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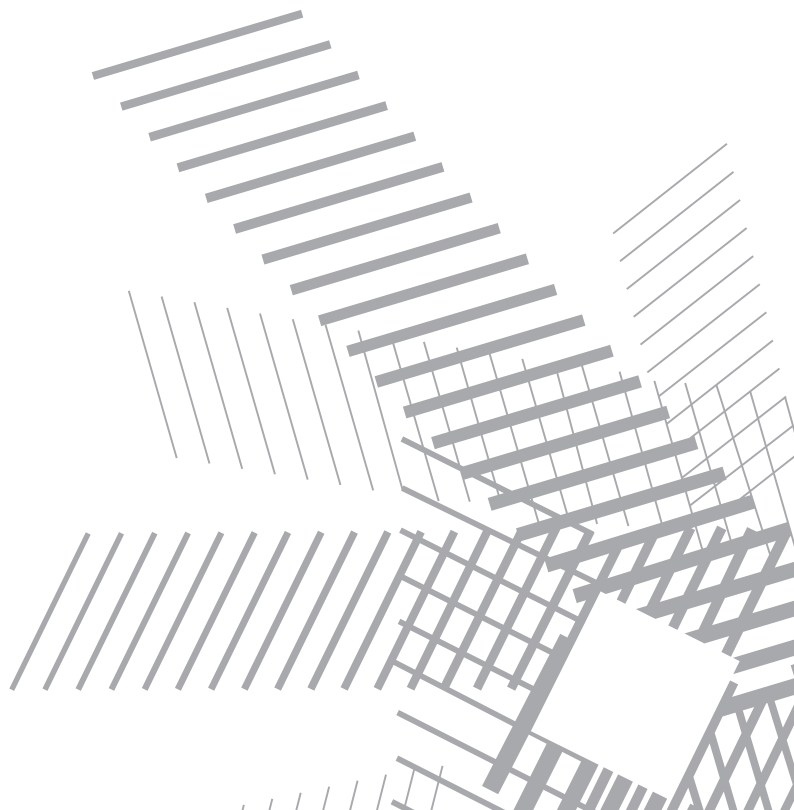
Australian Construction Law 2010

A review of recent developments
and their implications

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Allens Arthur Robinson 



Australian Construction Law

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We would very much like your feedback on this Review.



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Foreword

Introduction

Developments in construction law within the last year in Australia have largely been about the operation of the security of payment legislation in each of Australia's States and Territories and changes to domestic and international arbitration. In other words, it has mainly been about the process for resolving disputes rather than about the substantive issues the subject of the disputes.

Security of Payment Legislation

There are material differences between the security of payment statutes in each State and Territory, and these differences must be borne in mind when assessing the impact of a decision made in a State or Territory different to the one in which your project is located.

In a recent paper presented by a prominent legally qualified Adjudicator, Mr Scott Ellis, comment was given concerning the adjudication process under the *Construction Contracts Act 2004 (WA) (CCA)*. However, in respect of developments concerning substantive issues in construction disputes, Mr Ellis stated, tellingly, at the end of his presentation:

I have not dealt with the actual assessment of claims on the merits. Perhaps this is an oversight, seeing that assessment of merits of claims should be at the heart of the adjudication process. However, the actual assessment of claims by adjudicators tends to fly under the radar because adjudicators' decisions are not reviewable on the merits.

In preparing this publication, our team was put to the task of finding the most significant cases introducing change to construction law in Australia. This was truly a difficult task. There were very few qualifying substantive cases as a result of the new system of justice for construction disputes established by the security of payment legislation in force in each of Australia's States and Territories.

While adjudication was never meant to replace arbitration or litigation as a process for resolving a construction dispute, in large part it appears to have done so. Understandably, contractors have embraced the adjudication process and the unsuccessful party to an adjudication (particularly if it is an owner) is often hesitant to commit more resources to fighting the underlying dispute through litigation or arbitration. The notion of the adjudicator's determination as an 'interim' decision is, in our experience, more theoretical than practical.

The adjudication process continues to grow in significance and complexity. Official figures kept by the State appointing authorities confirm that there are now over 100 adjudication applications filed each year in Western Australia, over 800 in Queensland and over 1,000 each year in New South Wales.

The relative paucity of substantive authorities in 2010 reflects the fact that the adjudicator has largely replaced the judicial officer or Arbitrator in the determination of construction disputes. It may be that this trend continues and causes some suffocation of the development of the common law in respect of construction disputes in the coming years.

This begs the question: who are these adjudicators? They are a collection of lawyers, barristers, engineers, architects, quantity surveyors and others involved in the construction industry (currently 47 registered adjudicators in WA). They are almost always not chosen by the parties but appointed by an appointing authority like the Institute of Arbitrators and Mediators Australia.

The CCA is in the very early stages of a consultation and review process. Along with construction industry representatives, adjudicators and other lawyers we participated in a workshop hosted by the Institute of Arbitrators and Mediators Australia in June 2010 (*IAMA*).

The following issues emerged from the IAMA workshop as possible areas for review:

- clarification of the 28 day timeline for filing of an application for adjudication, in particular the need to define 'days' as *working* days;
- the need for a 'two tier' process, with a longer timetable for high value payment claims; and
- the desirability of the State Administrative Tribunal having the power to review positive findings of jurisdiction, not just dismissals.

The review process is yet to reach the level of formality required to produce a bill. However, we expect that a draft amendment bill will be released for comment some time in the second half of 2011.

Practical implications

- Ensure that your construction contracts have detailed provisions laying out a process for the making, assessing and responding to payment claims, including having suitable time bars.
- Ensure that adequate resources are in place on the project to carry out a thorough investigation and assessment of any payment claims at the time they are received (in particular, considerable effort will need to go into collating all evidence to support the assessment or at least the owner's position in respect of controversial issues).
- Ensure you are prepared for responding to an adjudication application (eg, have your personnel trained and familiar with the operation of the legislation, particularly in respect of the process of adjudication and relevant time limits, have a checklist of the steps that need to be undertaken in order to submit a response within 14 days, ensure your personnel are aware of the extent to which they will need to be available if an application is received and have an excellent document control system in place).

Developments in arbitration

The past year has seen significant changes to Australian laws governing domestic and international arbitration.

These developments will affect construction industry participants who have contracted to resolve disputes through arbitration. The net benefit these developments confer is that parties will have more freedom to decide for themselves how they resolve disputes, and the courts will take a more passive approach to supervision of non-court processes, especially arbitration.

Domestic arbitration

For some time now, there has been a concern among users and practitioners of arbitration that the uniform *Commercial Arbitration Acts 1984-5* were outdated and were inhibiting the practice of domestic arbitration. The Standing Committee of Attorneys-General (**SCAG**) resolved to draft a new national uniform arbitration law in April 2009, which was to be based on the *UNCITRAL Model Law on International Commercial Arbitration* (the **Model Law**). In May 2010, SCAG agreed on the wording of new legislation.

Like the recent amendments to the *International Arbitration Act 1974* (Cth) (**IAA**), the legislation adopts much of the text of the 2006 revision of the Model Law. The uniform legislation also includes certain 'Model Law Plus' provisions, which go beyond the scope of the Model Law, and reflect both Australian common law developments and international arbitration practice. NSW was the first state to pass the uniform legislation, which came into force on 1 October 2010.

Practical implications

- Parties will have to agree expressly that the award may be appealed on the basis of an error of law, and even then the court will only grant leave to appeal on this basis where the error is 'obvious'.
- Parties can agree that the arbitrator act as a mediator or conciliator, and then, if no consensual result follows, the mediator or conciliator can return to his or her role as an arbitrator.
- Oral and email-concluded arbitration agreements will be valid and enforceable, provided that there is a record of the agreement being made.
- Arbitrators will have the power to grant interim measures of protection necessary to preserve a party's rights while the arbitration is on foot.
- It will no longer be necessary to go to court to obtain an order for security for costs, as the arbitrators will have the power to make such an order themselves.
- It will be harder to challenge arbitrators for bias.
- It will be easier to progress an arbitration where the respondent refuses to participate.

International arbitration

The *International Arbitration Amendment Act 2009* (Cth) (**IAA Amendment Act**) came into force on 6 July 2010. The IAA Amendment Act updated the IAA, being part of a broader project of arbitration law reform in Australia, the aims of which are both to revive domestic arbitration and to make Australia more attractive as a venue for international dispute resolution.

Practical implications

The IAA Amendment Act takes up most of the changes that were made when the 1985 text of the Model Law was revised in 2006. It also includes certain Model Law Plus provisions. The main practical effects of the amendments are:

- Oral and email-concluded arbitration agreements will be valid and enforceable, provided that there is a record of the agreement being made.
- Arbitrators will have the power to grant interim measures of protection necessary to preserve a party's rights while the arbitration is on foot.
- It will no longer be necessary to go to court to obtain an order for security for costs, as the arbitrators will have the power to make such an order themselves.
- It will be harder to challenge arbitrators for bias.
- It will be easier to progress an arbitration where the respondent refuses to participate.

As part of the changes to the IAA, the Federal Attorney-General has recently confirmed his intention to name the Australian Centre of International Commercial Arbitration (**ACICA**) as the default appointing authority for international arbitrations in Australia. This means that, where the parties cannot agree on an arbitrator and have not designated an appointing authority, ACICA will perform the function.

Jurisdiction of the Federal Court

On 7 December 2009, the Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009 (Cth) (FJSEM Act) amended the IAA to give the Federal Court of Australia concurrent jurisdiction with State and Territory Supreme Courts in international arbitration matters.

Practical implications

Before the commencement of the amendments, State and Territory Supreme Courts had exclusive first-instance jurisdiction over applications for orders in aid of international arbitration and motions to enforce arbitral awards. In practice, this meant that parties seeking orders in aid of proceedings, such as *Mareva* injunctions, had to make parallel applications in multiple Supreme Courts. There were also situations where Supreme Courts arrived at different conclusions than did the Federal Court when interpreting the IAA.

With the FJSEM Act in force, in proceedings for the enforcement of a foreign arbitral award, or in respect of other steps that might need to be taken in aid of an international arbitration in more than one State or Territory, the parties can now make a single application in the Federal Court. This assists in making international arbitration in Australia cheaper and more efficient. In the longer term, the changes the FJSEM Act has introduced should aid the development of a coherent Australian body of common law on international arbitration.

Part 1: Contractual interpretation and effect

1. *BMD Major Projects Pty Ltd v Victorian Urban Development Authority* [2009] VSCA 221

Introduction

Both parties in this case appealed from the decision of the trial judge to accept some of the claims made by BMD Major Projects Pty Ltd for extra amounts in addition to the lump sum price of the contract.

Facts

The Victorian Urban Development Authority (**Authority**) contracted with BMD Major Projects Pty Ltd (**BMD**) to excavate, fill and rehabilitate a quarry in preparation for residential development. BMD was required to excavate deep stockpiles of overburden which covered the floor of the quarry, process the overburden and place it in the quarry as compacted fill. The parties used a lump sum contract (Australian Standard General Conditions of Contract AS2124-1992, with amendments). Clause 12.2 of the contract provided:

If ... the Contractor becomes aware of a Latent Condition, the Contractor shall forthwith and where possible before the Latent Condition is disturbed, give written notice thereof to the Superintendent.

During the tender process, the Authority had provided various reports and plans to assist assessment of the conditions that would be encountered at the site. These reports and plans carried disclaimers regarding their accuracy.

Dispute

BMD's principal claims were made under the Latent Conditions clause of the contract. BMD claimed for extra payment on the basis that the floor of the quarry (and therefore, the depth to which BMD had to excavate overburden) was lower than the levels that it could have reasonably anticipated when it tendered for the contract. BMD also brought a claim under section 52 of the *Trade Practices Act 1974* (Cth) (**TPA**) for misleading and deceptive conduct.

BMD possessed a file of documents, known as 'the Boral file', that revealed certain site conditions. The Authority claimed that proper analysis of the contents of the Boral file would have revealed possible inaccuracies in other reports, and so BMD should reasonably have anticipated the site conditions.

At trial, some expert evidence suggested that the Boral file should have alerted a reasonable contractor to the possibility of greater depths of overburden, however other evidence suggested that a reasonable contractor would not have found anything of significance in the file.

BMD first gave verbal notice that the quarry floor was lower than expected during discussions with the Superintendent on 24 July 2002 (or possibly the day after). BMD wrote a formal

notification letter of the Latent Condition on 2 August 2002, but this was not faxed to the Superintendent until 6 August 2002. BMD did not explain this delay of four days, though it submitted that exploratory drilling continued during this period.

'Forthwith'

The Authority argued that BMD failed to give notice of the Latent Condition 'forthwith' pursuant to clause 12.2.

The Court of Appeal accepted the finding of the trial judge that, despite the unexplained delay of four days, the notice had been given 'forthwith' and 'without delay'. The Court of Appeal did not disturb the comments of the trial judge that:¹

... provisions like clause 12.2 must be construed with business common sense ... A stricter construction would encourage, if not compel, contractors to be more concerned with anxiously satisfying a formal temporal requirement of notification rather than to explore the underlying needs and circumstances of the situation.

Latent Condition?

The Court of Appeal found that without the benefit of hindsight and knowledge of discrepancy between reports, a reasonable contractor might have overlooked the significance of the information contained in the Boral file.

The Court of Appeal also declined to overturn the trial judge's rejection of BMD's claim for misleading and deceptive conduct under the TPA. The trial judge had found that while contractual disclaimers as to accuracy cannot override the statutory prohibition against misleading and deceptive conduct, they can have the effect of erasing whatever is misleading in the conduct. This can be achieved, the trial judge said, if the effect of the disclaimer is to make clear something that, if allowed to remain vague or ambiguous, could have led a person into error. In this regard, the Authority's 'disclaimers' were more in the nature of clarifying the Authority's understanding and beliefs about the information which it provided. They were positive information for the benefit of BMD rather than an attempt to disavow liability for what was being proffered for assistance.

The Court of Appeal also found that the inclusion of a Latent Conditions clause in the contract inhibited BMD's claim under the TPA. The Court of Appeal found it important that the effect of these clauses is to shift the risk of unexpected site conditions from the contractor onto the principal:²

BMD knew, for it was a term of the contract, that if it encountered physical conditions which differed materially from those which should reasonably have been anticipated by BMD when it tendered for the contract, the contract price would be adjusted. The contract specified the information which was to be taken into account in determining whether BMD should reasonably have anticipated the conditions it encountered... BMD knew that if it acted reasonably in relying upon the information proffered by the Authority, that is, it took that information into account

¹ *BMD Major Projects Pty Ltd v Victorian Urban Development Authority* [2007] VSC 409 per Pagone J at [11].

² *BMD Major Projects Pty Ltd v Victorian Urban Development Authority* [2009] VSCA 221 per Buchanan, Nettle and Weinberg JJA at [205].

together with other information available to it, and later encountered altered conditions, the contract price would be adjusted.

Practical implications

'Forthwith' is used in the Latent Conditions clauses of AS2124-1992 and AS-4300-1995. Later standards, including AS4000-1997, AS4903-2000, AS4910-2002 and AS4920-2003, adopt the more modern word 'promptly'. This decision suggests that courts may not construe the temporal requirements of Latent Conditions clauses strictly. Courts may accept that the contractor (or sub-contractor, depending on the contract) gave notice 'forthwith' even though the contractor did not do so immediately upon becoming aware of the possibility of a Latent Condition. There appears to be some allowance for the contractor to further investigate the possibility of a Latent Condition before giving notice.

In relation to misleading and deceptive conduct, while the Court of Appeal accepted that parties cannot contract out of the statutory prohibition, the Court was willing to temper this prohibition with consideration of the risk distribution between the parties. The Court's approach to disclaimers as to accuracy also benefits principals whose contracts include Latent Conditions clauses.

In relation to expected site conditions, the decision may excuse contractors who overlook an inconspicuous, but potentially significant, feature contained in a group of tender documents, from liability if a reasonable contractor in its position would have similarly overlooked the feature.

2. *Centennial Coal Company Ltd v Xstrata Coal Pty Ltd* [2009] NSWSC 788

Introduction

The New South Wales Supreme Court provided guidance on the scope of contractual obligations requiring the use of 'all reasonable endeavours', pointing out that such obligations can subsist indefinitely.

Facts

In September 2007, Centennial Hunter (*Hunter*) sold the Anvil Hill coalmine to Xstrata Mangoola Pty Ltd (*Xstrata*). In addition to the mine, rights under the agreement with Newcastle Coal Infrastructure Group Pty Ltd (*NCIG*) held by Hunter's parent Centennial Coal Co Ltd (*Centennial*), were also novated to Xstrata. These permitted shipping via Newcastle Port facilities of coal mined at Anvil Hill. The sale deed included clauses relating to Centennial's shareholding and contractual obligations with NCIG, providing that:

- (a) Hunter and Xstrata 'use all reasonable endeavours' to novate the relevant 'rights and obligations under the NCIG arrangements to the buyer' and transfer the shares in NCIG, with effect from completion;
- (b) where such novation and transfer had not occurred on, and with effect from, completion then the seller and the buyer use all reasonable endeavours to ensure that the novation and transfer occurs as soon as reasonably practicable after completion; and
- (c) Xstrata could waive Centennial's obligations to novate and transfer if required.

On 17 October 2007, the sale was completed but transfer and novation had not occurred.

Dispute

Under the NCIG arrangements, if a shareholder wanted to transfer all or part of its shares it first had to offer its shares to existing shareholders and any proportion not acquired could be transferred to a qualified third party.

In May 2008, Centennial began efforts to transfer the shares and entitlements to Xstrata under the NCIG arrangements but Centennial failed in its attempts.

Centennial and Hunter brought proceedings in the New South Wales Supreme Court seeking declarations that they had discharged their obligations under the sale deed to use all reasonable endeavours and/or that they had no continuing obligation to comply with them.

Decision

Justice Brereton held that the effect of the 'best endeavours' clause depends on the wording and the circumstances in each case. It is not an obligation to ensure that the contractual object occurs as soon as is reasonably possible. Rather it is an obligation to do what can reasonably be done in the circumstances to achieve the contractual object without hindering or preventing its achievement. Reasonable endeavours must keep being made, unless they would have 'such remote prospects of success that they are simply likely to be wasted' and 'until the point is reached where all reasonable endeavours are exhausted.'

The Court also held that just because there are currently no more reasonable endeavours to be taken, this does not mean that all endeavours have been exhausted or that the parties are discharged from their obligations. In the context of the present case, Justice Brereton found that future changes may allow for new avenues of endeavour and, therefore, Centennial was under the obligation to make reasonable endeavours if transfer becomes reasonably practicable at any time in the future, until either transfer and novation is effected or Xstrata waives the obligation.

The decision was subsequently appealed to the New South Wales Court of Appeal in October 2009. The Court of Appeal affirmed Justice Brereton's reasoning and dismissed the appeal.³

Practical implications

It appears from this decision that an agreement to 'use all reasonable endeavours' to effect a contractual object may impose a never ending obligation. The duration of the obligation will depend on the circumstances of a given case and the context of the contract in question. Therefore, even if all avenues of endeavour are exhausted, the obligation may still exist into the future. Parties wishing to avoid obligations that might continue indefinitely should consider including time limits for the operation of the best endeavours clause in their contract.

³ *Centennial Coal Co Ltd v Xstrata Coal Pty Ltd* [2009] NSWCA 341 (Hodgson, Tobias and Campbell JJA).

3. *CJD Equipment v A&C Constructions* [2009] NSWSC 1362

Introduction

The New South Wales Supreme Court held that where a principal expressly directs a contractor to ignore or otherwise not comply with specifications proposed by that contractor (or any sub-contractor), the principal assumes responsibility for that aspect of the project and cannot obtain damages from either the contractor (or any sub-contractor) if they suffer loss as a result of that direction.

Facts

The defendant in this matter, A&C Constructions (**A&C**), designed and constructed a large commercial premises for the plaintiff, CJD Equipment (**CJD**). A&C was aware that CJD intended to use the premises to conduct its business of importing, selling and servicing heavy earthmoving and construction machinery and that the foundation of the premises would be required to bear extremely heavy loads.

CJD approached A&C in December 2001 to design its new commercial premises using, as a basis, certain drawings which CJD had previously had commissioned by an architecture firm. There were no written records of this initial design retainer.

As part of this initial design brief, A&C retained Telford to quote on the design and supply of a steel frame for the building and Murphy, a structural engineering firm, to design the external pavement area (including the concrete slabs and the sub-base of the structure).

Drawing on a geotechnical report which CJD had also previously commissioned, and mindful of the heavy loads which the foundation would be required to bear, Murphy submitted a design report to A&C that proposed an average slab of thickness 310mm with the slab's edges to be 450mm thick. This proposal was rejected by CJD on the basis that it would be too expensive. This decision was informed in part by CJD's experience across its other Australian locations that 150mm thick slabs were sufficient for its purposes. After CJD rejected a further, reformulated design and insisted on the thinner slabs, Murphy terminated its involvement with the project.

A second structural engineering firm, Marcus, was then engaged to design a slab with a uniform 180mm thickness. However, the engagement was qualified by a statement and follow up letter to CJD from A&C to the effect that neither A&C nor Marcus could take responsibility for the structural adequacy of the slabs as now designed.

Following the completion of the design phase, CJD approached A&C to construct the premises. A&C submitted a quotation for the construction works on 6 June 2002 which was accepted by CJD purchase order on 26 June 2004. The construction agreement was not documented and no 'as built' record of the premises was ever created.

In 2005, about two years after CJD moved into the premises, the internal slab began to heave. It was common ground that was a result of water penetrating underneath the unsealed slab, causing the compacted fill to swell. CJD had directed that the sealing proposed in the slab designs of both Murphy and Marcus be removed to save costs. The heaving also caused a

glass curtain wall at the front of the premises to become distressed and crack. The external slab also experienced some heaving as result of the lack of seals and suffered further damage as a result of its insufficient load bearing capacity.

CJD alleged that A&C had breached its duty of care in failing to design and construct a building that met CJD's requirements. CJD also alleged that A&C was liable under the Trade Practices Act 1974 (Commonwealth) for having made misleading representations about the suitability of Murphy and Marcus' proposed designs. Finally, CJD asserted that Murphy, Telford and Marcus had breached their duty of care to prevent economic loss to CJD when providing their design services.

Decision

Justice McDougall accepted CJD's submission that A&C was required to exercise a reasonable level of care and skill in discharging its obligations under the design and construction contracts. This duty of care was necessarily implied as a term of both (unwritten) agreements. However, with respect to the premises' two critical deficiencies, namely the failure to seal the concrete slabs and the failure to install slabs of sufficient load bearing capacity, Justice McDougall found that A&C could not be held responsible. CJD had assumed responsibility for the slab design when it ignored A&C and Murphy's directions as to thickness and required that the slab be no more than 180mm thick. This conclusion was supported by the fact that A&C had informed CJD that Marcus and it would only proceed with the project under protest.

Similarly, CJD assumed responsibility for the failure to seal the concrete slabs when it directed A&C not to undertake the sealing. However, as the damage caused by the failure to seal the slabs was exacerbated by A&C's over compaction of the fill, A&C was ordered to pay 25% of the damage caused by the slab heave.

A&C was also found to have contributed (85%) to the damage caused to the glass curtain wall for negligently allowing the wall to be affixed to the inner slab and steel frame. While A&C did not design the wall, or propose the method of installation, it had a contractual responsibility to CJD to ensure that it was constructed in a way that would make it fit for purpose. A&C should have rejected the design proposal submitted by the third party glazier as it possessed a geotechnical report that warned against such designs. However, as CJD had unreasonably declined to undertake the mitigation measures which A&C proposed when the damage had originally presented itself, Justice McDougall held that CJD was not entitled to recover the 85% contribution from A&C for the damage which had occurred.

Justice McDougall also rejected CJD's submission that by providing CJD with Murphy and Telford's design drawings, A&C had made a representation as to the adequacy of those designs. At best, his Honour reasoned that the submission of drawings to CJD by A&C amounted to a representation, based on a reasonable belief, that the designs were appropriate for the construction of a premises that met CJD's purposes. Justice McDougall rejected CJD's claim on the basis that CJD had not demonstrated that this representation was incorrect, let alone misleading or deceptive.

Justice McDougall also rejected CJD's submission that Murphy, Telford and Marcus each owed it a duty of care to prevent pure economic loss when providing their design services. Importantly, His Honour found that CJD was in a position to contract directly with each of these

consultants (or, alternatively, to require A&C to agree to contractual terms that would protect its interests), but that it had failed to take either of these steps. Thus, on his Honour's view, CJD was not "relevantly vulnerable" and was not owed a duty of care by the consultants to avoid pure economic loss. His Honour suggested that it would always be difficult for the first owner/principal of a commercial building to establish that it was "relevantly vulnerable" where it accepted the services of third party sub-contractors without taking the opportunity to protect itself contractually.

Practical Implications

A court will look at the totality of a relationship between principals and contractors (or sub-contractors) to determine the existence and extent of their contractual relationship in the absence of a written contract. Once an oral contract is established, basic construction law terms will be implied such as standard of care, fitness for purpose and terms of the BCA. In rare circumstances, there can be a separate legal relationship between sub-contractors and principals and a sub-contractor can be held to owe a duty to a principal. Generally, however, it will be difficult for the first owners of a commercial building to establish they were relevantly vulnerable to economic losses caused by the negligence of designers and builders where the owners failed to protect themselves contractually.

4. *Dante De Grazia t/a All Sydney Building Services v Nicholas Solomon & Ors* [2010] NSWSC 322

Introduction

The New South Wales Supreme Court held that, although a building contract did not include an express provision requiring a contract administrator to act impartially, on a proper construction of the contract a duty to act impartially could be implied. This duty applied despite the fact that the contract administrator, namely the architect, was also the owner. The court also held that the architect defendants were estopped from raising non-compliance with contractual time limits in relation to the builder's claims for variations of time.

Facts

This case concerned a construction contract entered into on 17 October 2001 between the plaintiff builder and the defendant architect, who was the architect nominated in the contract to administer the contract and was the building owner.

The original date for possession of the site was 1 November 2001 and practical completion was to occur by 11 September 2002. During the course of the works, the builder encountered various delays and the architect extended the contract time for completion to 17 February 2003. Practical completion was reached on 24 December 2003.

Dispute

There was a dispute between the parties as to the adjusted date for practical completion. The builder contended that the adjusted date should be March 2003, rather than February 2003, as the architect maintained. There were a number of issues arising from this dispute with regard to defects, delay and variations. However, the most important issues raised by this case were:

- whether the architect was estopped from raising arguments of non-compliance with contractual procedures because neither party had performed in strict compliance with the contractual terms; and
- whether the architect in his capacity as the architect under the contract had properly performed his role as architect administering the contract.

Decision

In examining the principles where the architects are simultaneously the owners, Justice Einstein identified that architects have an obligation to act honestly and impartially notwithstanding their relationship with the principal. In the absence of an express term, a similar obligation may be implied. This obligation was also consistent with the architect's role as contemplated by the express terms of the contract.

The builder contended that a close examination of the architect's conduct through the whole of the building project made it clear that the requisite independence required of him was often absent.

Justice Einstein said that the court was justified in the closest analysis of whether or not the claim by the builder was made good by the evidence. The architect's obligation to act impartially needed to be very carefully monitored. Although the Court did not consider that the architect's self-interest, by reason of his bifurcated position, affected his duty as contract administrator, the Court ultimately concluded that, on a number of occasions, the architect breached the relevant contractual duties of impartiality required of his role as contract administrator.

The Court also held that the architect was estopped from raising non-compliance with contractual time limits for the builder's claims for variations out of time. This was because, in significant instances, the parties had not acted in compliance with the relevant contractual provisions. Some of these breaches concerned key areas of the parties' relationship and some were of an ongoing nature, supporting the view that the parties did not regard themselves as strictly bound by the relevant contractual terms.

Practical implications

This case sounds as a warning that a nominated architect, who is also the owner, cannot avoid the duty to act impartially in administering a contract, as such a duty will be implied into the contract if it is not already contained in the contractual terms. Architects (or other building professionals) acting in such a bifurcated role must bear in mind that their conduct will be very carefully examined in the event of a dispute involving allegations of impartiality.

Quite apart from the cautionary point above, this case also underlines the need for principals and their representatives to themselves adhere strictly to contractual procedures and time limits, or run the risk of losing the right to rely on the builder's non-compliance as against variations made out of time.

5. *J-Corp Pty Ltd v Mladenis* [2009] WASCA 157

Introduction

The Western Australian Supreme Court of Appeal considered that a provision for 'nil' liquidated damages in a contract should be construed so as to exclude the proprietor's right to claim damages at common law by reason of the builder's breach.

Facts

The Contractor, J-Corp Pty Ltd, entered into a standard form, lump-sum building contract with the principal, Mr Mladenis to construct a house.

Under clause 11.1 of the contract, the contractor was obliged to complete the house, however clause 11.2 provided that the contractor would not be responsible for specified delays over which it had no control. Should the contractor breach that obligation, clause 11.9 of the contract provided that it would be liable to pay the principal liquidated damages at the rate of 'nil dollars (\$00.00)' per day, for each day beyond the date of practical completion that the house remained incomplete.

Dispute

The contractor argued that the contract excluded the principal's right to claim common law damages for losses caused by the contractor's failure to complete the house by the agreed date.

The primary judge held that on the authorities, any intention to deprive the principal of his common law right to unliquidated damages would have to be clearly expressed. The contract did not do this. As such, except in respect of delays over which it had no control, the contractor would be liable for common law damages for delay. The contractor appealed this decision.

Decision

Justice Newnes noted that there was conflicting authority on this issue. In *Temloc Ltd v Errill Properties Ltd*,⁴ the English Court of Appeal determined that damages for late completion are one head of general damages which may be recoverable for contractual breach by a builder. Their character was not altered by whether the amount payable was agreed by the parties in advance (as liquidated damages) or determined by a court after breach (as unliquidated damages). If the parties agreed that no amount was payable for late completion by way of liquidated damages, it could not be contended that damages could be claimed for an unliquidated amount.

⁴ (1987) 39 BLR 30.

However in *Baese Pty Ltd v RA Bracken Building Pty Ltd*,⁵ the insertion of 'nil' for the rate of liquidated damages did not exclude claims for unliquidated damages. The New South Wales Supreme Court in *Baese* distinguished *Temloc* on the grounds that the relevant clause was not contained under a heading entitled 'damages for non-completion' and the clause was neither mandatory or self executing.

In this case, Justice Newnes stated that a liquidated damages provision relieves an owner of the obligation to prove actual damage. The insertion of "Nil Dollars (\$00.00)" in clause 11.9 did not envince the intention that the principal should have no remedy in the event of a delay. Instead it placed the burden on the principal to prove actual damage should delay occur. The contract did not express in clear and unambiguous terms an intention to exclude the principal's common law right to damages.

His Honour derived additional support for this conclusion from several other clauses which expressly contemplated that any rights of termination should co-exist with any rights of termination at law. Furthermore, clause 4.4 of the contract expressly released the contractor from any liability for loss or damage suffered by the principal, in respect of the imposition of a tax resulting from delay. This clause was consistent with the existence of the principal's right to claim damages for delay in the absence of such an express exclusion.

Practical implications

An exclusion of the common law right to damages for breach of contract must be expressed in clear and unambiguous terms. Should a party wish to exclude the right to damages for breach of a contractual provision, it is not enough to insert 'nil' in a clause concerning liquidated damages. The contract should also contain an express provision limiting the right to claim unliquidated damages.

⁵ (1990) 6 BCL 137.

6. *Lucas Stuart Pty Ltd v Hemmes Hermitage Pty Ltd* [2010] NSWCA 283

Introduction

The New South Wales Supreme Court of Appeal granted an injunction to restrain a principal from calling upon performance bonds provided by the contractor, on the basis that the contractual pre-condition for the principal to make the call required the objective fact of the contractor's material non-compliance with the contract. The fact that the works had been certified as practically complete raised a serious issue as to whether the pre-condition had been met.

Facts

In November 2006, the contractor Lucas Stuart Pty Ltd contracted to construct for the principal, Hemmes Hermitage Pty Ltd, a multi-storey retail bar, restaurant and function centre. The contractor provided six performance bonds as security for performance of its obligations.

The work was done in three stages. The appointed Project Director certified that practical completion of the three stages had occurred on 1 February 2008, 30 June 2009 and 30 June 2010, respectively.

Clause 16.3 of the contract entitled the principal to call on the performance bonds if the contractor failed to comply with the terms of a notice given under clause 16.2. Clause 16.2 provided that if the contractor had not materially complied with its obligations under the contract, the principal could give a written notice to the contractor stating the breach, what the principal required the contractor to do to remedy the breach, and a specific reasonable time in which the contractor must remedy the breach.

On 16 July 2010, the Project Director sent a letter to the contractor enclosing a Schedule of Defects that it required to be rectified by 30 June 2011. On 19 July 2010, the principal itself issued a Notice to the contractor identifying various of these defects which it required to be completed by the much earlier date of 25 September 2010. The principal subsequently agreed to extend the time for compliance with the Notice to 14 November 2010.

Dispute

On 14 September 2010, the contractor applied to the New South Wales Supreme Court for an injunction restraining the principal from calling upon performance bonds in reliance upon the contractor's non-compliance with the principal's Notice. Relying on the provisions and heading of clause 2.1 'Contractor's main obligations', the primary judge reasoned that the inclusion of rectification of defects as one of these 'main obligations' meant that defects were within clause 16.2. The primary judge also referred to the Federal Court decision of *Clough Engineering Ltd v*

*Oil and Natural Gas Corporation Ltd [No 3]*⁶ in support of his view that an actual breach did not need to be established for a notice under clause 16.2 to be valid, only a bona fide claim by the principal that the contractor had not materially complied with its obligations. The primary judge therefore refused to grant the injunction, holding that the contractor had not shown that there was a serious question to be tried as to the validity of the Notice.

Subsequent to the primary judge's decision, the principal called upon two of the six bonds provided by the contractor.

On appeal, the contractor argued that the primary judge had erred in construing clause 16.2 as requiring simply a failure by the contractor to comply with a *material obligation* under the contract. The contractor contended that, on a proper construction, what was required as a pre-condition to the issue of a Notice was a *material failure* to comply with an obligation.

Decision

The Court of Appeal rejected the primary judge's view, noting that if it were correct, any failure, however minor, to comply with construction requirements would result in the contractor materially non-complying with its contractual obligations for the purpose of clause 16.2. That view would not give any effect to the word 'materially' in clause 16.2.

Consequently, the primary judge's conclusion that there was no serious question to be tried about the validity of the Notice was based on an incorrect interpretation of the contract.

The fact that the principal had, through the Project Director, certified that the works were practically complete raised a real issue as to whether the defects identified in the principal's Notice (and those in the earlier Schedule of Defects) were of sufficient seriousness to require a conclusion that the contractor had 'materially' failed to comply with its obligations under the contract.

Further and contrary to the primary judge's view, the power to issue a Notice under clause 16.2 was not conditional on the principal being satisfied of the existence of material non-compliance (ie, having merely a bona fide claim), but rather on the objective fact of such non-compliance. Accordingly, it was open for the contractor to seek to restrain the principal from calling on the bonds upon the basis that the pre-condition had, at least arguably, not been satisfied.

The Court of Appeal distinguished *Clough* because the contract in that case required provision of a performance guarantee in a form set out in an appendix, which form referred to payment to the guarantor 'notwithstanding any dispute(s) pending,' and 'without any demur, reservation or protest'. This was held in *Clough* to qualify the pre-condition in the relevant clause allowing the principal to call on the performance guarantee. Justice MacFarlan noted his reservations about the *Clough* decision: given the contractual pre-condition there for calling on the performance guarantee was also expressed in terms of objective fact,⁷ it was not apparent to his Honour why the clause had been construed by reference to the terms of the guarantee.

⁶ [2007] FCA 2082.

⁷ The pre-condition in clause 3.3.3 used the words, 'in the event of the Contractor failing to honour any of the commitments entered into under this Contract': see *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd [No 3]* (2008) 249 ALR 458.

Turning then to the question of whether the balance of convenience favoured the grant of the injunction, the Court acknowledged that the evidence did not suggest that the contractor would suffer any harm different to that ordinarily suffered if a contractor's performance bond were called upon (namely loss of reputation and financial standing, neither of which was readily curable by an award of damages). However, as it was implicit in the contract that the principal would only call upon the performance bonds in circumstances identified in the contract, the contractor had demonstrated an arguable case that the principal was threatening to breach an implied negative stipulation in the contract. The Court rejected the principal's argument that the fact that two of the bonds had already been called on meant that further calls would not worsen the loss of reputation and financial standing already suffered by the contractor. By contrast, in the absence of evidence otherwise, it was fair to assume that further calls would increase the damage, and to restrain those further calls would arguably lessen this adverse impact.

Accordingly, the Court considered an injunction restraining the principal from calling on the remaining bonds should be granted.

Practical implications

While this decision appears very favourable to contractors, the Court pointed out that the position would have been different if the clause made the principal's entitlement to call upon the bonds conditional on the principal's satisfaction or even simply on the principal's assertion that the contractor was in breach of the contract. Carefully drafted provisions of this type would tend to show an intention by the parties to enable the principal to obtain prompt payment of its claimed amounts, notwithstanding disputes raised by the contractor.

By contrast, clauses which are conditional on the objective fact of material non-compliance impose a much higher threshold. In light of this decision, Australian courts may be more inclined to grant injunctions sought by contractors where this threshold is not met.

7. *Timms Contracting Pty Ltd v Pipes International (Qld) Pty Ltd* [2010] QSC 88

Introduction

The Queensland Supreme Court rejected claims that a construct-only contract contained design obligations, including especially suitability for purpose, and held that the alleged implied warranty of fitness for purpose arising from the principal's reliance on the contractor's skill and judgment had been displaced due to statements and warnings by the contractor.

Facts

In late 2006, the principal, Pipes International (Qld) Pty Ltd, engaged Timms Contracting Pty Ltd as contractor for the construction of a hardstand on land co-owned by the principal's Managing Director. The principal required the hardstand to be suitable for use as a thoroughfare for heavy trucks and machinery, as well as a storage facility for its stock. The contract was in the form of a written quotation, prepared by the contractor, setting out the scope of the services to be provided to the principal. Upon completion, the principal withheld the final progress payment of \$236,384.40, due to what it contended were 'anomalies' with the finished product. In particular, the principal alleged that the quality of the surface of the hardstand was substandard and became soft after periods of heavy rain.

Item 5 of the quotation required the contractor to make the surface from a layer of crushed and compacted 'blue metal', which was to be sourced from the the principal's site.

Dispute

The contractor brought proceedings claiming the withheld amount. The principal counterclaimed for damages for breach of contract, negligence and misleading and deceptive conduct in the amount of \$1,400,161.02.

The principal contended that the contract comprised an oral term that the contractor would design as well as construct the hardstand. The principal adduced evidence of a conversation with the contractor, in which the contractor allegedly claimed to be skilled in design construction and that it would have no problems designing and building the hardstand. The contractor maintained that there was no requirement under the contract (express or implied) that it design the hardstand, and the contract was a construct-only contract.

The principal relied on the case of *Young & Marten Ltd v McManus Childs Ltd*⁸ to argue that as the contractor had selected the material to use in the surface layer and had decided the level of compaction required, its judgment and choice formed part of the design. Accordingly, the principal contended, there was an implied warranty that the work materials would be suitable for their purpose. The principal's expert witness gave evidence that the material used was not

⁸ [1979] 9 BLR 77.

'blue metal' as specified in the contract, and so the surface was not of sufficient quality or strength for its purpose.

The contractor claimed that the compacted material used for the surface was suitable for its intended use, and that the alleged defects in the hardstand had arisen because of lack of maintenance by the principal. The contractor gave evidence that it had repeatedly informed the principal of the need for ongoing preventative maintenance to avoid surface defects following wet weather usage and potential subsidence due to the nature of the site. The contractor had also advised the principal of the limitations of an unsealed surface and suggested other surface options, which the principal chose not to pursue. The contractor maintained, therefore, that if there was an implied term of fitness for purpose, this should be considered against the warnings and advice given by the contractor to the principal.

The contractor's expert witness gave evidence that although the term 'blue rock' had a technical meaning, the term was commonly used in the construction industry outside its more technical meaning.

Decision

Justice Philippides held that the scope of works did not specify that the contractor undertook to design the hardstand. It was clear from the evidence (including various design criteria not supplied to the contractor) that consultant engineers had been engaged as the design engineers for the project.

Further, there was neither an oral term, nor any representation by the contractor, that it was skilled in design construction.

Following the objective approach laid down by the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*,⁹ it was clear that whatever technical meaning 'blue metal' had in the construction industry, the parties were not using the term in that sense. In fact, the term 'blue metal' had no particular meaning to the principal, and any reference to 'blue metal' in pre-contractual discussions between the parties was simply a reference to the material on the principal's site which the contractor was to crush as a surface for the hardstand.

As to the alleged implied warranty of fitness for purpose, this had to be considered against the statements and warnings by the contractor in relation to proper maintenance of the hardstand and the inevitability of some subsidence, as the surface was not sealed. His Honour accepted that the deficiency was inadequate maintenance exacerbated by poor drainage. A further important consideration was that the principal had chosen not to pursue construction of a hardstand with a sealed surface, and requested that it be built in the cheapest form possible.

It was held that the alleged representations of the contractor had been accompanied by the same advice and warnings, and as a result, there was no conduct that was misleading or deceptive.

The Court held that the contractor was entitled to the withheld amount plus interest and dismissed the principal's counterclaim.

⁹ (2004) 219 CLR 165.

Practical implications

Although this case turned largely on the evidence led at trial, it illustrates the difficulties and limitations in seeking to establish oral or implied terms which go beyond the written contract. Clearly, there is far greater certainty and advantage in setting out fully all of the contractor's warranties, such as fitness for purpose, in the express terms of the contract.

8. *Zachariadis v Allforks Australia Pty Ltd* [2009] VSCA 258

Introduction

This was a case before the Victorian Court of Appeal regarding the applicable test to determine whether a liquidated damages clause is a penalty, and the extent of a guarantor's liability under a hire purchase agreement.

Facts

Allforks Australia Pty Ltd entered into four agreements and a number of associated guarantees with Priority Road Express Pty Ltd (**PRE**) for the hire of forklifts for a term of 60 months.

Clause 14.1 of the hire agreements stated as follows:

Upon the termination of this Hire Agreement in accordance with Clause 12.2, the Hirer shall...pay to Allforks Australia all Hire Charges that would otherwise have been payable from the date of termination of this Hire Agreement to the Expiry Date.

On 12 April 2006, Allforks was notified that a receiver and manager had been appointed to PRE and that the receiver would not exercise any rights in relation to the forklifts. At the date of this notification, PRE was in breach of the hire agreement for failure to pay Allforks a total of \$8,594.35 in outstanding hire charges. Following appointment of the receiver, each of the hire agreements was terminated and Allforks took repossession of the forklifts, and it was subsequently resolved that PRE would be wound up and a liquidator appointed.

Dispute

Allforks sought liquidated damages under clause 14.1 of the hire agreements, totalling \$117,961.08 for outstanding hire charges and hire charges that would have been payable from the date of termination to the expiry date of the hire agreements. In its defence, PRE alleged that the hire agreements were unenforceable, as:

- they failed for uncertainty, or did not comply with section 126 of the *Instruments Act 1958* (Vic) because they were incomplete at the time they were signed;
- they were void because of a material non-disclosure; and
- the guarantees had been vitiated by the insertion of a 60-month hire period after they had been executed and by the addition of an annexure that PRE had not seen.

PRE also alleged that clause 14.1 was unenforceable because it constituted a penalty.

At first instance, the County Court rejected PRE's arguments and granted orders in favour of Allforks requiring PRE to pay the full amount of the claim.

PRE appealed on the basis that, among other things, the primary judge incorrectly applied the appropriate test in determining whether the liquidated damages clause constituted a penalty.

Decision

The Court of Appeal ultimately allowed the appeal on the basis that the primary judge had erred in applying the test to determine whether clause 14.1 did in fact constitute an unenforceable penalty. After considering the relevant authorities, the Court concluded that the applicable test was the 'out of all proportion' test, as enunciated by the High Court in *O'Dea v Allstates Leasing System (WA) Pty Ltd*.¹⁰

This test states that a liquidated damages clause will constitute a penalty when it is not a 'genuine pre-estimate of damage'. Applying this test, the Court of Appeal held that the primary judge was correct in stating that:

A sum fixed by a contract is only a penalty if it is 'extravagant and unconscionable' in amount in comparison with the greatest loss that could be conceivably be proved to have followed from the breach. Further it is not enough that it should be lacking proportion. It must be 'out of all proportion'.

However, the court held that the primary judge erred in her application of the test, and that clause 14.1 was a penalty for the following reasons:

- the clause had the same characteristics as the provision held to create a penalty in *O'Dea*, as it did not provide a means of calculating the net loss Allforks would suffer if the hire agreement were terminated early;
- the parties to the hire agreement would have had no difficulty in drafting a clause that provided a formula for a pre-estimation of the loss likely to be suffered; and
- the requirement to pay all future hire charges for 'any breach' indicated that the clause was not a genuine pre-estimate of loss, as there was a lack of any relationship between the breach and the amount payable under clause 14.1.

Practical implications

This case highlights the need for parties to negotiate carefully any liquidated damages clauses that they propose to include in a contract. Such a clause is likely to constitute a penalty unless it is a genuine pre-estimate of the loss that will be suffered by an innocent party in the event of breach. A practical way to achieve this result will often be to include a formula within the clause that will guide the calculation of the liquidated damages to be payable upon breach.

¹⁰ (1983) 152 CLR 359.

Part 2: Arbitration, expert determination and dispute resolution

9. *AED Oil Limited & Anor v Puffin FPSO Limited* (2010) 265 ALR 415; [2010] VSCA 37

Introduction

This case before the Victorian Supreme Court of Appeal concerned the interpretation of an international arbitration clause. The decision adds support to the view that Australia is an 'arbitration friendly' jurisdiction.

Facts

AED Services Limited (**AED Services**) and Puffin FPSO Limited (**Puffin**) were parties to a charter contract agreement for an oil exploration project. AED Oil Limited (**AED Oil**) guaranteed AED Services' obligations under the agreement.

Under the agreement:

- AED Services indemnified Puffin's tax liabilities arising from the project;
- the parties agreed to submit disputes under the agreement to arbitration; and
- subclause 33.10 within the arbitration clause of the agreement permitted a party to seek urgent interlocutory or declaratory relief from a court where, in that party's reasonable opinion, that action was necessary to protect its rights.

Dispute

A dispute arose between Puffin, AED Oil and AED Services (together, the **AED Companies**) regarding the amount of Puffin's tax liabilities. Puffin sought relief from the Supreme Court, rather than under the arbitration clause of the agreement, on the grounds that the relief sought was sufficiently 'urgent' to invoke the exception to the agreement to arbitrate under clause 33.10. The AED companies disputed this, and claimed that the dispute should be arbitrated.

Decision

The Court of Appeal held that Puffin's claim for relief was not sufficiently 'urgent' so as to trigger the exception to the agreement to arbitrate under clause 33.10. Consequently, the Court of Appeal granted a stay of proceedings in order that the dispute may be referred to arbitration, in accordance with the terms of the agreement.

In deciding on the issue of urgency, the Court of Appeal:

- placed weight on the fact that Puffin had not made any claim regarding its tax liabilities until September 2009, despite receiving advice from its tax advisers in October 2007; and
- concluded that the delay associated with referring the dispute back to arbitration would not prejudice Puffin's claim for relief to such an extent as to justify triggering the exception under clause 33.10. This was based largely on the fact that financial position of AED Oil, as guarantor under the agreement, was not deteriorating to such an extent that a delay would prejudice Puffin's ability to enforce any prospective order against it.

The Court of Appeal also supported the view, albeit in obiter, that declaratory awards by arbitrators are enforceable.

Practical implications

This decision demonstrates that Australian courts are increasingly willing to narrowly interpret the grounds on which a party may resist an agreement to arbitrate. Similarly, the inclusion of the term 'urgent' as an exception to an arbitration clause will be interpreted narrowly and only permit the avoidance of arbitration in very limited circumstances.

Further, this decision supports the view that declaratory awards made by arbitrators are likely to be enforceable and that an arbitral declaration is a final determination of a matter in dispute between the parties.

In general terms, this decision broadly confirms Australia as an 'arbitration friendly' jurisdiction.

10. *Lipman Pty Ltd v Emergency Services Superannuation Board* [2010] NSWSC 710

Introduction

In this case the New South Wales Supreme Court outlined the circumstances in which a decision on a dispute made under an alternative dispute resolution clause in a commercial contract will be final and binding.

Facts

Lipman Pty Ltd (as principal) entered into an agreement with Emergency Services Superannuation Board (**ESSB**) (as contractor) to undertake building work on a Sydney shopping centre.

The agreement contained a dispute resolution clause (clause 42.10) that provided for expert determination of disputes arising under the agreement.

Clause 42.10 stated that determinations made under the clause were:

- 'final and binding unless a party gave notice of appeal to the other party within 21 days of the determination'; and
- 'to be given effect to by the parties unless and until it is reversed, overturned or otherwise changed under the procedure in the following clauses'.

Relevantly, clause 42.11 set out a procedure for negotiation between parties once a notice of appeal had been issued under clause 42.10. Clause 42.11 required the parties to attempt to negotiate with a view to resolving the dispute or, alternatively, to endeavour to agree on a procedure to resolve the dispute.

Clause 42.11 was silent on the procedure, if any, to be undertaken if both aspects of the negotiation under that clause were unsuccessful.

Dispute

A dispute regarding payment claims was the subject of expert determination under clause 42.10, with the written determination being given on 7 December 2005.

Lipman subsequently issued a notice of appeal of the determination in accordance with clause 42.10. Negotiations under clause 42.11 were commenced; however, the dispute was not resolved, nor was there agreement upon a procedure to resolve it.

Three-and-a-half years later, Lipman commenced an action in the New South Wales Supreme Court concerning the same dispute. The ESSB contended that the proceedings should be dismissed on the grounds that the parties were bound by the expert determination procedure under clauses 42.10 and 42.11.

Lipman's position was that the expert determination was final and binding only in circumstances where no notice of appeal had been issued. Lipman also contended that the abrogation of its common law right to have disputes decided in court required express wording to that effect in the agreement.

Decision

In determining whether an expert determination made under clause 42.10 is final and binding, the Court stated that the whole of the agreement had to be considered.

The Court held that the plain and unambiguous words of clause 42.10 required that the expert determination be given effect unless and until it was reversed, overturned or otherwise changed in accordance with the negotiation procedure in clause 42.11. As this had not occurred, the expert determination was final and binding.

The Court also held that the parties clearly intended the dispute resolution procedure under clause 42.10 to abrogate any common law remedies that may have been available. Consequently, the Court refused to adopt Lipman's interpretation of clause 42.11 that allowed for appeal from the expert determination to a court in the event of no agreement being reached, as it deemed the procedure under clauses 42.10 and 42.11 to be the totality of the dispute resolution process agreed to by the parties.

Practical implications

This decision indicates that courts are willing to uphold alternative dispute resolution clauses contained in commercial contracts as final and binding.

These clauses will be upheld even where the right to common law remedies is abrogated. Accordingly, parties wishing to retain a right to seek common law remedies for disputes arising under a contract are advised to make express provision for the maintenance of such a right in the terms of any alternative dispute resolution clause.

11. *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2010] QSC 97

Introduction

This Queensland Supreme Court decision considered the interrelationship between arbitral awards and expert determinations.

Facts

Northbuild Construction Pty Ltd (**Northbuild**) as builder and Discovery Beach Project Pty Ltd (**Discovery Beach**) as developer, entered into a Master Builders Australia Design and Construct – Lump Sum contract to redevelop a property in Queensland. The dispute resolution clause in the contract provided that failing resolution by conference, a dispute was to be referred to arbitration unless a party elects in writing to have the dispute determined by expert determination. During the course of construction a number of disputes arose, some of which were referred to arbitration and some of which were referred to expert determination. This dispute concerns findings made in an arbitration which occurred in June 2009. Northbuild sought declarations that Discovery Beach be estopped from contending issues other than in accordance with the matters contained in the arbitrator's reasons. Discovery Beach sought a stay of the proceedings brought by Northbuild.

Dispute

The dispute relates to the findings made as to the constitution and terms of the contract and whether the parties are precluded from seeking to re-agitate those issues in an expert determination. The court considered the interrelationship between the findings in an arbitration award and the extent to which such findings bind an ongoing expert determination process.

The Court was required to determine two issues:

- whether the application made by Northbuild actually raised issues which are part of the disputes referred to expert determination; and
- whether discretionary factors favour granting a stay.

Decision

Justice Lyons cited Justice Chesterman in *Zeke Services Pty Ltd v Traffic Technologies*¹¹ in identifying that the starting point for granting a stay is that the parties should be held to their bargain to resolve their dispute in the agreed manner. Justice Lyons emphasised that the court has the power to stay proceedings when the parties have contracted that a dispute is to be determined by some other process, including by expert determination. This power is inherent

¹¹ [2005] QSC 135.

but whether the court will exercise this power depends upon whether the justice of the case is against staying the proceedings.

Pursuant to section 13 (which allowed for expert determination) and Schedule 26 (which identified the Queensland Law Society as the nominating organisation to appoint an expert) of the contract, the parties agreed that certain disputes were to be referred to expert determination. However, it was found that the parties did not agree nor would a reasonable person have considered, that the expert would determine whether an arbitral award would create estoppels that would bind the parties in the expert determinations. Justice Lyons was not satisfied that the question of issue estoppel was an obvious part of the subject matter of the dispute referred to expert determination. Northbuild sought declarations as to the existence of estoppels arising out of the June 2009 award in broad terms and did not seek to limit those estoppels to any later proceeding. As the declarations sought by Northbuild were wider than the categories of disputes referred to expert determination, Justice Lyons therefore found that there was no legal basis for reading the declarations down. Justice Lyons held that it was not appropriate to stay Northbuild's proceedings seeking declarations for Discovery Beach to be estopped because the parties had not agreed that issue estoppel was a question to be resolved by expert determination.

Ultimately it was held that this was not a case where a stay might be ordered and therefore no occasion arose to discuss discretionary reasons to refuse a stay and the application was refused.

Practical implications

This decision highlights that the court will tend to hold parties to their preferred method of dispute resolution, such as the referral of disputes to expert determination. However expert determination clauses should be carefully drafted because if the parties have not agreed on the content of the dispute referred to an expert, a party may bring the matter to court, regardless of the fact that the dispute was agreed to be determined by expert determination.

12. *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2009] VSC 553

Introduction

This Victorian Supreme Court case concerned the scope of an arbitration clause in a distribution agreement and a challenge to an interim award by the arbitrators in relation to the scope of their jurisdiction.

Facts

On 29 December 2003, TCL Airconditioner (Zhongshan) Co Ltd, a Chinese airconditioner manufacturing company, entered into a distribution agreement with Castel Electronics Pty Ltd. Under this agreement, TCL granted Castel the exclusive right to sell TCL airconditioners in Australia for a fixed time period. The distribution agreement was subsequently extended until 31 January 2014 and was also amended on 29 March 2007.

Castel claimed that TCL breached certain terms of the distribution agreement. It also claimed that TCL had breached the terms of a number of other sales contracts and other agreements that had been made pursuant to, or in connection with, the arrangements constituted by the distribution agreement. Castel referred the matter to arbitration in accordance with the terms of the distribution agreement.

Dispute

The dispute was referred to a panel of three arbitrators, who directed Castel to deliver points of claim. TCL subsequently objected, and applied to strike out these points of claim on the basis that many of Castel's claims fell outside the scope of the arbitration clause. The arbitrators heard argument on this question and delivered an interim award, which determined that the scope of the arbitration clause extended to include disputes concerning alleged breaches of sales contracts made between the parties.

TCL contended that the proper construction of the arbitration clause limited the scope of the arbitrators' jurisdiction to disputes concerning alleged breaches of the terms of the distribution agreement. Accordingly, TCL sought to set aside the interim award and claim declaratory relief.

Decision

Justice Hargrave held that the scope of a referral to arbitration depends on the proper construction of the relevant arbitration clause and that the role of the court is to ascertain the meaning of the words chosen by the parties. His Honour stated that where the words of an arbitration clause are sufficiently elastic and general, or capable of broad and flexible meaning, they should be given a liberal construction. However, in accordance with the statements of

Justice Allsop in *Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd*¹² and Justice Austin in *Tridon v Tridon Australia*,¹³ his Honour held that there is no legal presumption in favour of arbitrability.

Regarding the scope of the arbitration clause in this case, Justice Hargrave agreed with the conclusion of the arbitrators that the distribution agreement was a 'constituent' or 'umbrella' agreement that established the broad terms of the commercial relationship between the parties. He also accepted the broad characterisation of the word 'under' in the arbitration clause to mean 'governed, controlled or bound by (or in accordance with)'. However, his Honour held that it was not consistent with the wording of the arbitration clause to conclude that a dispute could be referred to arbitration for any breach of any provision of a sales contract, whether or not that provision was specified in, or arose under, the distribution agreement.

In addition to this, his Honour held that any disputes not in relation to a breach of the agreement, such as a claim for misleading or deceptive conduct in breach of section 52 *Trade Practices Act 1974* (Cth), would not be covered by the arbitration clause.

As a result, Justice Hargrave found in favour of TCL and concluded that the arbitrator's jurisdiction was limited to disputes arising from alleged breaches of:

- provisions of the distribution agreement; or
- any provision of a sales contract or other agreement that is specified in the distribution agreement.

Practical implications

The conclusion in this case, that there is not necessarily a legal presumption in favour of arbitrability, highlights the importance of drafting an arbitration clause that is sufficiently broad in its application to cover every possible dispute contemplated between the parties.

The Court did, however, recognise that a liberal approach to the construction of the scope of an arbitration clause is often appropriate, as commercial parties are unlikely to have intended the inconvenience of having their disputes heard in two places. This is especially justified where the parties are operating in an international market and come from different countries.

However, this decision emphasises the principle that there is no justification for applying a broad interpretation to give words a meaning that they do not have.

¹² [2005] FCA 1102.

¹³ [2002] NSWSC 896.

13. *Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219

Introduction

This Queensland Court of Appeal decision considered the effect of parties electing, in their contract, the procedural rules which would apply to an arbitration of a dispute between the parties. Unlike the 2001 decision of the same court in *Australian Granites Limited v Eisenwerk Hensel Bayreuth Dipling Burkhardt GmbH*,¹⁴ this decision did not find that by electing a set of procedural rules the parties had agreed not to adopt the system of arbitration provided for under the UNCITRAL Model Law on International Commercial Arbitration. The Court of Appeal limited *Eisenwerk* to its particular facts, and found that the reasoning of *Eisenwerk* was only applicable to the adoption of the Rules of Arbitration of the International Chamber of Commerce, not other procedural rules like the UNCITRAL Arbitration Rules.

Facts

The contract between Wagners Nouvelle Caledonie SARL (**Wagners**) and Vale Inco Nouvelle Caledonie SAS (**Vale**) provided that 'any dispute or difference whatsoever arising out of, or in connection with, this contract shall be and is hereby submitted to arbitration in accordance with and subject to the UNCITRAL Arbitration Rules'.

Section 21 of the *International Arbitration Act 1974 (Cth)* (**Act**) (as in force at the relevant time) provided that if the parties agreed that disputes would be settled otherwise than in accordance with the Model Law, then the Model Law did not apply.

Dispute

A dispute relating to the contract arose between the parties. The court had to consider whether the Model Law (and its limited grounds for recourse against arbitral decisions) applied to their dispute. Wagners argued that the parties had agreed to opt out of the Model Law by agreeing to *submit* disputes to arbitration in accordance with the UNCITRAL Rules. Vale argued that there was no agreement to opt out of the Model Law, because the procedural UNCITRAL Rules could operate concurrently with the broader Model Law.

Decision

The Court agreed with Vale. Justice Muir noted that the UNCITRAL Rules are procedural in nature. Unlike the Model Law, these rules are not the law of a nation, and do not govern the *lex arbitri* (the law governing the conduct of the arbitration or the law of the seat of the arbitration). His Honour found that the UNCITRAL Rules and the Model Law were capable of operating together, and that the parties did not need to choose between the two.

¹⁴ [2001] Qd R 461.

Justice Muir then considered *Eisenwerk*. While his Honour did not find the decision plainly wrong, he suggested that it did not provide a generally applicable principle of law. *Eisenwerk* instead was a conclusion as to the contractual intention of the particular parties in particular circumstances. His Honour suggested that different circumstances might lead a court to construe an arbitration clause identical to that in *Eisenwerk* differently to the *Eisenwerk* court.

Justice Muir commented that 'significant differences' between the UNCITRAL Rules and the more elaborate ICC Rules (which the parties had adopted in *Eisenwerk*) meant that the *Eisenwerk* decision was plainly distinguishable. His Honour also found it significant that the Model Law and the UNCITRAL Rules were intended to complement each other.

Justice White similarly declined to find *Eisenwerk* plainly wrong, though his Honour noted that the New South Wales Supreme Court argued, persuasively to this effect in the case of *Cargill International SA v Peabody Australia Mining Ltd.*¹⁵ Justice White suggested that the Court in *Eisenwerk* failed to understand the difference between *lex arbitri* and elected procedural rules, and noted that the Model Law can sit harmoniously with this dichotomy. His Honour suggested that a detailed comparison between the ICC Rules and the mandatory provisions of the Model Law, to ascertain whether they were truly irreconcilable, had not been undertaken in *Eisenwerk*.

Amendment to the Act

Section 21 of the Act was recently repealed to address the difficulties raised by *Eisenwerk*. In the explanatory memorandum of the International Arbitration Amendment Bill 2010 (Cth), it was stated that the *Eisenwerk* interpretation was unsatisfactory. The Act no longer allows parties to opt out (intentionally or unintentionally) of the Model Law.

Practical implications

The decisions of *Cargill* and *Wagners* mean that the uncertainty raised by *Eisenwerk* has been largely put to rest. In any event, the amendment to the Act has removed the possibility of parties opting out of the Model Law.

¹⁵ [2010] NSWSC 887.

Part 3: Adjudication and security of payment legislation

14. *Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd & Ors (No 2) [2010] VSC 340*

Introduction

In this case, the Supreme Court of Victoria declined to grant a stay of an adjudication determination pending the outcome of separate but related proceedings. The court further found that it did not have power to grant an injunction to restrain an allegedly impecunious contractor from seeking payment of an adjudicated amount under the *Building Construction Industry Security of Payment Act 2002* (Vic).

Facts

This case concerned an application made to the Supreme Court of Victoria, in relation to an adjudication determination made on 2 December 2009 (**Blackman determination**), in which the principal (**APBC**) was validly ordered to pay the contractor (**Aircon**) \$105,647 pursuant to section 23(1)(a) of the *Building Construction Industry Security of Payment Act 2002* (**Act**).

APBC had already paid a deposit of the sum owing from the Blackman determination, and another determination, into an interest bearing account.

On 19 February 2010 a writ was issued, by which APBC claimed damages from Aircon arising from the same project the subject of the Blackman determination, pursuant to section 47 of the Act.

Dispute

APBC sought a permanent stay on the operation of the orders of the Blackman determination on the ground of the alleged impecuniosity of Aircon, and an injunction restraining Aircon from seeking payment of the determined sum.

Aircon also sought orders that it be paid the \$105,647 adjudication sum from the Blackman determination plus adjudicator's fees and expenses and interest (a total sum of \$121,132) from the interest bearing account.

Decision

The Court stated that there is authority both for and against the proposition that a stay of a declaratory order may be granted.

Justice Vickery noted the following, the circumstances where a stay may be granted for a declaratory judgment pending an appeal:

- a stay to preserve the subject matter of the appeal;¹⁶
- a stay to prevent the hearing and determination of the appeal being rendered nugatory;¹⁷ and
- where a stay is necessary to forestall further proceedings of an executory kind, founded on a declaratory order, such as an action for ejectment based on a declaration as to entitlement to possession of land.¹⁸

Justice Vickery then concluded that the court had no power to grant a stay of the declaration as the application for the stay was not made on the basis that a stay was necessary to preserve the subject matter of the appeal, or because it was necessary to prevent a successful appeal being rendered nugatory.

APBC also sought an injunction, on the basis that Aircon's parlous financial position could mean they would be unable to repay any interim payment should they be ordered to do so after the proceedings were heard. APBC stated the same would happen if the stay was not granted, and so on the balance of inconvenience, an injunction should be granted.

The Court found that an injunction will not be granted to restrain acts that would injure the plaintiff unless there is a cause of action. In this case, no cause of action to found an injunction had been identified. Furthermore, the Court stated that injunctions can only be granted to protect present rather than to future inchoate rights.

Justice Vickery referred to section 28M of the Act which makes it a statutory requirement that the respondent to a payment claim pay the adjudicated amount to the claimant if an adjudicator so determines. He therefore concluded that there was no basis for the court to grant an injunction, however, there was power for the court to make the order sought by Aircon, that they be paid the sum of \$121,132.

Practical implications

This case confirmed the limited circumstances in which an order by way of a declaration as to existing rights can be stayed, and confirms that a court does not have power to grant an injunction to restrain an allegedly impecunious contractor from seeking payment of an adjudicated amount under the Act.

¹⁶ *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd* [1986] 161 CLR 681.

¹⁷ *Marconi's Wireless Telegraph Company Ltd v Commonwealth (No 3)* [1913] 16 CLR 384.

¹⁸ : *McBride v Sandland* [1918] 25 CLR 69.

15. *CC No 1 v Reed* [2010] NSWSC 294

Introduction

This case considered whether an injunction should be granted to restrain an adjudication application if a subsequent payment claim referred to amounts in previous payment claims.

Facts

The principal entered into a construction contract based on AS4300 with the contractor to undertake construction works at the Chatswood Chase retail development. Three payment claims, in September, October, and February, were made by the contractor and were the subject of this dispute. The principal alleged that all of the variation claims contained in the September and October payment claims were repetitiously claimed by the contractor in the February payment claim.

Dispute

The principal sought to restrain the adjudication of the February payment claim initiated by the contractor's adjudication application. The principal alleged that the adjudication was an abuse of the processes of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**), as it contained repetitious claims and reagitated the subject matter of earlier claims.

Decision

It was held that the present proceedings did not constitute an issue estoppel, since the proceedings had not yet reached the stage of a hearing.

Associate Justice Macready emphasised that a proper construction of the Act must accommodate section 13, which permits a claimant including in a payment claim an amount that has been the subject of a previous claim. Associate Justice Macready held that it is not simply a repetition by itself that leads to an abuse but, rather, there must be something in all the circumstances for the abuse to arise. The additional amounts sought to be recovered in respect of the variations for the September and October payment claims were the subject of the earlier claims but were for a different amount. It was held that the respective amounts were a distinct item of cost, which were not claimed in the earlier claims (there was an accidental omission of the claim for preliminaries). So, although in an expansive use of the word, there was some 'reagitation' of the factual background, his Honour Justice Macready concluded that there was no reagitation of the entitlement to the earlier claimed amount. This is because a contractor is entitled to payment of an additional amount in respect of the same item of work if it has not been paid for.

It was found that, although the contractor made an accidental omission by not including all of the relevant details in the earlier payment claims, there was no misleading or deceptive conduct on the contractor's part. Although the omission was a default by the contractor, it was

not a sufficient reason to conclude that there had been an abuse of process, nor was a finding of an abuse of process consistent with a proper construction of the Act.

The proceedings were dismissed with costs and the existing interlocutory injunction was dissolved.

Practical implications

This decision confirms that courts will look beyond what is actually contained in the payment claim where a mere repetition will not necessarily invalidate the payment claim. An injunction will only be granted to restrain an adjudication if in all the circumstances the payment claim containing a repetition constitutes an abuse of process.

16. *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190

Introduction

In the wake of the New South Wales Court of Appeal's recent decision, courts may more readily find grounds to set aside determinations of adjudicators under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**).

Prior to this decision, *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport*¹⁹ was the leading authority on relief available where a determination was made by an adjudicator in circumstances where not all of the requirements of the Act had been satisfied. In that case, the New South Wales Court of Appeal held that the proper approach to such a dispute was to ask whether the 'basic and essential requirements' (on proper construction of the Act) for a valid determination had been satisfied. If they had not, then the determination was void. The 'basic and essential requirements' included (though the list was not closed) the existence of a construction contract under the Act, the service of a payment claim, the making of an adjudication application, the appointment of an adjudicator and a determination of a claim by an adjudicator. These mandatory requirements contrasted with other 'more detailed' requirements in the Act, non-compliance with which would not necessarily render an adjudication determination void. The Court held that prerogative relief in the nature of certiorari was not available to quash an adjudicator's determination.

In light of the decision of the High Court in *Kirk v Industrial Relations Commission*,²⁰ the New South Wales Court of Appeal in *Chase Oyster Bar* moved away from the narrower approach to review of adjudication determinations adopted by the Court of Appeal in *Brodyn*. The Court held that certiorari was available in appropriate circumstances.

Facts

In *Chase Oyster Bar*, the plaintiff (**Chase**) contracted with the first defendant (**Hamo**) to conduct a fit-out of an oyster bar in a shopping centre. Chase failed to provide (within the time frame required by the Act) a payment schedule in response to a payment claim made by Hamo. Hamo then made an adjudication application, but did not give notice of its application within the 20 business days required by section 17(2)(a) of the Act.

An adjudicator, the second defendant, was subsequently appointed. The adjudicator made a determination that Chase was liable to pay the amount claimed. In the process of making the determination, however, the adjudicator erroneously concluded that Hamo had given notice within the statutory time limit.

Chase commenced proceedings, seeking to have the adjudicator's determination quashed on the basis for failure to comply with section 17(2)(a).

¹⁹ (2004) 61 NSWLR 421.

²⁰ [2010] HCA 1.

Issues

A number of questions were removed to the Court of Appeal for determination before being remitted to the Supreme Court.

The questions revolved around the continued applicability of the approach in *Brodyn* in light of the High Court's decision in *Kirk*. In *Kirk*, the High Court held by majority that provisions of the *Industrial Relations Act 1996* (NSW) should not be read to prohibit the Supreme Court from granting certiorari for jurisdictional error on the part of the Industrial Court. It was held that a provision purporting to do so would be beyond the power of the legislature and in fact unconstitutional.

The question arose for determination whether or not the Act did in fact contain any privative provisions intended to oust the Court's supervisory jurisdictions, and whether or not any such provisions could be effective. Consequently, if the supervisory jurisdiction could not be ousted, was certiorari then available where an adjudication was made in jurisdictional error.

In light of these issues, a further issue arose as to whether or not, in spite of obiter in *Brodyn* to the effect that the requirements of section 17(2)(a) were among the 'more detailed' requirements referred to above, relief was available on the grounds of jurisdictional error for non-compliance with this section.

Decision

The Court held that prerogative relief in the nature of certiorari is, in principle, available against an adjudicator's decision. In reaching this conclusion, the Court noted that the Supreme Court's supervisory jurisdiction could be invoked with respect to the exercise of statutory powers, including those of an adjudicator (which arise out of statute rather than from the private agreement of the parties (as in an arbitration)).

The Court further held that such relief may be grounded on an jurisdictional error made by an adjudicator. A jurisdictional error, in the context of the Act, is an error made as to a criterion that must be present before an adjudicator has jurisdiction to determine a payment claim. In contrast with the narrower approach taken in *Brodyn*, in which the Court analysed the provisions of the Act in order to identify essential provisions which were intended must be strictly complied with in order for a determination to be valid, the Court in *Chase Oyster Bar* held that, consistent with *Kirk*, the Act could not oust the power of the Supreme Court to review an adjudicator's decision for jurisdictional error.

To the extent that *Brodyn* stood for the proposition that an adjudicator's failure to comply with a provision could constitute a jurisdictional error but not constitute an essential precondition to validity, the Court held that *Brodyn* was incorrect. The Court nonetheless suggested that failure to meet any of 'basic and essential requirements' outlined in *Brodyn* provided a good guideline as to when an adjudicator has made a jurisdictional error.

Consistently with its finding that nothing in the Act ousted review for jurisdictional error, the Court proceeded to consider whether the adjudicator had fallen into such an error by making a determination in circumstances where Hamo had not submitted a notice within the time limits specified in section 17(2)(a).

The Court concluded that compliance with section 17(2)(a) was an essential condition for a valid adjudication application. In reaching this conclusion, the Court observed that the section stipulated that an adjudication application 'cannot be made' unless notice has been given within the specified time, which suggested the section was intended to be mandatory. The Court further cited the statutory background as evidence that compliance with statutory time limits was not intended to be flexible.

Practical implications

The New South Wales Court of Appeal's decision in *Chase Oyster Bar* demonstrates a move away from the narrow approach to review of adjudicator's determinations encapsulated in *Brodyn*. The decision makes it clear that the concept of categories of 'jurisdictional error' under the Act is a broader one than failure to comply with the 'basic and essential requirements' listed in *Brodyn*.

It remains an open question whether compliance with time limits other than those in section 17(2) of the Act will be held to be preconditions to the exercise of an adjudicator's power. The time limit in section 17(2)(a), which was at issue in *Chase*, is expressed in stronger language than many other time limits in the Act, such as those in Section 21(3) relating to the time in which an adjudicator is to make his determination.

Following the decision, claimants seeking to make an adjudication application should familiarise themselves with statutory time limits and other procedural requirements and ensure that they comply with them.

17. *Spankie & Northern Investment Holdings Pty Ltd v James Trowse Constructions Pty Ltd & Ors* [2010] QSC 29

Introduction

In this case, the Supreme Court of Queensland held that an adjudicator did not act in bad faith or deny natural justice when making an adjudication determination, despite taking an erroneous view and misinterpreting contractual terms concerning calculation of amounts owing. The Court further found that an adjudicator is not required to investigate the truth of factual circumstances critical to a payment claim.

Facts

The respondent (*JTC*) contracted to perform works at the Homestead Tavern at Boondal for the applicants (*Northern Investment*), who were described in the contract as 'Principal'. On 2 June 2009, JTC served a payment claim in an amount of \$1,426,156.75. Northern Investment served a payment schedule, according to which nothing was payable. JTC then applied for an adjudication under the *Building and Construction Industry Payments Act 2004* (Qld) (*Act*).

In a decision dated 23 July 2009, the adjudicator upheld the progress claim to the extent that the Northern Investment should pay \$883,615.02. The due date for payment was specified in the adjudicator's decision as '24 June 2009 subject to the Claimant's compliance with the provisions of Clause 38.1 of the Contract on or prior to that date. After 24 June 2009, the due date for payment will arise upon the Claimant's compliance with the provisions of Clause 38.1 of the Contract.'

Dispute

Northern Investment sought to have the adjudicator's decision declared void and the judgment set aside on three grounds:

- the adjudicator did not undertake the adjudication in good faith, as there were errors in his reasoning that could not be consistent with a bona fide attempt to adjudicate;
- the adjudicator decided a question he had no power to decide, as Northern Investment argued that he was only to decide the value of that work performed under the contract for which JTC had not been paid; and
- there was a breach of the requirements of natural justice because of the way in which the adjudicator decided a certain question, without giving the applicants an opportunity to make submissions about it.

Decision

The Court acknowledged that the adjudicator, in his reasoning, identified a date as the relevant date of the payment claim according to the contract, identified a condition precedent to

payment and then concluded that, because the condition was unfulfilled, no reference date under the contract could be calculated. Although this reasoning was said to be 'fairly open to criticism', the Court was not persuaded that the reasoning was the result of a lack of a genuine attempt to exercise the adjudicator's power in accordance with the Act. While his reasoning may not have been correct, what the adjudicator wrote demonstrated an attempt to decide the question.

Northern Investment also claimed that the adjudicator made two errors that were irreconcilable with a genuine attempt to decide the claim according to the Act and the contract. The Court concluded that the adjudicator's reasoning was not so flawed as to warrant the inference that it was not a bona fide attempt to genuinely exercise his power under the Act. Rather, it was equally consistent with a misunderstanding of the terms of the contract. Any errors in the adjudicator's construction of the contract before arriving at his decision did not suggest that he acted in bad faith.

The Court accepted Northern Investment's argument that the adjudicator should have decided, as best he could within the time constraints upon him, whether the statutory declaration provided by the contractor was false. However, the absence of an investigation of that factual question did not mean that he failed to genuinely decide what the Act required.

JTC could not also say that any failure by the adjudicator to revert to them on the subject of the statutory declaration had a practical consequence that was adverse to them. The Court indicated that they had the protection of a decision that required them to make a progress payment only on the Superintendent's satisfaction with the evidence to be provided under the contract.

Practical implications

This case confirms that an adjudicator will act in good faith and accord natural justice even if they ultimately have an erroneous view and misinterpret contractual terms relating to calculation of amounts owing. These mistakes do not indicate a failure to make a genuine attempt to decide a claim according to the relevant contract legislation.

18. *Gisley Investments Pty Ltd v Williams* [2010] QSC 178

Introduction

The Queensland Supreme Court found that an email, despite its relative informality, may constitute a payment schedule for the purposes of the Queensland Security of Payment legislation.

Facts

Gisley Investments Pty Ltd (**Gisley**) and Mr Williams entered into a building contract. Subsequently, Mr Williams made a payment claim under the *Building and Construction Industry Payments Act 2004 (Qld)* (**Act**). Gisley replied by email, disputing the amount claimed by Mr Williams, and later gave evidence that the email was a payment schedule. Mr Williams acted on the assumption that the email was not a payment schedule and, as a result, did not make an adjudication application within the time prescribed by the Act. Instead, Mr Williams only gave notice to Gisley of his intention to make an adjudication application. Gisley did not serve a payment schedule within the prescribed time, as Gisley believed it had already served a valid payment schedule. Subsequently, Mr Williams made an adjudication application under the Act, to which Gisley did not respond as required. After the adjudicator found in favour of Mr Williams, Gisley sought a declaration that the adjudicator's decision was void and an injunction to restrain Mr Williams from enforcing the adjudicator's judgment.

Dispute

The issue was whether an email can constitute a valid payment schedule under the Act.

Decision

Although the Court found that the email did constitute a payment schedule, ultimately the adjudicator's decision was still held to be valid and binding.

Justice Douglas cited *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd*,²¹ an earlier Queensland Supreme Court decision which held that the Act emphasises speed and informality, hence an unduly critical view should not be taken where no particular form is required. What is important is whether the content of the document in question satisfies the statutory description.

It was held that Gisley's email did in fact constitute a payment schedule for the purposes of the Act. As required by section 18(2)(a) of the Act, the email identified the payment claim to which it related: the reference to 'paperwork' could only sensibly refer to Mr William's payment claim, because there was no other document it could be confused with. The statement in the email that, 'whilst the job continues to remain unfinished, final payment is not yet owed' was enough

²¹ [2007] QSC 333.

to meet the requirements of sections 18(2)(b) and (3) respectively. The email stated the amount of the payment Gisley proposed to make, namely nothing, and Gisley's reason for withholding payment, being that the work was unfinished.

Justice Douglas approved the earlier New South Wales and Queensland cases that held that the notice requirement in section 21(2) is not an essential requirement, and non-compliance with this section does not invalidate an adjudicator's decision.

His Honour found that, although the adjudication decision should have been made under an earlier notice (the email), the adjudicator's decision was valid and should not be considered a nullity, because the real objects of the Act had been met, namely providing notice of the claim, an opportunity to respond by the provision of a schedule and appearing before an adjudicator.

Practical implications

This case recognises that an email is capable of constituting a payment schedule and underlines the importance of assessing emails received from a principal in response to a payment claim. However, principals are advised not to adopt such an informal approach, in case it is interpreted by the contractor as a failure to respond within time. It remains to be seen whether courts in other states or territories will adopt a similar broad approach in construing the requirements of the security of payment legislation in those jurisdictions.

19. *John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd* [2010] QSC 159

Introduction

The Queensland Supreme Court considered the general proposition that the Queensland Security of Payment legislation displays an intention to prevent the re-agitation of the same issues.

Facts

John Holland Pty Ltd and Schneider Electric Buildings Australia Pty Ltd entered into a building contract. On 14 September 2009, Schneider made a payment claim (the **September 2009 claim**) under the *Building and Construction Industry Payments Act 2004* (Qld) (**Act**) and this claim was referred to adjudication. The adjudicator issued a statement finding in favour of John Holland and concluding that the September 2009 claim was barred by section 17(5) of the Act. Section 17(5) of the Act precludes a claimant from serving more than one payment claim for each reference date under the construction contract. On 30 March 2010, Schneider made another payment claim (the **March 2010 claim**) which was rejected by John Holland. John Holland subsequently sought a permanent injunction to restrain Schneider from serving on it any adjudication application lodged under the Act in respect of the March 2010 claim.

Dispute

John Holland contended that service of the March 2010 claim was merely a re-agitation of Schneider's September 2009 claim under section 27 of the Act, and was precluded by issue estoppel. The decision in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*²² was cited as authority for this proposition. Schneider argued that the adjudicator's statement did not constitute an 'adjudication decision' under section 26 of the Act and alternatively that *Dualcorp* should not be followed because its reasoning is contrary to the decision of Justice Mullins in *ACN 060 559 971 Pty Ltd v O'Brien*.²³

Decision

The Supreme Court found in favour of John Holland and granted a permanent injunction to restrain Schneider from serving upon John Holland any adjudication application lodged under the Act in respect of the March 2010 claim.

Justice Applegarth held that the Adjudicator's Statement complied with the formal requirements of section 26 of the Act. Whether or not the adjudicator's statement constituted an

²² [2009] NSWCA 69.

²³ [2008] 2 Qd R 396.

'adjudicator's decision' within the meaning of section 26 does not depend upon the way in which it was communicated to the parties or the brevity with which the adjudicator expressed his or her reasons but instead depends upon the contents of the decision. Having reviewed the parties' detailed submissions, the adjudicator made a valid 'adjudicator's decision' by concluding that the September 2009 claim was barred by section 17(5) of the Act and therefore that the adjudication application could not proceed any further.

Justice Applegarth also affirmed *Dualcorp* as authority for the general proposition that the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**NSW Act**) manifests an intention to prevent the re-agitation of the same issues. As the NSW Act contains practically identical terms to its Queensland equivalent and both Acts pursue a common statutory purpose, Justice Applegarth held that the same conclusions reached in *Dualcorp* apply in respect of the Act. Therefore, the Act displays an intention to preclude the re-agitation of the same issues and, subject to section 27, does not permit the re-agitation of the same issues that have been determined by an earlier adjudicator. Justice Applegarth dismissed Schneider's argument that *Dualcorp* is contrary to *O'Brien*, finding that the decision in *O'Brien* did not decide the broader issues canvassed in *Dualcorp* and is also not inconsistent with *Dualcorp*.

Practical implications

This case recognises that a valid 'adjudicator's decision' under the Act does not depend upon the way in which it was communicated to the parties or the brevity with which the adjudicator expressed his or her reasons but instead depends upon the content of the decision. It is, therefore, a question of substance over form.

The case is also authority for the proposition that the Act as a whole displays an intention to prevent repetitious re-agitation of the same issues and, subject to section 27, does not permit the re-agitation of the same issues that have been determined by an earlier adjudicator. An adjudicator's determination generally has a degree of finality for the purposes of the Act and this degree of finality generally precludes an issue which has earlier been determined being re-agitated in a later adjudication application. Where the issue that is later sought to be re-agitated has been earlier determined, the principle of issue estoppel is applicable.

20. *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* [2010] VSC 199

Introduction

In this case, the Supreme Court of Victoria held that an adjudicator denied natural justice to a party to an arbitration by not allowing submissions on a material issue. The Court further found that service of a payment claim by email was valid under the *Building Construction Industry Security of Payment Act 2002* (Vic).

Facts

The case concerned a construction contract entered into on 30 May 2008 between the principal (**Metacorp**) and the contractor (**Andeco**). An adjudication determination was made on 7 January 2010.

The determination followed a dispute arising between the parties as to a claim for a progress payment sent by email from Andeco to the superintendent on 24 October 2009.

The payment claim was for a total of \$549,734. The claim complied with the requirements for a payment claim prescribed by section 14(2) of the *Building Construction Industry Security of Payment Act 2002* (Vic) (**Act**) and was a simultaneous claim made both under the contract and under the Act.

Dispute

Metacorp initiated proceedings seeking judicial review of the adjudication determination, claiming that it was void on four grounds:

- the payment claim was served prematurely, leading to a failure to comply with a 'basic and essential requirement of the Act';
- service of the payment claim was defective because it was served upon the superintendent (not the principal) and was served by email;
- there was no failure to make a payment by the 'due date for payment' under section 18(1)(a)(ii) because clause 44.4 entitled Metacorp to suspend payment upon issuing a show cause notice, or alternatively because Andeco's evidence of payments to sub-contractors under clause 43(b) was contradicted by other evidence; and
- the adjudicator had failed to afford procedural fairness (natural justice) to Metacorp.

Metacorp sought relief in the nature of *certiorari* (here, quashing of the determination on the basis of jurisdictional error and breach of procedural fairness) and also sought declaratory and injunctive relief.

Decision

Justice Vickery held that time did not begin to run against Metacorp from the date when a payment claim was served because service occurred before the relevant reference date in the contract (here, the contract specified that claims for progress payments were to be made on the 25th of each month). Although the payment claim remained valid, rights under the Act for adjudication were only enlivened upon the relevant contractual reference date's arrival.

As to the validity of service, Justice Vickery said that section 14(a) of the Act did not operate in a commercial vacuum and needed to be read in the practical context of the building industry. Accordingly, the payment claim may be served upon any person who has the actual or ostensible authority of the person liable to make the payment. The terms of the contract in this case made it clear that the superintendent was acting as the agent of Metacorp when he received the payment claim, having its actual or ostensible authority to do so.

As to service by email, Justice Vickery held that section 50 of the Act is facilitative, and not mandatory. The service provisions under section 50 of the Act do not limit or exclude the common law or the provisions of any other applicable legislation with respect to the service of notices. Therefore, section 50 of the Act does not operate to prohibit service by email. The service provisions of the contract were also facilitative, and not mandatory. In light of the wording of section 50(1)(e), the relevant clause in the contract was wide enough to allow Andeco to deliver by email a payment of claims to the superintendent. This was in line with common commercial practice as was illustrated on this project, where 14 prior payment claims had been served by email on the superintendent (and had been received and assessed).

Justice Vickery also noted that the adjudication was made on the basis that Metacorp had failed to pay the whole or any part of the scheduled amount by the due date. While the due date for payment had not, at the time of the adjudication application, been reached, the adjudicator nevertheless had jurisdiction conferred upon him by section 18(a)(i) of the Act.

In reference to procedural fairness, it was clear that matters raised in Andeco's further submissions to the adjudication response had not appeared in any earlier material supplied to the adjudicator. Metacorp requested permission to submit a further response; however, the adjudicator failed to reply to this request and instead proceeded to make the adjudication determination. Justice Vickery concluded that:

- the issue of agency of the superintendent was clearly a new issue that had not been previously canvassed in any of the submissions between the parties, and involved new questions and law;
- the issue of agency was relevant to findings made by the adjudicator and important to his decision; and
- the adjudicator's approach to Metacorp's request to deliver a further response was misconceived, as it put to one side the rules of procedural fairness that the adjudicator was bound to apply.

Ultimately, Justice Vickery held that the adjudicator breached the rules of procedural fairness.

Practical implications

This case confirmed that a payment claim may be served by email on any person with actual or ostensive authority of the person liable to make the payment. A payment claim will not be invalidated by early service; however, time, for the purposes of the Act, will only begin to run from the contract reference date. Importantly, a respondent to a payment claim should always respond, or make clear their right to respond, to any new issue arising in an adjudication. Refusal by an adjudicator to allow a party the right to respond to new material issues may amount to a denial of procedural fairness.

21. *The University of Sydney v Cadence Australia Pty Limited & Anor* [2009] NSWSC 635

Introduction

This case contained some useful guidance on the application of the principles established in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*²⁴ and *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd t/a Novatec Constructions Systems*,²⁵ namely the fact that a person is not allowed to re-agitate claims made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**).

Facts

Cadence entered into a contract on 30 July 2007 with the University to provide project management services. Clause 12 of the contract stated that Cadence may be entitled to delay costs for variations requested by the University, subject to certain conditions.

Cadence served the University with a payment claim on 18 December 2008 (the **first claim**), and lodged an adjudication application for this claim on 23 January 2009. Cadence then withdrew this application and lodged another adjudication application for the first claim.

The claims listed in the first claim fell into three categories: namely, a project fee adjustment, delay costs and variations. The delay costs comprised \$266,390 of the total claim of \$525,344.

On 10 March 2009, upon adjudication of the first claim, the adjudicator determined that no monies were due to Cadence. The determination was based primarily on the fact that Cadence had failed to comply with the requirements of clause 12 of the contract.

Cadence then served a second claim on the University on 31 May 2009 (the **second claim**) for delay costs for all periods of delay claimed in the first claim, except in relation to one project, as well as other cost claims.

Dispute

The dispute that came before the New South Wales Supreme Court concerned only the determination for delay costs in relation to the second claim.

The University submitted 'that the second claim makes claims which are subject to an issue estoppel (which it described in submissions as a 'procedural estoppel'), and that repetitious use of the Act is an abuse of process which should be restrained.'

²⁴ [2009] NSWCA 69.

²⁵ [2009] NSWSC 416.

Cadence argued that:

- the majority holding relating to issue estoppel and its application to adjudication determinations under the Act in *Dualcorp* was obiter dictum, so should not be followed;
- as to the issue estoppel, the majority decision in *Dualcorp* should not apply because the second claim raised issues that had not been raised in the first claim, whereas in *Dualcorp* the two claims were identical;
- even if principles of issue estoppel were applicable, no issue estoppel prevented the second payment claims, as the adjudicator did not find there was no claim for delay costs but merely that there was insufficient evidence to support the claim;
- if the first claim failed for lack of evidence, it would not be an abuse of process for it to be brought again; and
- the application was not an abuse of process because the prohibitions in section 13(5) of the Act did not apply, as the second claim was made in respect of a later reference date. This is distinguished from the second payment claim in *Dualcorp*, which referred to the same date as an earlier claim.

Decision

The Court found that the second payment claim should not be allowed to proceed and that Cadence should be restrained from seeking adjudication of the second payment claim in the future.

The Court found that the decision from *Dualcorp* did establish that the principles of issue estoppel were capable of applying to adjudication determinations made under the Act. However, the Court found that the previous adjudication did not establish that Cadence had no claim for delay costs, but rather that Cadence had not adduced evidence that made out such a claim.

However, despite the fact that there was no issue estoppel operating, the Court found that Cadence had exhausted their statutory rights to claim the delay costs covered in the first claim. The mere fact that there were some delays claimed in the second claim that were not covered in the first claim was not enough to take the second payment claim out of the realm of 're-agitating' issues. Thus, as per the rule established in *Dualcorp*, there was an abuse of process arising out of the second claim. Justice Hammerschlag summarised the issue succinctly: 'the second claim and the present application accordingly have as their object the obtaining of an advantage beyond what the law offers and together they are an abuse of process.'

In support of the decision, Justice Hammerschlag pointed out that the intent of the Act is 'to provide a speedy determination of claims for payment on an interim basis, not to burden the parties to a construction contract with a prolonged quasi-judicial process.'

Practical implications

Making minor changes to a payment claim and then re-submitting it for adjudication will not take it outside the operation of the rule established by *Dualcorp*. However, depending on the context, there is still a need to examine closely an adjudicator's reasons for a determination,

because if a progress claim has been rejected for lack of sufficient evidence, it may still be able to be resubmitted with further and better evidence.

Part 4: Occupational health and safety

22. *Leighton Contractors Pty Ltd v Fox; Calliden Insurance Ltd v Fox* (2009) 240 CLR 1; [2009] HCA 35

Introduction

This High Court decision provides guidance on the safety obligations of principal contractors and their liability for the negligent acts of their independent specialist sub-contractors.

Facts

Leighton Contractors Pty Ltd was appointed as the 'principal contractor', as defined by the *Occupational Health and Safety Act 2000* (NSW), for the Hilton Sydney hotel refurbishment project. Leighton retained Downview Pty Limited to carry out concreting works. Downview then subcontracted the concrete pumping to a sub-contractor. The sub-contractor engaged an independent contractor, Mr Fox, to assist. Mr Fox was severely injured in the course of cleaning the pipes of the concrete pumping equipment while working on the project.

Leighton had run an OHS site induction that all workers were required to attend before starting work. Leighton also required Downview to provide it with a work method statement that took into account matters including the potential hazards of concrete pumping and the control methods to address those hazards. However, neither Leighton nor Downview had provided any activity-based safety training on concrete pumping procedures, instead relying on the sub-contractor to provide this training.

Mr Fox commenced proceedings in negligence against Leighton, Downview and the sub-contractor.

Primary Decision and appeal

At first instance, the court found that the accident was caused by the negligent conduct of the sub-contractor, whose employees did not follow the safe working procedures set out in the relevant industry code. The court dismissed Mr Fox's claims against Leighton and Downview, on the basis that they were not liable for the negligent acts of the sub-contractor, who had been retained as an independent contractor. Mr Fox appealed against the dismissal of those claims.

The Court of Appeal allowed the appeal, holding that Leighton and Downview had each breached a general law duty of care owed to Mr Fox. In particular, the Court of Appeal found that Leighton, as the principal contractor, had breached its duty by failing to provide the required safety induction training to sub-contractors. The Court of Appeal also found that Leighton should have provided activity-based training to all sub-contractors on safety relating to their specific work.

Dispute before the High Court

In the High Court, Leighton argued that the Court of Appeal had improperly extended the obligations of a principal contractor in such a way as to require it to train all workers on all safety aspects of their work on a project rather than rely on the specialist sub-contractor to do so.

The High Court allowed the appeal, concluding that Leighton was not negligent by reason of an assumed failure to provide OHS induction training to the sub-contractor and Mr Fox.

The High Court held that, in some circumstances, a principal does owe a duty to use reasonable care to ensure a safe system of work for independent contractors. However, the court held that this duty does not extend to the principal having an obligation to exercise full control of safe working systems where it is reasonable to engage specialist independent contractors who are competent to control their own systems of work without supervision. This is because a principal contractor is unlikely to have detailed knowledge of safe work methods across the whole spectrum of trades involved in construction work on a major project.

The High Court also considered what is required of a principal contractor under the New South Wales OHS legislation. The High Court noted that, under the legislation, general and activity-based OHS induction training must be provided in a documented training course, at the end of which a worker obtains a statement of satisfactory completion. The High Court stated that, to be satisfied that a worker has undergone general and work activity-based training as required, a principal contractor would normally only need to obtain a worker's statement of satisfactory completion of the training. The principal contractor should also provide site-specific training about the general risks and hazards at the site. However, the principal contractor would not generally be required to provide activity-based training itself when it has retained specialist sub-contractors who would be expected to have the competence to carry out that activity safely.

Practical implications

The High Court's decision confirms that a principal contractor does not have a common law duty to train or supervise the employees of specialist sub-contractors in the specifics of their work.

However, as the High Court's decision relates to a civil claim brought in negligence and not a claim for a breach of the *Occupational Health and Safety Act 2000* (NSW), it does not address the question of whether a principal contractor could still be liable under the legislation in similar circumstances. The High Court acknowledged that the statutory duty of a principal to ensure safety for all persons working or present on a construction site may extend beyond the general law duty. Despite this, the High Court's reasoning may provide assistance to a principal contractor in establishing a defence under OHS legislation in similar circumstances.