADJUDICATION CASES AND DEVELOPMENTS

The flow of adjudication cases has not slowed in the past six months. We profile a selection below.

As ever it is difficult to identify a trend in the decisions but there does seem to be an increasing willingness of the courts to quash decisions where the adjudicator makes errors within jurisdiction.[1] How this will play out between the two adjudication models in Australia remains to be seen as the Western Australian Supreme Court of Appeal recently noted that

*an adjudicator will not exceed jurisdiction… merely because he or she misconstrues the contract or makes an error in the application of its terms to the facts found.*[2]

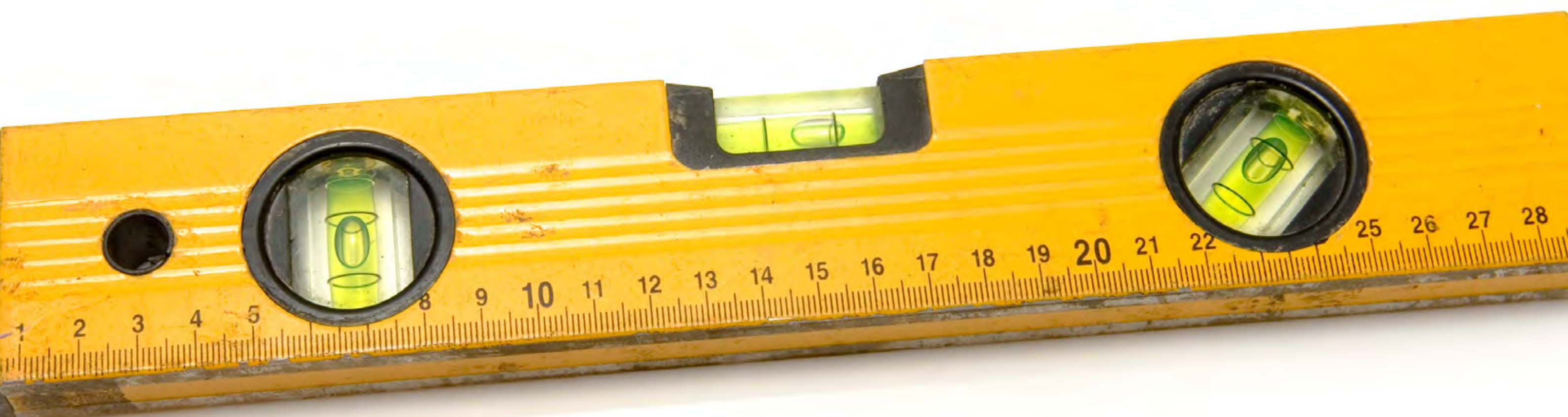
Our view is that the decision in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* will ultimately be found to be in error and that until there is legislative intervention to the contrary, adjudications will remain "quick and dirty" and adjudicators will continue to be permitted to make minor errors within jurisdiction without fear of their determinations being quashed for jurisdictional error. Of course there will always be situations where the adjudicator gets it so wrong that the Court will feel compelled to exercise its prerogative powers to quash a decision. However, those situations will remain far and few between and the "pay now argue later" ethos of the Australian adjudication system will remain in place for now.

It is difficult for construction industry participants to modify their behavior to account for these decisions. As we mention below, one positive step is to assist the adjudicator as much as possible. However much pressure the parties may be under during an adjudication process it is reasonably certain that the adjudicator is under greater pressure as he or she is the person who is obliged to actually make a decision, usually in circumstances where she or he has not really had an opportunity to understand the fine details of the disputes.

While not strictly related to adjudication, in Western Australia both sides of politics have announced their intentions to do something about further securing subcontractor payments for government projects. The statements come in the wake of a number of high profile insolvencies and other payment issues on government projects, including the beleaguered Perth Children's Hospital. Exactly what is proposed is still murky but it seems likely that a project bank accounts system (such as exists in some other Australian jurisdictions) will be put in place. We will continue to monitor developments in this space.

1 See e.g. *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770 (15 June 2016); *BGC Construction Pty Ltd v Citygate Properties Pty Ltd* [2016] WASC 88 (18 March 2016).

2 *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130 (21 July 2016) [101] (Martin CJ).



# AN ADJUDICATOR NEED NOT BE PERFECT BUT THEY ARE REQUIRED TO AT LEAST TRY TO GET IT RIGHT

*BCG CONSTRUCTION PTY LTD V CITYGATE PROPERTIES PTY LTD*

**Citygate Properties Pty Ltd (Citygate) engaged BGC Construction Pty Ltd (BGC) to perform construction works to expand the Eaton Fair shopping centre near Bunbury, Western Australia. The form of Contract was AS 2124, the contract sum was AU$57,680,069 plus GST.**

### Relevant facts

Disputes arose between the parties. BGC launched two separate adjudication applications under the Construction Contracts Act 2004 (WA) (CCA) in January and March 2015 respectively.[1]

Each application was determined by the same Adjudicator who found for BGC in each case. In each case the adjudicated sum was circa AU$400,000.[2]

BGC sought leave to enforce the determinations as judgments of the Supreme Court. Citygate opposed the applications and made its own applications for writs of certiorari to quash the determinations on the basis that the Adjudicator had committed jurisdictional errors in relation to each of the determinations.[3]

In the event Tottle J found that each determination was infected by jurisdictional error (although on different grounds) and made orders for them to be quashed. Consequentially, he did not deal with BGC's enforcement application at great length.

### First determination

Citygate succeeded in its application for judicial review on the basis that the first determination was delivered too late so that the application should be deemed to be dismissed by the mechanics within the CCA. It failed on the other grounds upon which it sought judicial review.[4]

Nonetheless, its success was driven by the chronology of correspondence between the parties' solicitors and the Adjudicator.

Although the CCA provides strict timelines for the submission of documents by the parties, it provides adjudicators with the ability to request the parties provide them with extensions of time to complete their determination.[5] In this case the adjudication application was lodged on 7 January 2015 so that the usual deadline for the Adjudicator to make his determination would have been 5 February 2015.[6] However, the parties consented to the Adjudicator's request for additional time so that the deadline was extended until Thursday, 26 February 2015.[7]

By 25 February 2015 the Adjudicator was still under great pressure to complete his deliberations and asked the parties for a further extension.[8] The parties did not consent.[9] Accordingly, on 26 February 2015 at 11:52pm the Adjudicator sent the parties an email which stated that it attached two documents, namely an Annexure A (which was intended to be the descriptive framework for the Adjudicator's determination) and an Annexure B (which was intended to be the detailed determination of each variation in issue between the parties). However, in fact Annexure B was not attached to the 11:52pm email and although Annexure A had a section headed "DETERMINATION" it did not, in fact, set out a figure for payment but rather referred to "the amounts listed in Annexure B".[10]

One hour and one minute later (but, critically, on Friday, 27 February 2015) at 00:23am, the Adjudicator sent the parties an identical email (but this time attached both Annexure A and Annexure B).[11]

On the following Tuesday, 3 March 2015 (the Monday being a public holiday in Western Australia) the Adjudicator sent the parties a further email attaching what he described as his 'final determination'. The email followed the same form as the emails on 25 and 26 February 2016 in attaching documents labelled Annexure A and Annexure B. However, each document was different, in substance, to the documents that had been circulated earlier.[12]

In the Supreme Court, Citygate contended that the adjudication application ought to have been deemed as dismissed under s 31(3) of the CCA as there had been no agreed extension of time and the Adjudicator's email which was sent within time had not set out an amount for payment. BGC opposed that submission by arguing either that as a matter of objective fact the parties had

1 BGC Construction Pty Ltd v Citygate Properties Pty Ltd [2016] WASC 88 (18 March 2016) [4] (Tottle J).

2 Ibid, [2].

3 Ibid, [2]-[3].

4 Ibid, [72], [73], [77], [97], [105].

5 Construction Contracts Act 2004 (WA) ss 26(1), 27(1), 32(3)(a).

6 Supra 119, [7], [10].

7 Ibid, [10].

8 Ibid, [45].

9 Ibid, [46]-[49].

10 Ibid, [50]-[52].

11 Ibid, [55].

12 Ibid, [57]-[61].

consented to the extension of time or (in the alternative) that if the Adjudicator was satisfied that there had been consent to such an extension then that was a "broad jurisdictional fact"[13] which would enliven the extension of time provision in s 32(3) and thus permitting the Adjudicator to have made his determination in the way he did.

Tottle J found (without much difficulty) that there had been no consent to an extension of time and that the Adjudicator did not consider that an extension had been granted.[14] Thus the first determination was deemed to be dismissed by operation of s 31(3) of the CCA.[15]

**Second determination**

Citygate succeeded in its application for judicial review of the second determination on the basis that the Adjudicator failed to give adequate reasons in support of his determinations in his obligation to do so.[16]

Tottle J held, on the basis of established authority,[17] that the obligation to give reasons means that the adjudicator must adequately explain the basis for the determination and demonstrate that the adjudicator has adopted a rational approach to the determination of the payment dispute.[18]

In this case Tottle J held that the deficiencies in the second determination identified by Citygate meant that it was impossible to ascertain how the Adjudicator had arrived at the final sum he determined Citygate was liable to pay.[19] The deficiencies in question were:

- Awarding an amount to BGC when the issue to be decided was the extent to which an allowance should be made in Citygate's favour.
- Failure to attribute any dollar figure to claims, and in some cases, it seemed that the Adjudicator had adopted an inconsistent approach to the same items.
- In respect of certain variations the determination simply recorded the Adjudicator's comments as "XXXXXX", or no comment at all.
- It was not possible to ascertain from the determination whether some of the variations had been subject of the first determination.[20]

Tottle J accepted that there were a great number of individual disputes (some 64 items) in issue and that the Adjudicator was under pressure to determine them in the allowed time. However, even making an allowance for the appropriate latitude to be given to lay adjudicators his Honour held that the Adjudicator had failed to exercise the jurisdiction conferred upon him by the CCA. Accordingly, Tottle J quashed the second determination.[21]

With one exception the remaining challenges to the second determination were confined to the facts of the case. The exception was Citygate's argument that the application did not contain its ABN, was therefore not made in accordance with the CCA and consequently the Adjudicator ought to have dismissed it without making a determination on the merits.

It was common ground that the application did not list Citygate's ABN as part of Citygate's contact details in the application.[22] Citygate seized upon that fact and argued that it invalidated the application by reason of not being in prepared in accordance with s 26(2)(a) the respondent's ABN being information prescribed by the regulations.[23] Citygate's ABN appeared on many of the documents appended to the application.[24]

Tottle J, sensibly, found that the distinction that Citygate sought to draw between the application and its attachments was artificial. In doing so, he stated: *"[i]t is undesirable to construe the Act in way that introduces artificial and formal rules into a process that the Act provides should be informal."*[25] The well known objects of the CCA, being to resolve construction disputes 'fairly and as quickly, informally and inexpensively as possible'[26] and the fact that there is no prescribed "application form' were important to his Honour's conclusions on this ground.

**BGC's application to enforce the determinations**

Although he was not required to determine BGC's enforcement application, Tottle J observed that it would be difficult for BGC to persuade him to exercise his jurisdiction to grant leave to enforce the whole of

13 See e.g. *Delmere Holdings Pty Ltd v Green* [2015] WASC 148 (24 April 2015), [94] (Kenneth Martin J).

14 Supra 119, [66], [70].

15 Ibid, [72].

16 Construction Contracts Act 2004 (WA) s 36(d).

17 *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd* [2014] WASC 39 (12 February 2014), [15] (Le Miere J).

18 Supra 119, [145].

19 Ibid, [167]-[171].

20 Ibid, [151]-[164].

21 Ibid, [168]-[173].

22 Ibid, [130].

23 Construction Contracts Regulations (2004) (WA) rr 4, 5.

24 Supra, 119, [175].

25 Ibid, [139].

26 Construction Contracts Act 2004 (WA) s 30.

the amount awarded given that, even on BGC's own case, the second determination included a substantial amount in favour of BGC in error and which BGC had not sought to correct (either by an approach to the Adjudicator under the slip rule[27] or as part of the enforcement application).[28] It was a none too gentle reminder to legal practitioners of their paramount duties to the Court even where that may be averse to their client's interest and an example of a situation where leave to enforce under s 43 of the CCA might be refused (at least in part).

### A post script

There is a post-script to the case. In a second hearing before Tottle J Citygate sought to enforce a third adjudication determination (for around AU$800,000) which had been given (by another adjudicator) in its favour.

On that application BCG argued (without seeking to have the determination subjected to judicial review) that the adjudication application which led to the determination was "at best opportunistic and at worst an abuse of process"[29] It held that position because the adjudication application was made after the works on site were complete and after the progress payment regime under the contract had concluded. It also sought to argue that to enforce the determination would result in money flowing "up the contractual chain" which was inconsistent with the objects of the CCA.

Tottle J (properly) did not accept those arguments and granted leave to Citygate to enforce the determination.[30]

### HFW perspective

The case builds on a growing body of case law in Western Australia concerning the quality of the legal analysis in adjudication determinations.[31] The upshot being that while adjudicators are not expected to make decisions of a quality comparable to the Courts they are expected to act rationally and logically.

However, it is not immediately apparent how construction industry participants should alter their behavior to avoid such situations. One way, might be to be careful when putting pressure on adjudicators to make decisions on complicated or voluminous disputes in a relatively short space of time. Of course, a party might want to put pressure on the adjudicator in the hope that the determination will be infected by jurisdictional error. In our view that is a short-sighted approach. The ultimate goal of adjudication is to resolve disputes quickly and efficiently. Putting pressure on adjudicators in the hope that they make mistakes so that the award is unenforceable is inconsistent with that approach and will only prolong your dispute unnecessarily. Sometimes it makes sense to ease the pressure on the adjudicator.

Tottle J's decision in relation to the absence of an ABN in the application is also noteworthy. In adjudication processes it is common for opposing lawyers to look for the slightest technical non-compliance to use as a means of invalidating the whole application. While it is true that the regime requires strict compliance with timelines (and for good reason) adopting an unduly technical approach to matters such as the contact details included in the application serves no purpose in the resolution of the overall dispute. For that reason Tottle J's decision in this regard makes good sense and is a reminder to respondents to direct their energies to the substance of the dispute rather than minor technical informalities.

27 Construction Contracts Act 2004 (WA) s 41(2).

28 Supra 119, [175].

29 Citygate Properties Pty Ltd v BGC Construction Pty Ltd [2016] WASC 101 (1 April 2016) [9] (Tottle J).

30 Ibid, [13].

31 See eg, Supra 131, [16], [132]; Red Ink Homes Pty Ltd v Court [2014] WASC 52 (26 February 2014) [143] (Kenneth Martin J).

# IT'LL ALL COME OUT IN THE WASH: HOW CONSTRUCTION ADJUDICATIONS ARE LIKE A FRONT-LOADING WASHING MACHINE

*LEEVILLA PTY LTD AND DORIC CONTRACTORS PTY LTD AND BGC CONTRACTING PTY LTD AND RALMANA PTY LTD*

**Front loading washing machines are magnificent inventions. They are more efficient and faster than the old school top-loaders. However, once the cycle has started the door locks (ostensibly to avoid leaks) so if you have forgotten to put that errant sock in the wash you better be prepared to either walk around with only one sock or wear flip flops until the next load.**

Similarly, once the processes under the *Construction Contracts Act 2004* (WA) (CCA) (and the corresponding security of payment legislation in other jurisdictions) are underway they cannot be stopped until time has expired or a decision has been made. Two recent cases in the Western Australian State Administrative Appeals Tribunal (SAT) demonstrate the point by reference to disputes about identity of the relevant payment claim.

Identifying a payment claim is one of the four key jurisdictional facts that enliven an adjudicator's jurisdiction under the CCA. The others being, the existence of a construction contract, the existence of a payment dispute and a link between the dispute and the construction contract.[1]

Accordingly, identifying the payment claim upon which the adjudication application is based is of critical importance because it is from the date that the payment claim is rejected or otherwise not paid that time starts running for the adjudication process.

The recent SAT decisions in *BGC Contracting Pty Ltd and Ralmana Pty Ltd*[2] and *Leevilla Pty Ltd and Doric Contractors Pty Ltd*[3] provide further guidance to construction industry participants as to what will and will not be a payment claim and what the consequences will be for overlooking the time at which a payment dispute first arose.

***BGC v Ralmana***

BGC Contracting Pty Ltd (BGC) contracted with Ralmana Pty Ltd (Ralmana).

On 3 December 2014 BGC wrote to Ralmana advising of its *intention* to apply a set-off under the contract in relation to amounts it claimed Ralmana owed it in relation to the works being performed by Ralmana. However, BGC's did not make an express claim for the payment of money.[4] Nonetheless, Ralmana responded on 5 December 2015 setting out reasons why it said BGC was not entitled to apply the set-off. In fact the set-off referred to in the December letter was not applied by BGC until 6 March 2015 when BGC sent Ralmana an invoice for payment under the set-off regime under the contract.

Ralmana refused to pay; BGC sought adjudication of the payment dispute. Ralmana argued (amongst other things) that the adjudication application was brought out of time because the payment claim was first made on 3 December 2014. The adjudicator accepted that argument and dismissed the application. BGC sought review of that decision in the tribunal.

The tribunal held that the language of BGC's December letter was prospective and merely telegraphed that BGC intended to make a set-off claim in the future, but that no claim was actually being made in that letter. It was important to the tribunal's finding that the December letter did not demand or seek payment and that it was couched in non-conclusive expressions such as "may be set off".[5] Thus it was not a payment claim and the adjudication application had been made within time. Accordingly, the tribunal remitted the matter to the adjudicator to make a determination on the merits.[6]

***Leevilla Pty Ltd v Doric Contractors Pty Ltd***

On 10 October 2012 Doric Contractors Pty Ltd (Doric) entered into a subcontract with Leevilla Pty Ltd (Leevilla) to undertake epoxy floor works at the Jimblebar Mine Site.

On 24 June 2013 Leevilla issued a tax invoice for payment of AU$54,400. Doric did not pay and Leevilla took no further action in relation to the outstanding invoice.[7]

On 21 August 2013 Doric, in a typical "wash up" situation issued a document headed "Final Account" to Levilla in which it claimed AU$51,961.43 by way of negative variations. The final account stated that the sum of the negative variations and an additional amount of AU$40,538.57 (in relation to retention

1 *Delmere Holdings Pty Ltd v Green* [2015] WASC 148 (24 April 2015), [103] (Kenneth Martin J) ('*Delmere v Green*').

2 [2015] WASAT 128 (13 November 2015) ('*BGC v Ralmana*').

3 [2015] WASAT 127 (16 November 2015) ('*Leevilla v Doric*').

4 *BGC v Ralmana* [2015] WASAT 128 (13 November 2015) [49].

5 *Ibid,* [52].

6 *Ibid,* [55].

7 Ibid, 619.

and deliverables) would be retained by Doric until practical completion and final completion.[8] The parties took no further steps in relation to the final account.

On 17 January 2014 Leevilla's lawyers wrote to Doric claiming an amount of AU$47,649.99 on account of negative variations which ought to be reversed.[9] However, no further action was taken by either party until 27 January 2015 (over a year later) when Leevilla issued a further tax invoice in relation to the same claims mentioned in the 17 January 2014 letter. Doric rejected that claim on 3 February 2015.[10] An adjudication application ensued which was dismissed for being out of time.[11] Leevilla applied to the tribunal for review of the decision to dismiss. The resolution of the application turned on an identification of the date at which a payment dispute arose.[12]

The tribunal found that in truth there were two separate disputes and both had crystallised and the time for making an adjudication application ran out well before the adjudication application was lodged.

In the case of the claim by Leevilla, the tribunal found that the right to adjudication expired in mid-September 2013 at the latest so the application as well out of time.[13]

As to the set-off claim by Doric, the tribunal found that the final account was a payment claim under the CCA and accordingly, the time to make an adjudication application expired in or around mid-October 2013.[14]

Leevilla sought to overcome the delay by arguing that the parties had been engaged in on-going negotiations. While that may well have been the case (although there was no evidence to substantiate the allegation) the tribunal found that the facts were such that the time for making adjudication applications had long since past.[15]

**HFW perspective**

While the tribunal in *BGC v Ralmana* did not refer to Kenneth Martin J's reasoning in *Delemere v Green* regarding the attempt there to re-characterise a claim for an entitlement to claim a variation as a payment claim[16] in substance, the reasoning is identical and highlights the fact that the CCA will not bite in relation to every claim to an entitlement under a construction contract. What is clearly required is a claim for the actual payment of money under a construction contract.

However, once a payment claim has been made time will run regardless of the other facts. Thus, *Leevilla v Doric* serves as a salutary reminder to not lose sight of the strict statutory adjudication timelines which will expire even where you are engaged in negotiations with your counterpart. Of course, you should always consider the consequences of launching an adjudication process in the midst of negotiations as it may have the undesired effect of steeling the resolve of your opposition and ending the negotiation. It will always be a difficult election but a decision that, nonetheless, must be made.

The upshot is, if you are intending to claim money from your opposition but want to keep the negotiation going make sure you don't actually make a claim (whether oral or in writing)[17] otherwise time will run and you may just miss your chance to adjudicate.

8 *Ibid,* [11].

9 *Ibid,* [13].

10 *Ibid,* [15]-[16].

11 *Ibid,* [20].

12 *Ibid,* [38].

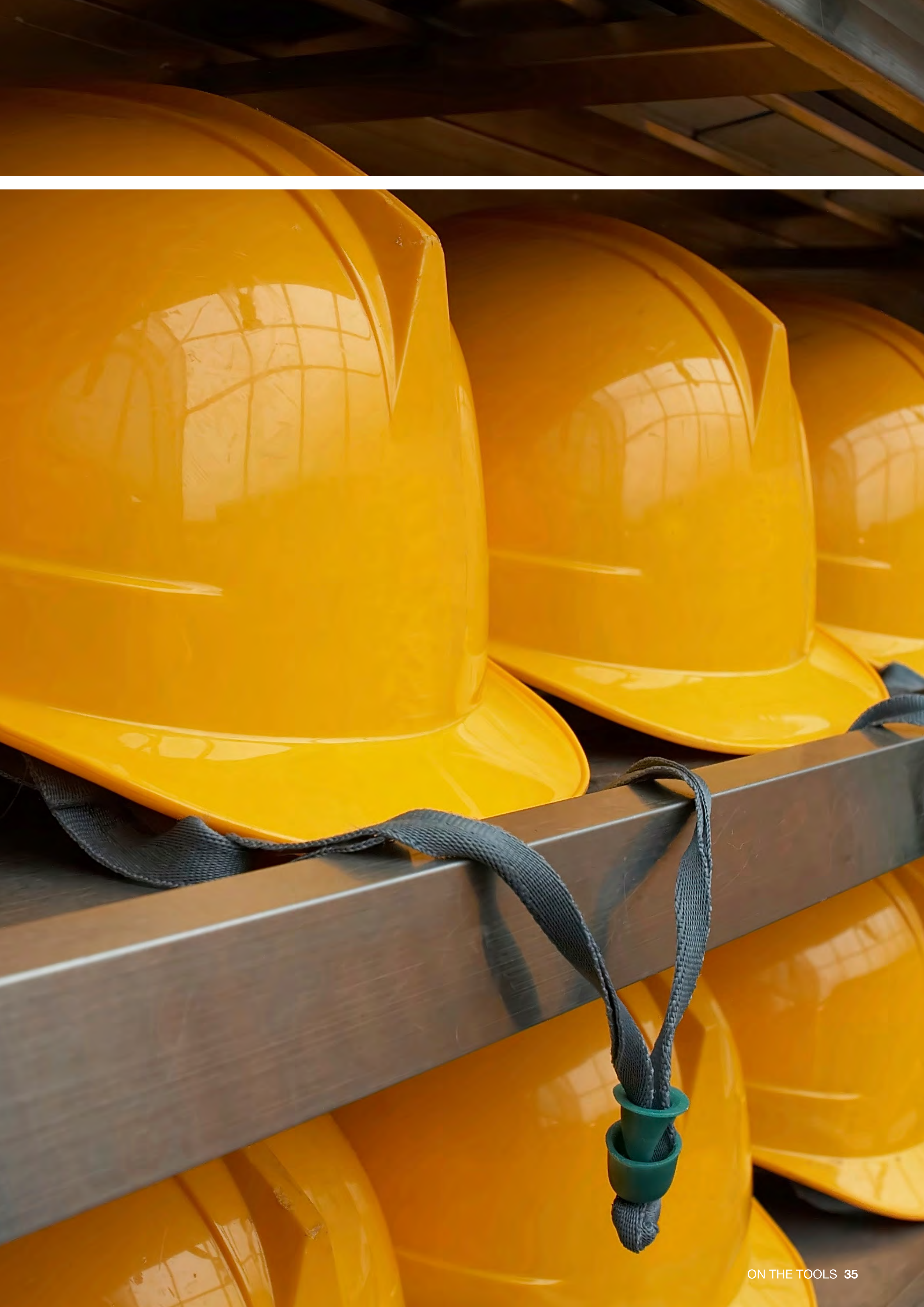
13 *Ibid,* [45].

14 *Ibid,* [53].

15 *Ibid,* [56].

16 *Delmere v Green* [2015] WASC 148 (24 April 2015), [64].

17 *Blackadder Scaffolding Service (Aust) Pty Ltd and Mirvac Homes (WA) Pty Ltd* [2009] WASAT 133 (30 June 2009), [59].



# INJUNCTIONS TO STOP ADJUDICATORS FROM MAKING DETERMINATIONS MAY BE POSSIBLE ON THE EAST COAST

*VINSON V NEERIM PROPERTIES DEVELOPMENTS PTY LTD*

**A recent decision in the Supreme Court of Victoria[1] has provided some further guidance[2] as to the requirements of a valid payment claim, and notice under s18(2) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (BCISPA). It has also served as a reminder that courts can and will order injunctions where applications for adjudication of construction payment claims are held to be an abuse of process.**

### Relevant facts

On 29 November 2014 Ms Vinson entered into three separate contracts (Contracts) with Neerim Properties Developments Pty Ltd (Neerim). The project was the construction of three town-houses on her property in Ashburton, Victoria (Property). The Contracts required works to be completed by 13 August 2015.[3]

On 22 January 2016, Neerim issued Vinson a payment claim for variations in the amount of AU$111,050 (Payment Claim).[4] However, the Payment Claim did not stipulate a date for payment.[5] Vinson rejected the Payment Claim on 4 February 2016.[6] On 9 February 2016 Neerim's director sent an email to Vinson in which he stated he "reserve[d] the right to exercise [his] rights under the Act".[7]

On 16 February 2016, Neerim sought adjudication of the resultant dispute by filing an application with Adjudicate Today.[8] Vinson objected to the jurisdiction of the adjudicator.[9] Two adjudicators considered the application, each refused to adjudicate on grounds that the jurisdiction under the BCISPA had not been enlivened.[10]

Undeterred, on 1 April 2016, Neerim filed a second adjudication application with a second nominating authority, Able Adjudicators.[11] The second application was also rejected by a third adjudicator for similar reasons.[12]

Refusing to take "No" for an answer, on 22 April 2016 Neerim applied to a third nominating authority, ASC Adjudications. ASC did not nominate an adjudicator.[13]

On 28 April 2016 Vinson applied to the court for a declaration that the Payment Claim was invalid under the BCISPA and an injunction to prevent Neerim from making any further adjudication applications.[14]

The Court could not, on the papers, deal with Vinson's first argument, namely that the domestic building exclusion operated so that the Payment Claim was invalid, as to do so would have required an evaluation of competing evidence which was impossible without oral evidence.[15]

Accordingly, the case turned on the second issued raised by Vinson which was whether or not Neerim had served a valid notice under s 18(2) of the BCISPA. It was common ground that as no payment schedule had been issued by Vinson in order for Neerim's adjudication applications to be valid it had to be able to point to a piece of correspondence which complied with the requirements of s 18(2) of the BCISPA.[16]

Vinson contended that the 9 February 2016 email from Neerim's director was not sufficient to meet the requirements of BCISPA s 18(2) and therefore ground an adjudication application as it did not give any indication of Neerim's intention to apply for adjudication.[17]

The court held that the failure to expressly notify Vinson of Neerim's intention to apply for adjudication of the Payment Claim in the 9 February 2016 email compromised the validity of the various adjudication applications. Vickery J explained that:

*"The notice, such that it was, merely reserved the exercise of the company's rights under the Act. This is insufficient, for the purposes of the Act, to amount to a notice that Neerim intended to apply for adjudication of its Payment Claim."*[18]

Vickery J noted that the object and purpose of the notice provision in s18(2) is to give respondents the opportunity to provide a payment schedule to the claimants within the prescribed time so that recourse to adjudication may be avoided. In the present circumstances, he concluded that Vinson was given no such opportunity.[19] Accordingly he declared that Neerim's purported s18(2) Notice was invalid and made orders restraining Neerim from making further adjudication applications on the basis of its Payment Claim.[20]

### HFW perspective

In his concluding remarks, Vickery J noted that "[t]his is another case where a standard form of notice, in this case

1 *Vinson v Neerim Properties Developments Pty Ltd* [2016] VSC 321 (9 June 2016) (Vickery J).

2 See also *Commercial & Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd* [2015] VSC 426 (21 August 2015) [81]-[89] (Vickery J) and *Hallmarc Construction v Saville* [2014] VSC 491 (7 October 2014) [21]-[23] (Vickery J).

3 *Supra* 1, [6]-[8],[10].

4 *Ibid*, [9].

5 *Ibid*, [49].

6 *Ibid*, [10].

7 *Ibid*, [46].

8 *Ibid*, [11]. [14].

9 *Ibid*, [15].

10 *Ibid*, [16], [19].

11 *Ibid*, [20].

12 *Ibid*, [23].

13 *Ibid*, [24]-[25].

14 *Ibid*, [2].

15 *Ibid*, [26]-[42].

16 *Ibid*, [43], [51].

17 *Ibid*, [44].

18 *Ibid*, [52].

19 *Ibid*, [53].

20 *Ibid*, [55].

a 18(2) notice, would be of assistance in the administration of the BCISPA to avert the problem that has arisen."[21] Although the introduction of a further layer of formality presents its own problems, His Honour's suggestion would, in this instance, appear sensible given what transpired.[22]

However, the judgment may have more far reaching consequences than the mere suggestion of an additional form in the regulations. In essence, Vickery J granted injunctive relief on the grounds of a lack of jurisdiction. He held that Neerim's application was, and always would be, insufficient to enliven the BCISPA's jurisdiction. Vinson's quick thinking and action in corresponding with the nominating authorities prevented that from taking place. By doing so, and by pursuing the issue into the Court, she has highlighted a step in the adjudication process which, until now, has received little judicial attention, namely the nominating authority or potential adjudicator to decide on the validity, or otherwise, of the application.

The East Coast adjudication model requires the adjudicator to serve a notice accepting the nomination. Implicit in that obligation is a requirement that the adjudicator form a view about the application's compliance with the formal requirements of the BCISPA. If the adjudicator comes to the conclusion that the application does not comply, as was the case here, then the adjudicator ought not serve the notice accepting the nomination. In coming to that view the adjudicator is essentially making a finding about whether or not there are the requisite jurisdictional facts to enliven the jurisdiction.[23] Put another way, if one of the adjudicators had accepted jurisdiction and made a determination it would have been infected with jurisdictional error and liable to be quashed by a writ of certiorari. Although the BCISPA does not require, in terms, a determination to be made about jurisdiction this case highlights that it is, nonetheless, a necessary step in the process.

**What this means for you**

It follows that well advised recipients of defective adjudication applications ought to move quickly to point out those deficiencies to the potential adjudicator, or nominating authority, as the case may be and, if necessary, take action to obtain a declaration and injunction (as was the case here) to prevent the process from commencing. That the Court should make that ultimate finding (rather than the adjudicator him or herself) is consistent with existing authority in the Supreme Court of Victoria.[24] The current case highlights that there is an opportunity to ask for the Court to make that decision earlier in the process rather than after the respondent has gone to the trouble and expense of preparing an adjudication response.

Of course, no such step can be taken under the West Coast model of adjudication where the adjudicator is expressly empowered to dismiss the application without making a determination on the merits if he or she determines that the jurisdiction has not been enlivened.[25] Moreover, there is a review process in the State Administrative Tribunal for such decisions to ensure that they are properly made.[26] No such procedure exists under the East Coast model so that applying for an injunction and declaration, as happened in this case, is possible under that model of adjudication.

21 *Ibid*, [57].

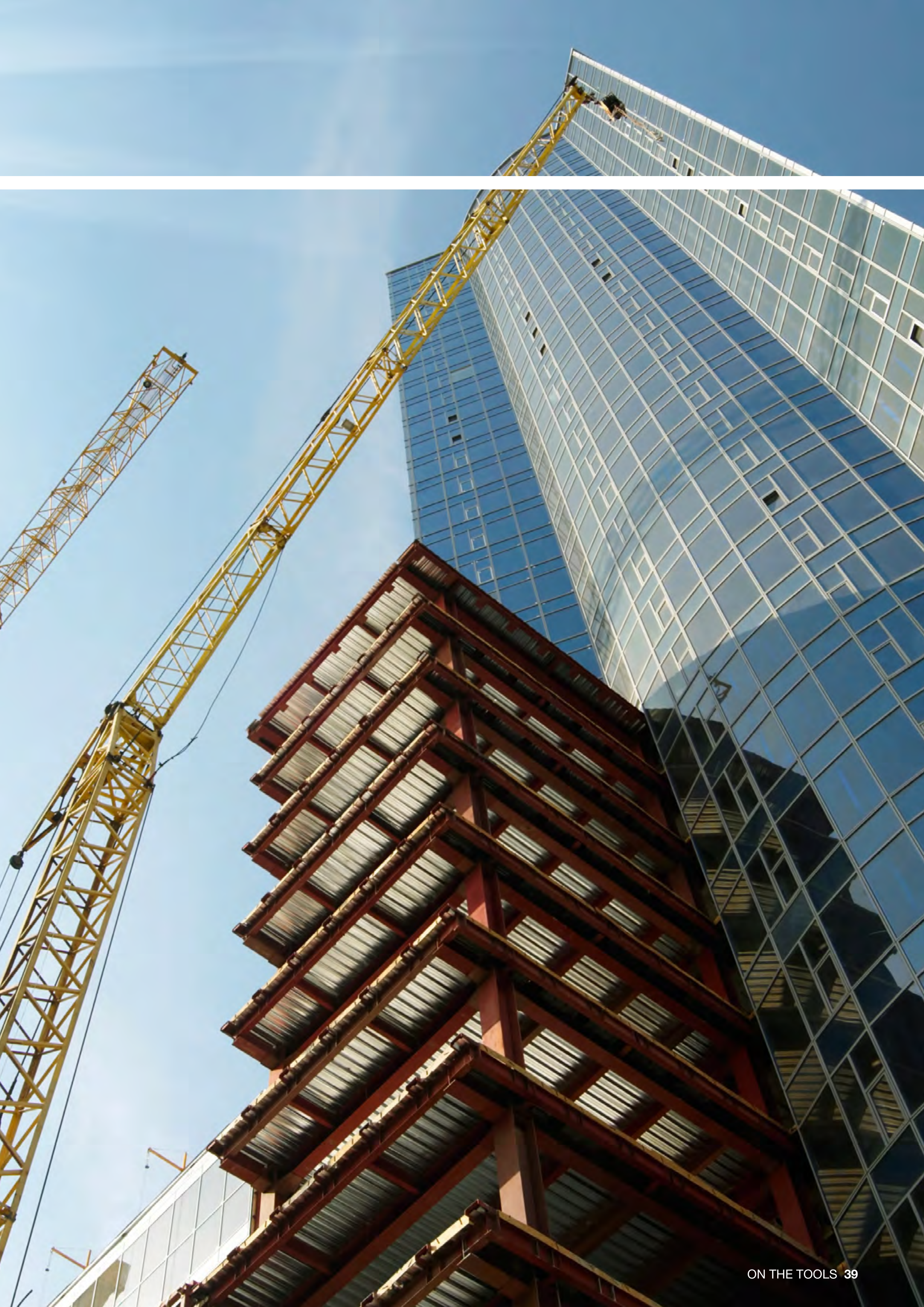
22 See also, *BGC Construction Pty Ltd v Citygate Properties Pty Ltd* [2016] WASC 88 (18 March 2016) [140] (Tottle J) where the court made similar remarks in relation to the West Coast model of adjudication.

23 See *Delmere Holdings Pty Ltd v Green* [2015] WASC 148 (24 April 2015) [95]-[102] (Kenneth Martin J).

24 *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd* [2013] VSC 535 (15 October 2013) [113] (Vickery J). See also *Chase oyster Bar Pty Ltd v Hamo industries Pty ltd* (2010) 78 NSWLR 393 [98] (Basten JA).

25 *Construction Contracts Act 2004* (WA) s 31(2). See, *O'Donnell Griffin Pty Ltd v Davis* [2007] WASC 215 (7 September 2007) [31]; *Enerflex Process v Kempe Engineering Services (Australia) Pty Ltd* [2013] WASC 406 (15 November 2013) [12].

26 Construction Contracts Act 2004 (WA) s 46.



# YOU CAN'T HAVE YOUR CAKE AND EAT IT TOO

*LAING O'ROURKE AUSTRALIA CONSTRUCTION PTY LTD V SAMSUNG C&T CORPORATION*

**On 21 July 2016 the Court of Appeal handed down the most recent instalment of the ongoing dispute between LORAC and Samsung arising out of the Roy Hill Project.[1]**

### Relevant facts

The facts are partially set out above. Following Samsung's termination of the subcontract in February 2015 the parties entered into an interim deed (Interim Deed). The Interim Deed required Samsung to pay LORAC, amongst other amounts, a liquidated sum of AU$45 million in three instalments. Samsung made the payments between 24 February 2015 and 20 March 2015.[2] The Interim Deed did not specify what the liquidated sum was to be paid in respect of but did state that it was "on account only and shall not constitute evidence that [LORAC] has completed any [works under the subcontract]."[3]

Following the termination and entry into the Interim Deed, LORAC issued two applications for adjudication under the Construction Contracts Act 2004 (WA) in relation to payment disputes which, it said, arose out of construction works carried out prior to the termination of the subcontract.[4]

The applications were each heard by the same Adjudicator who found, in each case, for LORAC.[5] In total the Adjudicator determined that Samsung was obliged to pay LORAC approximately AU$43 million in satisfaction of the determinations.

LORAC applied to enforce the determinations as orders of the Supreme Court. Samsung applied for judicial review of the determinations seeking to have them quashed by writs of certiorari. At first instance the Court found that Samsung's applications for judicial review should be upheld and quashed the determinations on the basis that the Adjudicator had exceeded his jurisdiction. The Court also found that the payments under the Interim Deed extinguished Samsung's obligation to pay the determined amounts so indicated that leave to enforce would have been refused on that basis.[6] LORAC appealed.

### Appeal decision

Martin CJ gave the leading judgment. There were three issues for resolution:

- Whether, on a proper construction of s 6(a) of the Construction Contracts Act 2004 (WA) (CCA), there was a payment dispute in existence at the time each adjudication application was lodged.
- Whether the Adjudicator exceeded his jurisdiction in making his determinations.
- Whether leave to enforce should be denied in any event because Samsung had already made payments on account of the determined amounts under the Interim Deed.

### When a payment dispute arises

The first issue resolved a common (but cute) argument among construction lawyers in Western Australia. The point concerns the time when a payment dispute arises under s 6(a) of the CCA. That provision states that a payment dispute comes into existence when the respondent to a payment claim does one of three things, either:

- Does not pay in full.
- Rejects the payment claim.
- Wholly or partially disputes the payment claim.

Samsung's contention was that the time qualification in the section should be read so that the payment dispute arises at the end of the end of the payment period under the relevant construction contract no matter which of the three steps had been taken.[7] The Court did not accept that argument and held that the time qualification should be read so that once the respondent had taken one of the three steps the payment dispute came into existence.[8]

### Jurisdictional error

The main argument in the appeal concerned whether or not the Adjudicator had committed jurisdictional error by failing to make his determinations by reference to the terms of the construction contract. At first instance, Mitchell J held that he had done so.[9] He drew a distinction between making a determination otherwise than by reference to the

1 See e.g. section 2.2 above.

2 *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130, [3] (Martin CJ).

3 Ibid, [26] (Martin CJ) (Clause 2.2(a) of the interim deed).

4 Ibid, [34]; [40] (Martin CJ).

5 Ibid, [39]; [50]-[52] (Martin CJ).

6 Ibid, [6] (Martin CJ).

7 Ibid, [55]; [76] (Martin CJ).

8 Ibid, [89] (Martin CJ), [202] (McLure P).

9 *Laing O'Rourke Australia Construction Pty Ltd v Samsung S&T Corporation* (2015) 31 BCL 290, 323 [234], 324-5 [247]-[248] (Mitchell J).

terms of the construction contract (which would constitute jurisdictional error by reason of exceeding jurisdiction) and making a determination by misconstruing the terms of a construction contract (which would not lead an adjudicator into error).[10]

On appeal the Martin CJ (with whom the other members of the court of appeal agreed) found that approach to be in error.[11] Relying on an established line of authority, Martin CJ started his analysis from the proposition that:

*an adjudicator will not exceed jurisdiction to make a determination conferred by the [CCA] merely because he or she misconstrues the contract or makes an error in the application of its terms to the facts found... At the other end of the spectrum ... an adjudicator who expressly excluded from consideration the construction contract in respect of which the payment dispute arose, or who took no account whatever of that contract, would exceed jurisdiction.*[12]

From that basis Martin CJ looked to the Adjudicator's reasoning and in relation to each determination found that:

*it cannot be concluded that any error made by the Adjudicator was anything more than an error in the construction or application of the construction contract in respect of which the payment dispute arose.*[13]

Accordingly, the orders quashing the determinations were set aside and the applications for judicial review dismissed. Martin CJ's conclusion also meant that he did not have to deal with Samsung's argument that the determinations were manifestly illogical or irrational.[14]

### Leave to enforce

Despite re-instating the determinations, the Court of Appeal refused to grant leave to enforce them as orders of the Supreme Court. In essence, the refusal to grant leave was based on an analysis of the Interim Deed by which the Court of Appeal found that, in essence, Samsung had already accounted to LORAC for the amounts determined by the Adjudicator.[15] In coming to that conclusion Martin CJ noted that the Court's power to grant leave under to enforce a determination is different to the Court's power to enforce arbitral awards where the grounds on which enforcement of an award are expressly limited in the legislation.[16] Accordingly, he found that:

*the proper role of a court to which an application for leave to enforce a determination under the [CCA] has been made involves more than merely ascertaining whether a determination has been made, but does not involve a de facto appeal from, or review of, the relevant determination. Nor is an application for leave to enforce a determination an appropriate vehicle for the resolution of issues with respect to the validity of the relevant determination, which should be taken as valid unless challenged in proceedings for judicial review.*[17]

To summarise, the discretion to grant leave is to be exercised judicially so as to do justice in the circumstances of the case. To attempt to define the boundaries of the court's role further than that is undesirable.[18] In this case the Court of Appeal found that the payment had already been made (principally by relying on a proper construction of the term "on account" in the payment clause in the Interim Deed) and so refused to grant leave to enforce the (reinstated) determinations.

### HFW perspective

As with many of Court decisions concerning adjudication, this decision focuses heavily on the Adjudicator's conduct in making the determination. As a consequence it is difficult to draw a conclusion on how construction industry participants should modify their behaviour to account for the decision. We think that the real lessons to come from the judgment are:

- The confirmation (from the Court of Appeal as opposed to the State Administrative Tribunal[19]) that a payment dispute comes into existence on the happening of any of the acts or omissions described in s 6(a) of the CCA
- The Court's justice-based approach to the question of enforcement under s 43(2).

It is the second of these two lessons which, we think will have the most impact on the industry in Western Australia.

10 Ibid, 320 [219].

11 Supra, 194 [103]-[131] (Martin CJ).

12 Ibid, [101] (Martin CJ).

13 Ibid, [103] (Martin CJ).

14 Ibid, [132] (Martin CJ).

15 Ibid, [157]-[162]; [182] (Martin CJ); [208]-[216] (McLure P).

16 Ibid, [138]; Commercial Arbitration Act 2012 (WA) s 46.

17 Supra, 194 [141]. *Cf Perrinepod Pty Ltd v Georgiou Building Pty Ltd* (2011) 43 WAR 319, 339 [92] (Murphy JA); *RNR Contracting Pty Ltd v Highway Constructions Pty Ltd* [2013] WASC 423 [13]-[17] (Master Sanderson).

18 Supra, 194 [141].

19 *Blackadder Scaffolding Services (Aust) Pty Ltd and Mirvac Homes (WA) Pty Ltd* [2009] WASAT 133 (30 June 2009); *Fuel Tank & Pipe Pty Ltd and Decmil Australia Ltd* [2010] WASAT 165 (12 November 2010).

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